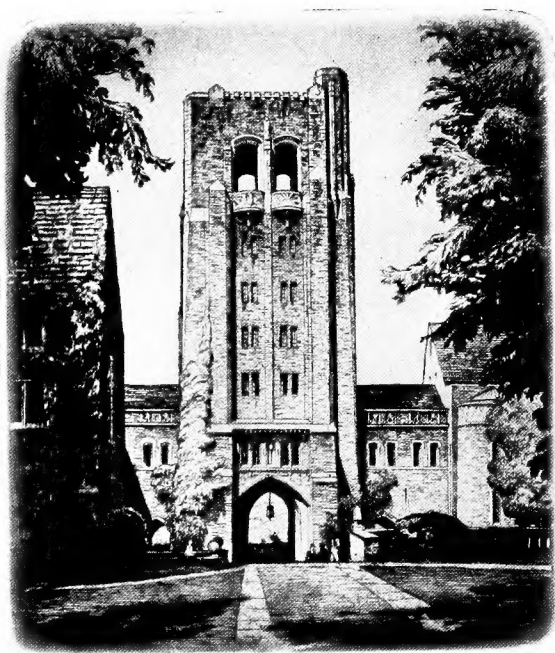


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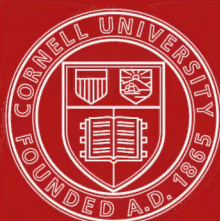
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A TREATISE
ON THE LAW OF
PRIVATE CORPORATIONS

ALSO OF
JOINT-STOCK COMPANIES


AND OTHER
UNINCORPORATED ASSOCIATIONS

BY
JAMES HART PURDY
OF THE CHICAGO BAR

Enlargement, revision and reconstruction of Beach on Private Corporations

IN THREE VOLUMES
VOLUME II

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THE LAW OF PRIVATE CORPORATIONS

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A.

DIVIDENDS.

§ 433. In general. Definitions.—Dividend is a corporate profit set aside, declared, and ordered, by the directors, to be paid to the stockholders on demand, or at a fixed time.¹ A dividend to the stockholders of a corporation is a fund which the corporation sets apart from its profits to be divided among its members at a certain percentage upon their holdings of its capital stock.² "The term 'dividend,' in its technical, as well as in its ordinary acceptance, means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders."³ Until the dividend is declared, it is only something that may come into existence, and the obligation on the part of the corporation to declare it, cannot be treated as the dividend itself.⁴ Until a dividend is declared, the profits belong, not to the stockholders but to the corporation, and till then, are liable for the corporate debts.⁵ Dividends are payable, (1), in cash, (2) or in stock, (3) or in bonds, or scrip, or (4) in property. A division of the profits is a dividend, whether or not so called.⁶ If all the stockholders consent, the profits may be distributed in payment of salaries.⁷ A dividend is "declared" by announcement of readiness to pay it. It is "made" by setting apart the sum ready for payment, and it is "passed" when not made at the regular time. Unless otherwise provided, dividends are payable in cash and current money.⁸ The earnings do not belong to the stockholders until a dividend is declared.⁹

¹ Alsop v. De Koven (1903), 107 Ill. App. 190.

² Lockhart v. Van Alstyne (1875), 31 Mich. 76, 79; Taft v. Hartford, etc. R. Co., 8 R. I. 310.

³ Mobile, etc. R. R. v. Tennessee (1894), 153 U. S. 486.

⁴ Lockhart v. Van Alstyne (1875), 31 Mich. 78; *In re London, etc. Co.*, L. R. 5 Eq. Cas. 525.

⁵ Goodwin v. Hardy (1869), 57 Me. 143.

⁶ Scase v. Gillette-Herzog Manuf. Co. (1893), 55 Minn. 349.

⁷ Fitchett v. Murphy (1899), 46 N. Y. App. Div. 181.

⁸ Ehle v. Chittenango Bank (1862), 24 N. Y. 548.

⁹ Robertson v. H. E. Bucklin & Co. (1903), 107 Ill. App. 369;

§ 434. **Right to declare dividend.**—Every private corporation, whether stock or non-stock, has inherent right to declare dividends of its surplus profits undivided.¹⁰ Unless otherwise expressly provided, dividends are declared by the directors, instead of by the stockholders.¹¹ In the absence of special provision to the contrary, a dividend is presumed to be payable in cash and in lawful or current money, and may be denominated a cash dividend.¹² Thus, a company making a dividend payable, for example, in "New York State currency," cannot show that bank bills, passing only at a discount, were meant by that phrase.¹³

§ 435. **Declaration of dividend.**—The directors of a corporation may increase the corporate assets beyond the nominal amount, by retaining and accumulating the profits or earnings, and may apply them to the purchase of property, or to other purposes not beyond the corporate powers.¹⁴ They cannot be compelled by the stockholders to make dividends of these earnings, or prevented from accumulating them, unless the non-declaration of them be in fraud of the shareholders.¹⁵ In England, however, they must report the condition of affairs to the stockholders, and leave it to the latter to determine whether a dividend shall be declared.¹⁶

§ 436. **Declared dividend is a debt to the stockholder.**—A dividend declared is a debt of the corporation to the stockholders, and liable to the usual action for recovery as a debt, from the day it becomes payable.¹⁷

§ 437. **Scrip dividend.**—Scrip dividends are certificates entitling the holder to specified rights based upon surplus profits accumulated, not in money, but in other property which may be sold, and the proceeds distributed in cash dividends. The certificate may provide for payment of money with interest, at the option of the corporation, or may be convertible into bonds or stock,¹⁸ or exchangeable for lands, or other property of equivalent

Hartley v. Pioneer Ironworks (1903), 84 N. Y. Supp. 79.

¹⁰ McKean v. Biddle, 181 Pa. St. 361.

¹¹ McNab v. McNab, etc. Co., 62 Hun, 18.

¹² Ehle v. Chittenango Bank (1862), 24 N. Y. 548; Scott v. Central R., etc. Co. (1868), 52 Barb. 45.

¹³ Ehle v. Chittenango Bank (1862), 24 N. Y. 548.

¹⁴ Lord v. Brooks, 52 N. H. 72; Pratt v. Pratt (1866), 33 Conn.

446; Brundage v. Brundage, 60 N. Y. 544.

¹⁵ Karnes v. Rochester, etc. Ry. Co. (1867), 4 Abb. Pr. (N. S.) 107; March v. Eastern Ry. Co., 43 N. H. 515; Jackson v. Newark, etc. Co., 31 N. J. L. 277; Coyote Gold, etc. Co. v. Ruble, 8 Oreg. 284.

¹⁶ 8 Vic., ch. 16, § 120.

¹⁷ Southwestern, etc. Ry. v. Martin (1893), 57 Ark. 355.

¹⁸ Chaffee v. Rutland R. R. (1882), 55 Vt. 110.

value with that of the par value of the certificate. The scrip has no voting power.¹⁹ A scrip dividend is an *interim* or provisional document or certificate to be exchanged, when certain payments have been made, or conditions complied with, for a more formal certificate, as of shares or bonds, or entitling the holder to the payment of interest, a dividend, or the like."²⁰ Scrip certificates, reciting that the holder is entitled to a certain sum in settlement of dividends upon the stock of the company, or to a certain number of shares of stock, or that the holder may exchange them for bonds or other securities of the company,²¹ may be issued, but only when there have been profits actually earned.²²

§ 438. Property dividend.—Property dividend is where the corporate property is divided in kind, instead of sold and its proceeds divided in a cash dividend.²³ "There is no rule of law or reason, founded upon public policy, which condemns a property dividend. The directors could convert the property into cash, before a dividend and divide that. So the stockholders can take the property divided to them and sell it, and thus realize the cash. Within the domain of law it can make no material difference which course is pursued. If, however, a dividend be made payable in cash or payable generally, the corporation becomes a debtor, and must discharge such debt as it is bound to discharge all its other debts, in lawful currency. It is true, that a stockholder cannot be compelled to receive property divided to him. So he cannot be compelled to take a cash dividend. In case of his refusal to take cash dividend, the corporation may retain it for him, until he shall demand it. In case he shall refuse to take a property dividend, the corporation may retain it and hold it in trust for him, or possibly, sell it for his benefit."²⁴

§ 439. Interest-bearing stock, similar to preferred stock, may be legally issued to the subscriber for the sums paid in by him, upon which the interest is to be paid out of the surplus profits of the corporate business, but not from the capital stock.²⁵

§ 440. Stock dividend.—A stock dividend, instead of cash, is made by a permanent addition to the capital stock, of an

¹⁹ Commonwealth v. Union, etc. Co. (1899), 192 Pa. St. 507.

²⁰ Century Dict. & Cyc. "Scrip;" Chaffee v. Rutland R. R. (1882), 55 Vt. 110. *Vide infra*, § 472.

²¹ Chaffee v. Rutland R. R. (1882), 55 Vt. 110, 112.

²² Bailey v. Citizens' Gas Light Co. (1876), 27 N. J. Eq. 196; Chaf-

fee v. Rutland R. R. (1882), 55 Vt. 110.

²³ Merchant v. Western, etc. Assn. (1894), 56 Minn. 327.

²⁴ Williams v. Western Union Tel. Co., 93 N. Y. 162. *Vide*, § 472.

²⁵ Rutland, etc. Co. v. Thrall, 35 Vt. 543, 27 L. R. A. 136.

amount of money or property of value equal to the par value of the stock distributed. Such a dividend is valid if not prohibited.²⁶

§ 441. **Who are entitled to payment of dividend.**—Every owner of stock at the time of declaration of dividend, is entitled to share ratably therein. It is often difficult to determine in whom vests ownership of particular shares. The rule is that they belong to the person in whose name they are registered upon the corporate stock books.²⁷ Where stock was sold "including all dividends, due, or to become due thereon," and a dividend was payable on a day subsequent to which it was formally declared, the stock was held to belong to the owner on the day of the declaration of the dividend, and not to the owner at the time it was payable.²⁸ A dividend declared, operates as a specific appropriation of a part of the property of the company to its payment, and the claim of the shareholders, as creditors, develops into an absolute title to the property so appropriated.²⁹ Accordingly, after the declaration of the dividend, the profits are considered as separated from the corporate property and payable on demand to the individual stockholders,³⁰ as a debt due absolutely to them.³¹ And if a corporation declares a dividend, and deposits the fund divisible in a bank for distribution, and after the dividend has become payable, a receiver is appointed, the receiver cannot withdraw the portion of the fund not paid out, for the title to it has passed to the shareholders.³² So, also, if a stockholder, after receiving due notice of the deposit of money to pay his dividend at a banking house of good credit, neglects to draw his money within a reasonable time, and a loss occurs by a failure of the bank, it will fall upon him.³³ Again, if an insurance com-

²⁶ *Farwell v. Great Western Tel. Co.* (1896), 161 Ill. 522.

²⁷ *Brisbane v. Delaware, etc. R. R.* (1883), 94 N. Y. 204.

²⁸ *Rose v. Barclay* (1899), 191 Pa. St. 594.

²⁹ *Carpenter v. New York, etc. Ry. Co.*, 5 Abb. Pr. 277; *Elkins v. Camden, etc. R. Co.* (1883), 36 N. J. Eq. 233; *Lockhart v. Van Alstyne*, 31 Mich. 76, 78; *Curry v. Woodward*, 44 Ala. 305; *Rand v. Hubbell*, 115 Mass. 461, 474; *Dalton v. Midland Counties Ry. Co.*, 13 C. B. 474; *Goodwin v. Hardy*, 57 Me. 143, 145.

³⁰ *King v. Paterson, etc. R. Co.* (1860), 29 N. J. L. 82; s. c. 29 N. J. L. 504; *Kane v. Bloodgood*,

7 Johns. Ch. 90; *State v. Baltimore, etc. R. Co.*, 6 Gill, 363; *Hart v. St. Charles Street Ry. Co.*, 30 La. Ann. 758; *Fawcett v. Laurie* (1860), 1 Drew. & S. 192. Cf. *Carlisle v. Southeastern Ry. Co.* (1850), 1 Mac. & G. 689; *People v. Merchants' & Mechanics' Bank*, 78 N. Y. 269.

³¹ *Scott v. Central R. etc. Co.*, 52 Barb. 45; *Williston v. Michigan Southern R. Co.*, 13 Allen, 404; *Jermain v. Lake Shore, etc. R. Co.* (1883), 91 U. Y. 483.

³² *In re Le Blanc*, 4 Abb. N. C. 221; s. c. 14 Hun, 8.

³³ *King v. Patterson, etc. R. Co.* 29 N. J. 82.

pany, having declared a dividend from profits, and carried the fund divisible to the profit and loss account, and prepared checks for the shareholders, is then made insolvent by a great fire, the policy-holders have a right to that fund.³⁴ If, however, the fire and insolvency occur after the dividend is declared, but before it is payable, the shareholders come in only as creditors equally with the policy-holders.³⁵ As a dividend, once declared, passes to the person owning the stock at that time, it is wholly immaterial at what times, or from what sources, the profits, out of which it is declared, may have been earned.³⁶

Husband and Wife.—Since, generally, the married woman's acts have so changed the common law, that her property is free from her husband's control, her right to receive a dividend is the same as that of an unmarried woman.³⁷ Whether a dividend upon stock owned by a married woman, is payable to her, or to her husband, depends upon the law of the company's domicile.³⁸

Pledgee.—A pledgee of stock is, consequently, pledgee of all accrued and accruing dividends, to be accounted for by him upon redemption of the stock.³⁹

Legatee.—In case of bequest of stock, the legatee takes the stock as it was upon the death of the testator. Prior dividends go to the administrator.⁴⁰ One who takes title to stock under a general bequest, is not entitled to dividends until the lapse of the time limited for the settlement of the estate,⁴¹ though a specific bequest of stock vests in the legatee the right to all dividends accruing after the death of the testator.⁴² An heir is not entitled to receive payment of dividends until the stock has been transferred into his own name upon the company's books.⁴³

³⁴ *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657.

³⁵ *Lowerre v. American, etc. Co.*, 6 Paige, 482.

³⁶ *Marsh v. Eastern R. Co.*, 43 N. H. 515; *Jones v. Terre Haute, etc. R. Co.*, 57 N. Y. 196; *Goodwin v. Hardy*, 57 Me 143; *Gifford v. Thompson*, 115 Mass. 478; *Jermain v. Lake Shore, etc. Ry. Co.*, 91 N. Y. 483.

³⁷ *Graham v. First National Bank, etc.*, 20 Hun, N. Y. 325, 84 N. Y. 393, 38 Am. St. Rep. 528.

³⁸ *Graham v. First National Bank*, 84 N. Y. 393; s. c. 20 Hun, 325; *Bank of Louisville v. Gray*

(1887), 94 Ky. 565. *Cf. Dow v. Gould, etc. Co.*, 31 Cal. 629.

³⁹ *Hasbrouck v. Vandervoort* (1850), 4 Sandf. 74.

⁴⁰ *Brundage v. Brundage*, 60 N. Y. 544 (1875).

⁴¹ *Webster v. Hale*, 8 Ves. 410.

⁴² *Loring v. Woodward*, 41 N. H. 391. He has no title, however, to dividends declared before the testator's death, although remaining unpaid. *Perry v. Maxwell*, 2 Deq. Eq. 487.

⁴³ *State v. New Orleans, etc. R. Co.*, 30 La. Ann. 308. Payment should be made to the administrator. *Brisbane v. Delaware, etc. R. Co.*, 94 N. Y. 204.

§ 442. **Payment as between vendor and vendee.**—It is the established rule, as between the vendor and vendee of shares, that the latter is entitled to all dividends declared after sale of the stock, and whether or not the transfer is recorded in the company's books. The transfer of stock carries with it all accrued profits, and they are assumed to be earned at the time the dividend is declared.⁴⁴ And the transfer carries all subsequently declared dividends, whether or not earned before the transfer.⁴⁵ And in case of doubt with respect to the person entitled, the company may safely pay it to him, in whose name the shares are registered, upon the corporate books.⁴⁶

§ 443. **Payment where the transfer of the stock is not made on the books.**—Where certificates expressly provide that they are not transferable except on the books of the corporation, it may safely pay the dividends due upon the shares to the record-owner, notwithstanding any transfer of the stock of which the corporation had no notice.⁴⁷

§ 444. **Effect of transfer upon title to dividend.**—A transfer of stock does not carry dividends already declared thereon.⁴⁸ For, when a dividend is once declared, it belongs to the owners of the stock at the time, and is no longer an incident of the shares.⁴⁹ Accordingly, the owner of the stock at the time that a dividend is declared, is entitled thereto, though it is made payable at a date subsequent to the transfer of shares.⁵⁰ And where a contract of sale of shares is entered into, under conditions of sale by which the purchase may be completed on a future fixed

⁴⁴ *Jermain v. Lake Shore, etc.* R. R. (1883), 91 N. Y. 483.

⁴⁵ *Goodwin v. Hardy* (1869), 57 Me. 143.

⁴⁶ *Brisbane v. Delaware, etc. R. Co.*, 94 N. Y. 204; s. c. 25 Hun, 438; *Jones v. Terre Haute, etc. R. Co.*, 29 Barb. 353; *Cleveland, etc. R. Co. v. Robbins*, 35 Ohio St. 483.

⁴⁷ *Robinson v. New Berne Nat. Bank*, 95 N. Y. 637, 2 Cum. Cas. 157.

⁴⁸ *Harper v. Raymond* (1858), 3 Bosw. 29. They may, however, be the subject of contract between the parties, and a lawful agreement in reference to them will be enforced. *Hyatt v. Allen*, 56 N. Y. 553.

⁴⁹ *Hill v. Newichawanick Co.* (1876), 71 N. Y. 593, affirming 8 Hun, 459; *Boardman v. Lake Shore, etc. Ry. Co.* (1881), 84 N. Y. 157, 178.

⁵⁰ *City of Ohio v. Cleveland, etc. R. Co.*, 6 Ohio St. 489; *Boardman v. Lake Shore, etc. R. Co.*, 84 N. Y. 157, 178; *Wheeler v. Northwestern Sleigh Co.* (1889), 39 Fed. Rep. 347; *Hill v. Newichawanick Co.* (1877), 71 N. Y. 593, affirming s. c. 45 How. Pr. 427, and 8 Hun, 459. It is only when it becomes payable that the dividend becomes "fruit fallen" and detached from the principal estate so as not to pass with it. *Vide* 45 L. R. A. 392.

day, or at any time prior thereto, and dividends are in the meantime declared, the dividends, upon the consummation of the sale, pass to the vendee of the stock.⁵¹ So also, where a transfer of shares is made with an agreement, as a condition subsequent, to transfer within a certain time at the option of one of the parties, is is generally held that if the condition is fulfilled, or the option exercised, the transfer dates from the day the conditional sale was made, and the title to dividends thereafter declared and payable, is in the buyer.⁵² But where an option was sold to take shares before a certain day, afterwards extended to another day, and a dividend was declared between the last two dates, payable after the last one, the dividend was held not to pass to the buyer, as the ownership of the buyer did not begin until the consummation of the transfer.⁵³

§ 445. (a) Effect by special agreement.—It seems, however, that in any case, by special agreement, the vendee may have the dividend, or it may be reserved to the vendor.⁵⁴ In a suit between the seller and buyer of stock, where the ownership of the dividends is in question, the courts will not undertake to apportion them according to the time when they were earned, whether before or after the transfer.⁵⁵

⁵¹ *Black v. Homersham*, 39 L. T. N. S. 671. If the dividend so declared has been paid to the vendor the vendee can recover it from him. *Harris v. Stephens* (1835), 7 N. H. 454.

⁵² *Harris v. Stephens* (1835), 7 N. H. 454; *Currie v. White* (1871), 45 N. Y. 822; *Black v. Homersham* (1878), 4 Ex. Div. 24. In the first case cited one offered to another shares if the buyer gave security by a certain date, which he did, and a dividend declared in the meantime belonged to him.

⁵³ *Bright v. Lord* (1875), 51 Ind. 272. *Cf.* *Central R. etc. Co. of Georgia v. Papot*, 59 Ga. 342; *Southwestern R. Co. v. Papot*, 67 Ga. 675.

⁵⁴ *Wheeler v. Northwestern Sleigh Co.* (1889), 39 Fed. Rep. 347; *Hyatt v. Allen*, 56 N. Y. 553; *Brewster v. Lathrop*, 15 Cal. 21.

⁵⁵ *Kane v. Bloodgood*, 7 Johns.

Ch. 90; s. c. 11 Am. Dec. 417; *Boardman v. Lake Shore, etc. R. Co.*, 84 N. Y. 157; *March v. Eastern R. Co.*, 43 N. H. 515; s. c. 77 Am. Dec. 732; *Gifford v. Thompson*, 115 Mass. 470; *Granger v. Bassett*, 98 Mass. 462; *Goodwin v. Hardy*, 57 Me. 143; *Brewster v. Lathrop*, 15 Cal. 21; *Ryan v. Leavenworth, etc. R. Co.*, 21 Kan. 365; *King v. Follett*, 3 Vt. 385; *Foote's Appeal* (1839), 22 Pick. 299; *Minot v. Paine* (1868), 99 Mass. 101; *Rand v. Hubbell*, 115 Mass. 461; *Phelps v. Farmers, etc. Bank*, 26 Conn. 269; *Bailey v. Railroad Co.*, 22 Wall. 604, 637; *Jermain v. Lake Shore, etc. R. Co.* (1875), 91 N. Y. 483; *Brundage v. Brundage*, 60 N. Y. 544; *Jones v. Terre Haute, etc. R. Co.* (1874), 57 N. Y. 196; *Currie v. White*, 45 N. Y. 822; *Hill v. Newichawanick Co.*, 48 How. Pr. 427; *Central R. etc. Co. of Georgia v. Papot*, 59 Ga. 342; *Coleman v.*

§ 446. (b) **Apportionment between vendor and vendee.**—Accordingly, a dividend declared for a period, during part of which one was entitled to the dividends declared, and during the other portion another, does not come under a statutory provision apportioning all rents, dividends and other periodical payments in the nature of income, as interest is apportioned according to the lapse of time.⁵⁶ And it has even been held that there can be no apportionment between vendor and vendee, of a dividend declared, but payable at stated intervals;⁵⁷ for the profits of the enterprise, until set apart by the declaration of a dividend, remain a part of the stock itself, and will pass under a transfer of the shares.⁵⁸ And for the same reason, that there can be no apportionment of dividends, dividends that have not been declared can not be assigned separately from the stock itself, even in the case of guaranteed or preferred dividends.⁵⁹ When, however, a dividend has been declared, it is distinct and separable from the fund out of which it is declared, and may be the subject of assignment by the shareholder, before he has received it from the company.⁶⁰ But a contract by a shareholder, in reference to dividends and profits on his shares, includes only dividends or profits declared by the corporation and allotted to shareholders, not profits ascertained by third persons or courts.⁶¹ Accordingly, where a person was entitled under a contract to the dividends upon certain shares for five years, and none were declared until two years

Coleman, etc. Co., 51 Pa. St. 74; Ryan v. Leavenworth, etc. R. Co., 21 Kan. 365; Paris v. Paris, 10 Ves. 184; Clive v. Clive, Kay, 600; Ibbotson v. Elam, L. R. 1 Eq. 188; Bates v. McKinley, 31 Beav. 280; Black v. Homersham, 4 Ex. Div. 24.

⁵⁶ Jones v. Ogle (1872), L. R. 14 Eq. 419; 33 and 34 Vic. ch. 35.

⁵⁷ Clapp v. Astor, 2 Edw. Ch. 379.

⁵⁸ Phelps v. Farmers' etc. Bank, 26 Conn. 269. As to preferred shares the rule holds true also. Boardman v. Lake Shore, etc. R. Co., 84 N. Y. 157; Nickals v. New York, etc. R. Co., 15 Fed. Rep. 575; Jermain v. Lake Shore, etc. R. Co. (1875), 91 N. Y. 483; Hyatt v. Allen, 56 N. Y. 553; Coey v.

Belfast, etc. Ry. Co., Irish R. 2 C. L. 112.

⁵⁹ City of Ohio v. Cleveland, etc. R. Co. (1856), 6 Ohio St. 489; Manning v. Quicksilver, etc. Co. (1881), 24 Hun, 361. Although bargains in prospective dividends are transactions which the Stock Exchange does not recognize nor enforce, they have been said to be not contrary to law and are valid as between the parties. Marten v. Gibbon, 33 L. T. N. S. 561.

⁶⁰ Marten v. Gibbon, 33 L. T. N. S. 561. Cf. Jermain v. Lake Shore, etc. R. Co., 91 N. Y. 483.

⁶¹ Hyatt v. Allen (1873), 56 N. Y. 553; Williams v. Western, etc. Co. (1883), 93 N. Y. 162, affirming 61 How. Pr. 217.

afterwards, when nearly a hundred per cent. was declared, it was held that no apportionment could be made, although it was declared largely from profits accruing during the five-year period; and also, that such a contract refers to dividends to be ascertained and declared by the corporation, and not to the growing profits from day to day, or month to month, to be ascertained by third persons, or courts of justice, looking into the accounts and transactions of the company.⁶²

§ 447. (c) **As to unregistered transferee.**—The corporation is bound to recognize, as stockholders, only those having the legal title to stock as shown by its books, and therefore it is not bound to pay dividends to an unregistered transferee, even when it has notice of the transfer.⁶³ But the right to dividends declared after the date of the transfer, passes to the vendee, as between him and

⁶² *Clapp v. Astor* (1834), 2 Edw. Ch. 379.

⁶³ *Stockwell v. St. Louis Ins. Co.*, 9 Mo. App. 133; *Continental National Bank v. Eliot National Bank* (1881), 7 Fed. Rep. 369; *Erwin v. Oregon Ry. etc. Co.*, 35 Hun, 544; *Merchants' etc. Bank v. Richards*, 6 Mo. App. 654; *Bright v. Lord*, 51 Ind. 272; *Wright v. Tuckett*, 1 J. & H. 266. In England, the Companies Clauses Act of 1845 provides that until the deed of transfer be delivered to the secretary of the corporation for the purpose of registration, the purchaser is not entitled to any share in the profits of the undertaking, nor to vote upon the stock at corporate meetings. 8 Vic. ch. 16, § 15. An unregistered transferee can not enforce the payment of a dividend at law, but must bring his bill in equity. *Cleveland, etc. R. Co. v. Robbins*, 35 Ohio St. 483; *Chambersburgh Insurance Co. v. Smith*, 11 Pa. St. 120; *Northrup v. Curtis*, 5 Conn. 246. And mere possession of the certificate of stock or even a special property therein by a person not their owner, is not sufficient ground upon which to base an action for dividends. *Dow v. Gould, etc. Mining Co.*, 31 Cal. 629. Where

an owner of bank stock directs another to obtain all the money possible thereon, and pay the owner's money to a bank, and adds: "You may apply any and all balance towards the payt. of my indebtedness to you," there is no assignment of the stock to the latter, and after his debt is paid, he can not maintain an action for dividends due thereon. *Ware v. Merchants' Nat. Bank* (Mass. 1890), 24 N. E. Rep. 328. Where, after a contract for the sale of certain shares in the stock of a corporation, but before the time appointed for receiving payment and making delivery, a dividend is declared, as to which there is no express stipulation in the contract, the purchaser has no right to decline acceptance and making payment because the seller claims the dividend as his own. *Phinizz v. Murray* (Ga. 1890), 10 S. E. Rep. 358. In an action for the transfer of stock, and the payment of dividends brought against the stockholder in whose name the shares are, and against the corporation, the latter has no interest at stake, and has no right to prosecute an appeal from a judgment rendered contradictorily with both parties defendant, in favor of plaintiff,

his vendor, even where the transfer has not been recorded on the corporate books.⁶⁴ And after the company has been notified of a transfer of stock, although registration thereof has not been made upon the corporate records, the dividend may safely be paid to the transferee.⁶⁵

§ 448. (d) **Transfer without surrender of certificate.**—If the company has allowed a shareholder to have his stock transferred upon the books without a surrender of the certificates, it will not be protected in paying dividends to the transferee as against the holder of the certificates,⁶⁶ although a stock-owner, to whom no certificate has been issued, is not thereby debarred from claiming his dividends.⁶⁷

§ 449. (e) **In case of fraudulent transfer.**—A corporation may always refuse to pay dividends to any one who has obtained a fraudulent transfer of stock upon the books of the company. It is the legal duty of the corporation to refuse payment under such circumstances.⁶⁸ And where dividends have been actually paid to such parties before discovery of the fraud, there being no fault upon the part of the original owner, he is entitled, as against the corporation, to demand the dividends or their equivalent.⁶⁹

where the real party in interest, the stockholder, has not appealed, and the judgment has become final and executory. *Board of Liquidation v. New Orleans Water Works Co.* (1887), 39 La. Ann. 202.

⁶⁴ *March v. Eastern R. Co.* (1862), 43 N. H. 515; s. c. 77 Am. Dec. 732; *Central R. etc. Co. of Georgia v. Papot*, 59 Ga. 342; *Ambrose v. Riddle*, 3 Md. Ch. 320; *Goodwin v. Hardy*, 57 Me. 143; *Foote, Appellant*, 22 Pick. 299; *King v. Follett*, 3 Vt. 385; *Ryan v. Leavenworth, etc. R. Co.*, 21 Kan. 365, 403; *Black v. Homersham*, 4 Ex. Div. 24; *Bates v. McKinley*, 31 L. J. Ch. 389; *Clive v. Clive, Kay*, 600; *Jones v. Terre Haute, etc. R. Co.* (1874), 57 N. Y. 196; *Currie v. White*, 45 N. Y. 822; *Hill v. Newichawanick Co.*, 48 How. Pr. 427; *Brundage v. Brundage*, 60 N. Y. 544; s. c. 65 Barb. 397; *Clapp v. Astor* (1834),

2 Edw. Ch. 379. Cf. *Boston, etc. R. Co. v. Commonwealth*, 100 Mass. 399; "Title to Dividends," 19 Am. Law Rev. 571; *Nickals v. New York, etc. Ry. Co.*, 21 Blatchf. 177; *Johnson v. Bridgewater, etc. Co.*, 14 Gray, 274.

⁶⁵ *Smith v. American Coal Co.*, 7 Lans. 317; *Hill v. Newichawanick Co.*, 48 How. Pr. 427; *Bell v. Lafferty*, 1 Pennyp. 454.

⁶⁶ *Bank v. Lanier* (1870), 11 Wall. 369; *Brisbane v. Delaware, etc. R. Co.*, 25 Hun, 438; *Lowry v. Commercial, etc. Bank, Taney*, 310; *Magwood v. Railroad Bank*, 5 S. C. 379; *Brewster v. Lime*, 42 Cal. 139.

⁶⁷ *Ellis v. Proprietors of Essex-Merrimac Bridge*, 2 Pick. 243.

⁶⁸ 2 *Redfield on Railways*, 540.

⁶⁹ *Davis v. Bank of England*, 2 Bing. 393; *Taylor v. Midland R. Co.*, 28 Beav. 287; *Sloman v. Bank of England*, 14 Sim. 775; *Ashley v. Blackwell*, 2 Edw. 299.

§ 450. (f) **Effect of closing the books.**—That it is found convenient to close the transfer books of a company for any purpose, does not, in any way, impair the legal rights of a stockholder to share in dividends subsequently declared, although the closing of the books would, to some extent, embarrass the transfer of stock.⁷⁰ The usage of the stock exchange that all stocks, sold before the books of the company are closed, are “dividend on” and carry the forthcoming dividend to the buyer, while all subsequent transfers are “en dividend,” that is, the dividend belongs to the seller, has no application to transfers not made in the exchanges.⁷¹

§ 451. **Dividend is payable only from profits.**—It is the rule that dividends can be made only from profits. The exception is, where no rights of creditors intervene, and all the stockholders assent.⁷²

§ 452. **What constitutes profits.**—As to what part of the corporate income constitutes profit which may be used for dividend, the United States Supreme Court said: “The term ‘profits’ out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans.”⁷³ In an English case the Court said: “What are profits, and what is capital, may be difficult, and sometimes an almost impossible problem, to solve. There is no hard-and-fast rule by which the company can determine what is capital and what profit. It may be safely said that what losses can be properly charged to capital, and what to income, is a matter for business men to determine, and it is often a matter on which the opinion of honest and competent men will differ . . . there is no single definition of the word ‘profits,’ which will fit all cases.”⁷⁴ Net earnings are, properly, the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains; that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out

⁷⁰ *Jones v. Terre Haute, etc. R. Co.* (1874), 57 N. Y. 196, affirming s. c. 20 Barb. 363; *Luling v. Atlantic, etc. Co.*, 45 Barb. 510; *Phelps v. Farmers’ etc. Bank*, 26 Conn. 269; *March v. Eastern R. Co.*, 43 N. H. 515; *Footte’s Appeal*, 22 Pick. 299; *Rider v. Alton, etc. R. Co.*, 13 Ill. 516; *Reese v. Bank of Montgomery Co.*, 31 Pa. St. 78.

⁷¹ *Lombards v. Case*, 45 Barb. 95; *Hill v. Newichawanick Co.*, 8 Hun, 459.

⁷² *Hughes v. Vermont Copper Min. Co.* (1878), 72 N. Y. 207.

⁷³ *Mobile, etc. R. R. v. Tennessee* (1894), 153 U. S. 486.

⁷⁴ *Dovey v. Cory* (1901), House of Lords, A. C. 477.

of the gross receipts, or out of the net earnings, the remainder is the profit of the shareholders to go towards dividends, which in that way are paid out of the net earnings."⁷⁵ Popularly speaking, the net receipts of a business are its profits.⁷⁶ "Surplus earnings" are said to be moneys available for dividends. "Net earnings," and "net income," are interchangeable terms.⁷⁷ "That the first thing to be done by any manufacturer who would ascertain his net earnings during the preceding year, is to take a careful inventory of what he has left, including his plant and machinery, and then make just and full allowances for all losses and shrinkages of every kind that he has suffered in his property during the year, and for all expenses of every kind, ordinary or extraordinary, that have occurred during the year; and, having made such inventory, and deducted such losses and shrinkage of every kind, his net earnings will be the difference between all his investments in his business, and all his expenses of every kind on the one hand, and this new inventory, with the reduction properly made, and all that he has received of every kind, on the other hand; and if his books are properly kept, and proper deductions made, these net earnings will finally appear on the balance sheet to the credit of the profit-and-loss account."⁷⁸ A railroad may declare a dividend from its profits without paying the principal of its funded or bonded debt, but it must first pay the interest on such debts,⁷⁹ and pay or fund its floating debt,⁸⁰ and set aside a sum for repairs and necessary reconstruction from wear and tear.⁸¹ Insurance companies cannot declare dividends out of unearned premiums,⁸² nor banks, out of interest not yet received.⁸³ Dividends of whatever nature can, as a general rule, only be declared out of a company's net profits.⁸⁴ But a dividend may be

⁷⁵ *St. John v. Erie Ry.* (1872), 10 Blatchf. 271; (1874), 22 Wall. 136.

⁷⁶ *Eyster v. Centennial Board* (1876), 94 U. S. 500.

⁷⁷ *Williams v. Western Union Tel. Co.* (1883), 93 N. Y. 162; *Phillips v. Eastern R. R.* (1884), 138 Mass. 122.

⁷⁸ *Richardson v. Buhl* (1889), 77 Mich. 632, 6 L. R. A. 457.

⁷⁹ *Mobile, etc. R. R. v. Tennessee* (1894), 135 U. S. 486.

⁸⁰ *Belfast etc. R. v. Belfast* (1885), 77 Me. 445.

⁸¹ *MacIntosh v. Flint, etc. R. R.* (1888), 34 Fed. Rep. 583.

⁸² *De Peyster v. American Fire Ins. Co.* (1837), 6 Paige, 486.

⁸³ *People v. San Francisco Savings Bank* (1887), 72 Cal. 199.

⁸⁴ "Companies Accounts—Payment of Dividends out of Capital," 46 L. T. 343; *Main v. Mills*, 6 Biss. 98; *Hughes v. Vermont, etc. Co.* (1878), 72 N. Y. 207, 210; *Carpenter v. New York, etc. R. Co.*, 5 Abb. Pr. 277; *Painesville, etc. R. Co. v. King*, 17 Ohio St. 534; *Att'y-Gen. v. State Bank*, 1

declared for a fiscal year subsequent to the time when the net profits divided, were earned.⁸⁵ In Virginia, however, directors who have failed to declare dividends at the time fixed by the charter, can not declare one extending over the period of their failure.⁸⁶ And after a consolidation, the profits of one company already earned, can not be used to pay a dividend upon the stock of the consolidated corporation.⁸⁷ Net profits are to be distinguished from net earnings, which are properly the gross receipts less the operating expenses. Interest on debts is paid out of what thus remains, that is, out of the net earnings. Many other liabilities are paid out of the net earnings, the remainder is the profit of the stockholders to go toward dividends.⁸⁸ That dividends can only be paid out of net profits, does not imply that the company is wholly out of debt.⁸⁹ But it has been laid down that the profits of a corporation, for the purpose of declaring a dividend, consist in the excess of its cash and other property on

Dev. & B. Eq. 545, 555; Elkins v. Camden, etc. R. Co. (1882), 36 N. J. Eq. 233; Lockhart v. Van Alstyne, 31 Mich. 76; Pittsburgh, etc. R. Co. v. Allegheny, 63 Pa. St. 126; Barnes v. Pennell, 2 H. L. Cas. 497; *In re Mercantile*, etc. Co., L. R. 4 Ch. 475.

⁸⁵ Mills v. Northern Ry. etc. Co. (1870), L. R. 5 Ch. 621. *Cf.* Hoole v. Great Western Ry. Co., L. R. 3 Ch. 262.

⁸⁶ Gordon v. Richmond, etc. R. Co., 78 Va. 501.

⁸⁷ Chase v. Vanderbilt, 37 N. Y. Super. Ct. Rep. 334.

⁸⁸ St. John v. Erie Ry. Co. (1872), 10 Blatchf. 271, 279, affirmed in 22 Wall. 136; Warren v. King (1882), 108 U. S. 389, 398; Van Dyck v. McQuade, 86 N. Y. 38, 47; Union Pacific R. Co. v. United States (1878), 99 U. S. 402, 422; De Peyster v. American Fire Ins. Co., 6 Paige, 486; Scott v. Eagle Fire Ins. Co., 7 Paige, 198; Lexington, etc. Ins. Co. v. Page, 17 B. Mon. 412; s. c. 46 Am. Dec. 528; Green's Brice's *Ultra Vires*, 161; People v. Supervisors of Niagara, 43 Hill, 20, 23; Mass. 122; Hazeltine v. Belfast, Phillips v. Eastern R. Co., 138

etc. R. Co. (1887), 79 Me. 411; s. c. 1 Am. St. Rep. 330. For further definition and explanation of "net profits" and similar terms, see Beach on Railways, §§ 298, 301; Nichols v. New York, etc. R. Co., 21 Blatchf. 177; Heard v. Eldridge, 109 Mass. 258; Park v. Grant Locomotive Works, 40 N. J. Eq. 114; Coltners, etc. Co. v. Black, 51 L. J. Q. B. 626; Bloxam v. Metropolitan Ry. Co., L. R. 3 Ch. 337; Bardwell v. Sheffield, etc. Co. L. R. 14 Eq. 517; Hadley's Railway Transportation, 58-62; Mills v. Northern Ry. etc. Co., L. R. 5 Ch. 621, 631; Salisbury v. Metropolitan Ry. Co., 18 W. R. 974.

⁸⁹ Belfast, etc. R. Co. v. Belfast, 77 Me. 445; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280, 307. *Acc.* Mills v. Northern Ry. etc. Co. (1870), L. R. 5 Ch. 621; Hadley's Railroad Transportation, 58; Stevens v. South Devon Ry. Co., 9 Hare, 313; Stringer's Case, L. R. 4 Ch. 475. But see Hoole v. Great Western Ry. Co., L. R. 3 Ch. App. 269; New York, etc. R. Co. v. Schuyler, 34 N. Y. 49; Beach on Railways, § 297.

hand, over its liabilities.⁹⁰ Dividends can be declared only out of surplus profits. The corporation can not declare a dividend out of its capital stock, and thus reduce it, or out of assets which are needed to pay corporate debts.⁹¹

§ 453. **Payment of dividend out of capital.**—The general rule is clear that a company can not pay dividends out of capital; it can only pay them out of profits. To pay dividends out of capital is reducing the capital to the detriment of the creditors of the company. The money is, of course, liable to be spent or lost in carrying on the business of the company; but no part of it can be returned to a member, so as to take away from the fund to which the creditors have a right to look, as that out of which they are to be paid.⁹² Existing or subsequent corporate creditors, to the extent of their unpaid claims, may compel stockholders receiving dividends out of the capital stock, to refund the same.⁹³ It is illegal for a company to pay interest to shareholders during the construction of its works, or the period which elapses before an income is earned out of capital.⁹⁴ But this rule does not prevent payment of interest on bonds or debenture stock

⁹⁰ Hubbard v. Weare (Iowa, 1890), 44 N. W. Rep. 915, following Miller v. Bradish, 69 Iowa, 278.

⁹¹ Warren v. King, 108 U. S. 389.

⁹² Flitcroft's Case (1862), 21 Ch. Div. 519, 533; "Companies' Accounts—Payment of Dividends out of Capital," 46 L. T. 343; Carpenter v. New York, etc. Ry. Co. (1885), 5 Abb. Pr. 277; Bloxam v. Metropolitan Ry. Co., L. R. 3 Ch. 337; Salisbury v. Metropolitan Ry. Co., 38 L. J. Ch. 249; Macdougall v. Jersey, etc. Co., 2 Hem. & M. 528; Holmes v. Newcastle, etc. Co., 45 L. J. Ch. 383; Queen v. Liverpool, etc. Ry. Co., 21 L. J. Q. B. 284. In Trevor v. Whitworth, 57 L. T. Rep. N. S. 457; s. c. 12 App. Cas. 409, the company affected to purchase its own shares and the transaction was condemned. Either it was a purchase of shares in the sense of a trafficking in shares, which was a purchase not authorized by the memorandum of association, or else it was an extin-

guishment of the shares, and therefore a reduction of the capital of the company. Either way it was *ultra vires* and illegal. Therefore, if a company's articles of association provide for the payment of dividends out of capital, they are invalid, and the directors will be restrained from acting under them. Even if such payment purported to be authorized by the memorandum of association, it would, in the opinion of Lord Justice Lindley (Company Law, p. 432), be illegal.

⁹³ Finn v. Brown (1891), 142 U. S. 56.

⁹⁴ "Payment of Interest out of Capital," Editorial article, Law Times, July 19, 1890, reprinted in 8 Ry. & Corp. L. J. 178, citing and discussing Guinness v. Land Corporation, 22 Ch. Div. 349; James v. Eve, L. R. 6 E. & I. App. 335. *Contra*, Dent v. London Tramways Co., 16 Ch. Div. 344; Lambert v. Neuchatel Asphalte Co., 30 W. R. 912; s. c. 47 L. T. N. S. 73.

representing available money raised by borrowing.⁹⁵ When, however, the capital stock of a company has been reduced, the property, thus deducted from the capital, may be distributed as a dividend.⁹⁶ And although the property of the company was in its nature of a wasting character, being a deposit of rock to be mined under a lease of the land for that purpose, and had become depreciated, both by the lapse of time, and in consequence of the rock dug out, the company was not bound to provide a reserve fund to meet the depreciation, and therefore dividends paid without doing so, were not a payment thereof out of capital.⁹⁷

§ 454. **Remedy for payment out of capital.**—An action may be maintained by a stockholder to enjoin the payment of a dividend, where the directors are about to misapply the funds of the corporation in paying the dividend, there being, in fact, no money earned for the purpose of a dividend.⁹⁸ And if it has been so declared and paid, it may be recovered back of the shareholders who received it.⁹⁹ So also, if dividends have been paid out, under the pretense and denomination of surplus profits, when there were no surplus profits to divide, not only may they be taken from the hands of the shareholders who have received them and applied to the payment of debts, but the directors are personally liable therefor,¹ to the company, its shareholders and creditors;² except where the dividend was paid through a mere error

⁹⁵ *Bloxam v. Metropolitan Ry. Co.*, L. R. 3 Ch. App. 337; *Bardwell v. Sheffield Water Works Co.*, L. R. 14 Eq. 517.

⁹⁶ *Strong v. Brooklyn, etc. R. Co.*, 93 N. Y. 426, 435; *Seely v. New York, etc. Bank*, 8 Daly, 400; s. c. 78 N. Y. 608; *Parker v. Mason*, 8 R. I. 427.

⁹⁷ *Lee v. Neuchatel Asphalte Co.* (Ch. Div. 1889), 6 Ry. & Corp. L. J. 266. *Cf. Davison v. Gillies*, 16 Ch. Div. 347; *Dent v. London Tramways Co.*, 16 Ch. Div. 344; *Lambert v. Neuchatel Asphalte Co.*, 47 L. T. N. S. 73; *Stringer's Case*, L. R. 4 Ch. App. 475; *Coltness Iron Co. v. Black*, L. R. 6 App. Cas. 315, 329; *Rance's Case*, L. R. 6 Ch. App. 104; *In re Oxford Benefit Building Society*, 35 Ch. Div. 502; *Leeds Estate, Build. and Invest. Co. v. Shepherd*, 36 Ch. Div. 787.

⁹⁸ *Carpenter v. New York, etc. R. Co.* (1857), 5 Abb. Pr. 277.

⁹⁹ *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474; *Holmes v. Newcastle, etc. Co.*, 1 Ch. Div. 682; *Stringer's Case*, L. R. 4 Ch. App. 475.

¹ *Gratz v. Rudd* (1843), 14 B. Mon. 178, 194; *Hill v. Frazier* (1853), 22 Pa. St. 320; *Fletcroft's Case* (1882), 21 Ch. Div. 519; *Turquand v. Marshall*, L. R. 4 Ch. 376; *Evans v. Coventry*, 8 De Gex, M. & G. 835; *Burnes v. Pennell*, 2 H. L. Cas. 497, 531; *In re Alexander Palace Co.*, 21 Ch. Div. 149; *Salisbury v. Metropolitan Ry. Co.*, 22 L. T. N. S. 839.

² Holding them liable to creditors, are: *In re Exchange Banking Co.*, 21 Ch. Div. 519; *In re County Marine Ins. Co.*, L. R. 6 Ch. 104; *Main v. Mills*, 6 Biss. 98; *Scott v. Eagle Fire Ins. Co.*, 7

in judgment.³ There are statutes, however, making them liable without reference to whether the dividend, infringing the capital stock, was declared innocently or fraudulently.⁴ But their statutory liability may be barred by laches, where they have not been guilty of actual fraud.⁵

§ 454a. Liability of corporate officers for dividends paid out of the capital stock.—There is not full accord of the courts as to the liability of corporate officers who have paid illegal dividends out of the capital stock, except that they are liable for any such dividend which, as stockholders, they themselves have received.⁶ The prevailing rule is, that, if in good faith and without neglect, the directors pay out a dividend, although it results in impairment of the capital stock, they are not to be held liable.⁷ A stockholder is not liable to the corporate creditors for a dividend received by him in good faith, when the corporation was solvent.^{7a}

§ 455. Equality of payment.—There can be no discrimination made between stockholders of the same class. They must be *pro rata* and without preference.⁸ A dividend, regularly declared and due, is the individual property of the stockholder as a separate fund, distinct from other surplus profits.⁹ Payment of

Paige, 198. *Cf.* Rance's Case, L. R. 6 Ch. 104. To the corporate creditors only: Smith v. Hurd, 12 Met. 371; s. c. 46 Am. Dec. 690; Chamberlin v. Huguenot Manuf. Co., 118 Mass. 532; Priest v. Essex Manuf. Co., 115 Mass. 380. Not to creditors, but only to the company and the stockholders: Lexington, etc. R. Co. v. Bridges (1847), 7 B. Mon. 556, 559; s. c. 46 Am. Dec. 528. To each shareholder: Turquand v. Marshall, L. R. 4 Ch. 376. Directors, however, who have not been guilty of fraud, and have been compelled to make good to corporate creditors a dividend impairing the capital stock, are entitled to be subrogated to the creditors' rights against the stockholders. *In re* Alexander Palace Co., 21 Ch. Div. 149; Salisbury v. Metropolitan Ry. Co., 22 L. T. N. S. 839.

³Excelsior, etc. Co. v. Lacey (1875), 63 N. Y. 422; Stringer's Case, L. R. 4 Ch. 475. *Cf.* Gillett v. Moody, 3 N. Y. 479; Scott v.

Central R. etc. Co., 52 Barb. 45; Keppel v. Petersburg R. Co., Chase's Dec. 167; Reid v. Eaton Manuf. Co., 40 Ga. 98.

⁴Companies' Act of 1862, § 165; Mass. Stat. 1862, ch. 218, § 3; Mass. Stat. 1870, ch. 224, § 40, 42; Rev. of N. J. p. 178; Pa. Act of April 7, 1849, § 9; Hill v. Frazier (1853), 22 Pa. St. 320; N. Y. 1 Rev. Stat. ch. 18, tit. 2, art. 1, §1, subs. 10.

⁵Williams v. Boice, 38 N. J. Eq. 364; *In re* Mammoth Copperopolis, 50 L. J. Ch. 11.

⁶Davenport v. Lines (1899), 72 Conn. 118.

⁷Latimer v. Equitable, etc. Assn. (1898), 78 Mo. App. 463; Chick v. Fuller (1902), 114 Fed. Rep. 22.

^{7a}Great Western, etc. Co. v. Harris (Vt. 1903), 128 Fed. (C. C. A.), 321.

⁸Ryder v. Alton R. R. (1851), 13 Ill. 516.

⁹People v. Merchant, etc. Bank (1879), 78 N. Y. 269.

dividends must be provided for, without discrimination and at a reasonable time and place, which may be fixed by the directors subsequently to the resolution declaring them.¹⁰ The place of payment must be appointed at a reasonably convenient distance from the company's place of business, or from that of the stockholders,¹¹ and the time must be within a reasonable time after it is declared.¹² When the directors undertake to distribute any portion of the funds of the corporation, whether it be called profits or not, all the stockholders are entitled to an equal share in the fund in proportion to their stock.¹³ Accordingly, there can be no difference made between large and small shareholders;¹⁴

¹⁰ *March v. Eastern R. Co.* (1862), 43 N. H. 515; s. c. 40 N. H. 548; s. c. 77 Am. Dec. 732; *Simpson v. Moore*, 30 Barb. 637; *Clarkson v. Clarkson*, 18 Barb. 646; *Spear v. Hart*, 3 Robt. 420; *Le Roy v. Globe Ins. Co.* (1836), 2 Edw. Ch. 657, where about four-fifths of the dividend having been called for, the rest were not deprived of the benefit of the fund set apart therefor, on account of subsequent bankruptcy; *Foote, Appellant*, 22 Pick. 299; *Balsh v. Hallett*, 10 Gray, 402; *Earp's Appeal*, 28 Pa. St. 363; *Jackson v. Newark Plank Road Co.*, 31 N. J. 82, 504, where the place of payment was a banking house in New York City, just across the river from one terminus of the road declaring the dividend; *De Gendre v. Kent*, L. R. 4 Eq. Cas. 283; *Price v. Anderson*, 15 Sim. 473; *McLaren v. Stainton*, 3 De Gex, F. & J. 202.

¹¹ *King v. Paterson, etc. R. Co.* (1860), 29 N. J. 82.

¹² *Brundage v. Brundage*, 60 N. Y. 544; s. c. 65 Barb. 397; *King v. Paterson, etc. R. Co.* (1860), 29 N. J. 82; *City of Ohio v. Cleveland, etc. R. Co.* (1856), 6 Ohio St. 489. *Cf. Burroughs v. North Carolina R. Co.*, 67 N. C. 376.

¹³ *Jones v. Terre Haute, etc. R. Co.* (1859), 29 Barb. 353; s. c. affirmed 57 N. Y. 196; *Howell v. Chicago, etc. R. Co.*, 51 Barb. 378; *State v. Baltimore, etc. R. Co.*

(1847), 6 Gill, 363, where the discrimination was in giving the smaller shareholders cash for a part of the dividend that the larger ones had to take in bonds; *Beers v. Bridgeport Spring Co.* 42 Conn. 17; *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542; *Ryder v. Alton, etc. R. Co.*, 13 Ill. 516; *Coey v. Belfast, etc. Ry. Co.*, Irish Rep. 2 C. L. 112; *Harrison v. Mexican Ry. Co.*, L. R. 19 Eq. 358. *Cf. Miller v. Illinois Central R. Co.*, 24 Barb. 312. An action in *assumpsit* lies against the corporation on the implied contract that the distribution of dividends shall be equally made. *Jackson v. Newark Plankroad Co.* (1865), 31 N. J. 277; or for damages, *Coey v. Belfast, etc. Ry. Co.*, I. R. 2 C. L. 112. But see *State v. Baltimore, etc. R. Co.*, 6 Gill, 363, where it is held that the shareholders cannot maintain *assumpsit*, but must proceed by bill in equity. Or a shareholder from whom a dividend has been illegally withheld may resort to the other shareholders to recover his proportion of the money had and received by them. *Peckham v. Van Wagenen*, 83 N. Y. 40. So, also, a court of equity may restrain a discrimination of this character. *Luling v. Atlantic Mutual Ins. Co.*, 45 Barb. 510. *Cf. Harrison v. Mexican Ry. Co.*, L. R. 19 Eq. 358.

¹⁴ *State v. Baltimore, etc. R. Co.* (1847), 6 Gill, 363.

or between shareholders whose subscriptions are fully paid, and those in arrears.¹⁵ And no discrimination can be lawfully made between shareholders on account of the date of the issue of their stock if issued before the distribution; and it is immaterial when the property distributed was acquired, earned or accumulated.¹⁶ The corporation can not discriminate between the shareholders as to the medium of payment. It can not pay one shareholder in gold, and force another to accept his *pro rata* portion in a depreciated paper.¹⁷

§ 456. **Set-off of debt due the corporation.**—If, when a dividend becomes payable to the stockholder, he is in debt to the corporation, it may apply the dividend to payment of the debt, by way of set-off or counterclaim,¹⁸ unless the registered stockholder has sold and transferred his stock certificate before the dividend becomes payable.¹⁹

§ 457. **Action to compel declaration of dividend. Jurisdiction of the courts.**—As a general rule, a stockholder can not sue the corporation for his share of accumulated profits, until a dividend has been declared, which is a matter within the discretion of the directors, and which the courts will not control.²⁰ It is not for the stockholders to decide whether or not a dividend shall be declared, but for the directors to determine in their sole discretion.²¹ Where they fail to declare a dividend, but without bad faith, neglect of duty, or abuse of their power, a court of equity will not assume jurisdiction to order a dividend declared.²² The stockholder has no inchoate or other legal right to the earnings or profits of the company till the dividends have been declared.²³

¹⁵ Reese v. Bank, 31 Pa. St. 78; Oakbank Oil Co. v. Crun, L. R. 8 App. C. 65.

¹⁶ Phelps v. Farmers', etc. Bank (1857), 26 Conn. 269; Luling v. Atlantic, etc. Ins. Co., 45 Barb. 510; Jones v. Terre Haute Ry. Co., 57 N. Y. 196; Boardman v. Lake Shore, etc. Ry. Co., 84 N. Y. 157; Jermain v. Lake Shore, etc. Ry. Co., 91 N. Y. 283.

¹⁷ State v. Baltimore, etc. Ry. Co. (1847), 6 Gill, 363; Keppel v. Petersburg, etc. R. Co., Chase's Dec. 167.

¹⁸ Donnally v. Hearndon (1895), 41 W. Va. 519.

¹⁹ Gemmell v. Davis (1892), 75 Md. 546, 32 Am. St. Rep. 412.

²⁰ Beveridge v. New York El. R. Co. (1889), 112 N. Y. 1, 27; Williams v. Western, etc. Co., 93 N. Y. 162.

²¹ Grant v. Ross (1896), 100 Ky. 44; Hunter v. Roberts (1890), 83 Mich. 63.

²² New York, etc. R. R. Co. v. Nickals (1886), 119 U. S. 296; Greenleaf v. Equitable, etc. Soc. (1899), 160 N. Y. 19.

²³ Browne v. Collins, L. R. 12 Eq. Cas. 594; Hyatt v. Allen, 56 N. Y. 557; Minot v. Paine, 99 Mass. 101; Rand v. Hubbell, 115 Mass. 474. It is a fundamental rule that dividends can be paid only out of profits or the net increase of the capital of a corpo-

It has been strongly stated that the property of every corporation, including all its earnings and profits, belongs primarily to the corporation itself, and not to its stockholders individually or collectively. They have a certain claim, it is true, but their claims are always subordinate to the claims of creditors, and the latter approach much nearer to the condition of ownership than the former.²⁴ Until a division, a shareholder has no legal right to the property or profits of the corporation. The individual members of a corporation are, no doubt, interested, in one sense, in the property of the corporation, as they may derive individual benefit from its increase or loss from its destruction; but in no legal sense are the individual members the owners.²⁵ So, too, each share represents an aliquot part of the capital stock; but the holder can not touch a dollar of the principal. He is entitled only to a share in the dividends and profits. Upon the dissolution of the institution, each shareholder is entitled to a proportional share of the residuum after satisfying all liabilities.²⁶ Yet the profits that are divisible among the shareholders as dividends, are considered as their own property to the extent that the corporation may not apply them to any purpose not included in the charter, without the unanimous consent of the shareholders.²⁷ For it is a breach of trust and a fraud upon non-assenting shareholders, otherwise to apply profits that should have been divided among them; and at their suit the diversion of the fund may be prevented by injunction, and its proper application enforced.²⁸

ration, and cannot be drawn from the capital contributed by the shareholders for the purpose of carrying on the company's business. And a holder of shares in a corporation has no legal claim to profits earned by the company until a dividend has been declared by the proper agents; nor can he compel the declaration of a dividend, except when the profits are withheld in violation of the charter. Morawetz on Corporations, §§ 344, 351.

²⁴ *Karnes v. Rochester, etc. R. Co.*, 4 Abb. Pr. (N. S.) 110.

²⁵ *Lord Denman, C. J.*, in *Queen v. Arnaud*, 9 Ad. & El. N. R. 806. Where sums chargeable to capital account were paid out

of revenue, it was held on the construction of the special acts relating to the company, that shares which the directors had power to issue, but which could only have been sold at a discount, could not be issued at par in lieu of the dividend which might have been paid if the revenue had not been diverted. *Hook v. Great Western Ry. Co.*, L. R. 3 Ch. 262.

²⁶ *Farrington v. Tennessee*, 95 U. S. 687.

²⁷ *March v. Eastern R. Co.* (1862), 43 N. H. 515.

²⁸ *March v. Eastern R. Co.* (1862), 43 N. H. 515; *Brown v. Buffalo, etc. R. Co.* (1882), 27 Hun, 342; *Beers v. Bridgeport*

Therefore, while a right to a dividend is no debt until the dividend is declared, the stockholders are not remediless in case the directors, without reasonable cause, refuse to divide the surplus profits. They may be compelled in such cases to make the distribution.²⁹

Jurisdiction of the Courts.—Where there is abuse of power by the directors in refusal to declare a dividend, a court of equity, at the instance of any stockholder, will order a dividend declared and paid. "An argument is made, which has the sanction of some of the authorities, to the effect that all of the assets of a corporation are deemed capital until a dividend is declared. We may concede that assets are ordinarily so treated in going concerns, but the rule has its limitations. The directors must act in good faith. If they fail to do so, and it clearly appears that they have accumulated earnings not required in the prosecution of the business, which they withhold from the stockholders for illegitimate purposes, a court of equity may interfere and compel a distribution of such earnings."³⁰ The courts will, however, interfere only in rare and exceptional cases, where the directors are shown to be acting in bad faith, or wilfully abusing their discretion.³¹ Where a company has become insolvent,³² or is indebted to an extent that would make it unwise to declare a dividend, the court would unquestionably refuse to interfere.³³ In any case, how-

Spring Co., 42 Conn. 17; Park v. Grant Locomotive Works, 40 N. J. Eq. 114; Browne v. Monmouthshire Ry., etc. Co., 4 Eng. L. & Eq. 118; s. c. 13 Beav. 32; Stevens v. South Devon Ry. Co., 9 Hare, 313.

²⁹ Scott v. Eagle Fire Co., 7 Paige, 198.

³⁰ Matter of Rogers (1899), 161 N. Y. 108.

³¹ Williston v. Michigan Southern, etc. R. Co., 13 Allen, 400; Chaffee v. Rutland R. Co. (1883), 55 Vt. 110; Karnes v. Rochester, etc. R. Co., 4 Abb. Pr. 417; Thompson v. Erie R. Co., 45 N. Y. 468; Chase v. Vanderbilt (1875), 62 N. Y. 307; Scott v. Eagle Fire Ins. Co., 7 Paige Ch. 198; Ely v. Sprague, Clarke Ch. 351; Howell v. Chicago, etc. R. Co., 51 Barb. 378; Barnard v. Vermont, etc. R. Co., 7 Allen, 512; Park v. Grant Locomotive Works,

40 N. J. Eq. 114; Browne v. Monmouthshire Ry., etc. Co., 4 Eng. L. & Eq. 118; s. c. 13 Beav. 32; Stevens v. South Devon Ry. Co., 9 Hare, 313; Smith v. Prattville Manuf. Co., 29 Ala. 503; State v. Bank of Louisiana, 6 La. 745; Beers v. Bridgeport Spring Co., 42 Conn. 117; Pratt v. Pratt, 33 Conn. 446; Harris v. San Francisco, etc. Co., 41 Cal. 393.

³² Scott v. Eagle Fire Ins. Co., 7 Paige, 198.

³³ Smith v. Prattville Manuf. Co., 29 Ala. 503; Ryan v. Leavenworth, etc. Ry. Co., 21 Kan. 365. In Karnes v. Rochester, etc. R. Co., 4 Abb. Pr. (N. S.) 107, the defendant's debt was funded and not payable for many years. The plaintiff sought to obtain an order that a surplus equal to half of the amount of its indebtedness should be distributed as a dividend. But the court refused, say-

ever, one who is not a shareholder in a corporation, has no right to a decree compelling the corporation to declare and pay such dividends as may appear upon an accounting to be proper; nor will a court of equity decree an account of liens on the shares of a stockholder at the request of a person having no lien on the shares.³⁴

§ 458. **Actions to enforce payment. Assumpsit. Mandamus.**—When dividends have been declared an action of *assumpsit* may be maintained to enforce payment according to the terms of the resolution declaring them; for after they have been declared, the shareholder's right thereto becomes absolute.³⁵ In some cases, however, it is necessary to proceed by bill in equity.³⁶ As when a dividend has been declared, but the time of payment has not been fixed by the directors.³⁷ But *mandamus* is not a proper remedy to compel a private corporation to pay dividends which it has declared; still less when any other question exists as to the rights of the person claiming to be entitled to them.³⁸

ing: The board of directors in their discretion might do this, but that no court would ever undertake to deal in such a manner with the funds of a corporation which was indebted to an amount at least double the fund sought to be distributed.

³⁴ *Berford v. New York Iron Mine* (1889), 56 N. Y. Super. Ct. Rep. 236.

³⁵ *Kane v. Bloodgood*, 7 Johns. Ch. 90; s. c. 11 Am. Dec. 417; *State v. Baltimore, etc. R. Co.* (1847), 6 Gill, 363; *City of Ohio v. Cleveland, etc. R. Co.* (1856), 6 Ohio St. 489; *Jones v. Terre Haute, etc. R. Co.*, 57 N. Y. 196; *Westchester, etc. R. Co. v. Jackson*, 77 Pa. St. 321; *Jackson v. Newark Plankroad Co.*, 31 N. J. 277; *Scott v. Central R., etc. Co. of Georgia*, 52 Barb. 45; *Carpenter v. New York, etc. R. Co.*, 5 Abb. Pr. 277; *King v. Paterson, etc. R. Co.* (1860), 29 N. J. L. 504; *Festial v. King's College*, 10 Beav. 491; *Davis v. Bank of England*, 2 Bing. 393; *Coles v. Bank of England*, 10 Ad. & E. 437; *Keppel v. Petersburg, etc. R. Co.*, *Chase's Dec.* 167; *Le Roy v. Globe Ins.*

Co., 2 Edw. Ch. 657; *Dalton v. Midland Counties Ry. Co.*, 13 C. B. 474; *Coey v. Belfast, etc. Ry. Co.*, 1. R. 2 C. L. 112; *Fawcett v. Laurie*, 1 Drew. & S. 192. The action should as a general rule be instituted against the corporation itself and not against its officers. *Smith v. Poor*, 40 Me. 415; s. c. 3 Ware, 148; s. c. 63 Am. Dec. 672. Where a lease of corporate property provides that the rent shall be paid as dividends directly to the stockholders, the corporation, fully representing their interests, is the proper party to enforce a claim for unpaid dividends. *Pacific R. Co. v. Atlantic, etc. R. Co.*, 20 Fed. Rep. 277. No shareholder can sue in behalf of the other stockholders. *Carlisle v. Southeastern Ry. Co.*, 13 Beav. 295.

³⁶ *Beers v. Bridgeport Spring Co.* (1875), 42 Conn. 17; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657.

³⁷ *Scott v. Eagle Fire Ins. Co.*, 7 Paige, 203; *Pratt v. Pratt, etc. Co.*, 33 Conn. 446.

³⁸ *People v. Central, etc. Co.* (1879), 41 Mich. 166.

It is generally held that, in order to maintain an action therefor, it is essential to show that a demand for the dividend was actually made.³⁹ A letter of inquiry, addressed to the president of the company, inquiring generally about dividends for a number of years back, is not a sufficient demand.⁴⁰ The company may set off unpaid calls against dividends.⁴¹ But unless it has a lien upon the stock, it may not plead a counterclaim.⁴² Where plaintiff, the only resident stockholder, was *prima facie* entitled to five per cent. of the dividends of the corporation, he was held to be properly entitled to temporary injunction against the payment of more than ninety-five per cent. of the dividends to the other stockholders, and to have the remaining five per cent. held on deposit, with a trust company, pending the determination of the suit.^{42a}

§ 459. **Enjoining payment of illegal dividend.**—At the instance of any stockholder, a court of equity will enjoin the distribution in dividend of any part of the capital stock, but if neither creditors nor stockholders will be injured in the dividend, the court will not interfere.⁴³ The payment of a dividend already declared may be enjoined when it appears that there have been no profits earned out of which it could be legally declared; that is, when it would have to be paid out of a fund other than net profits,⁴⁴ or out of funds necessary to make needed repairs,⁴⁵ or

³⁹ Scott v. Central R. Co., 52 Barb. 45; State v. Baltimore (1847), 6 Gill, 363; Bank of Louisville v. Gray (1887), 84 Ky. 565; Keppel v. Petersburg R. Co., Chase's Dec. 167, 213; King v. Paterson, etc. R. Co. (1860), 29 N. J. 504; Hagar v. Union Nat. Bank, 63 Me. 509. But in New York it has been held that the institution of suit is in itself a sufficient demand for the payment of dividends due. Robinson v. National Bank, 95 N. Y. 637.

⁴⁰ Scott v. Central R., etc. Co., 52 Barb. 45.

⁴¹ King v. Paterson, etc. Ry. Co. (1860), 29 N. J. 504; Bates v. New York Ins. Co., 3 Johns. Ch. 238; Sargent v. Franklin Ins. Co., 8 Pick. 90; Hagar v. Union Nat. Bank, 63 Me. 509; Citizens, etc.

Ins. Co. v. Scott, 45 Ala. 185; 8 Vic., ch. 16, § 123.

⁴² March v. Eastern R. Co., 43 N. H. 515; s. c. 77 Am. Dec. 732; Att'y-Gen. v. State Bank, 1 Dev. & B. Ch. 545; Hagar v. Union Nat. Bank, 63 Me. 509.

^{42a} Dupignac v. Bernstrom, 83 N. Y. Supp. 350 (1903).

⁴³ Chaffee v. Rutland (1882), 55 Vt. 110.

⁴⁴ McDougall v. Jersey, etc. Co. 2 Hem. & M. 528; Carpenter v. New York, etc. R. Co., 5 Abb. Pr. 277; Underwood v. New York, etc. R. Co., 17 How. Pr. 537; Karnes v. Rochester, etc. R. Co., 4 Abb. Pr. (N. S.) 107; Dent v. London Tramway Co., 16 Ch. Div. 344; Carlisle v. Southwestern Ry. Co., 13 Beav. 295; Fawcett v. Laurie, 1 Drew. & Sim. 192. Cf. Stevens v.

⁴⁵ Dent v. London Tramway Co. (1880), 16 Ch. Div. 344.

where there has been an overissue of stock, until it can be determined which are the spurious certificates.⁴⁶ But a dividend can not be restrained on the ground that there is not cash on hand to pay it in full,⁴⁷ nor because the account upon which it was based contained some immaterial errors in calculation;⁴⁸ nor upon the ground that the directors have acted in violation of their duties to the public;⁴⁹ nor, in case of foreign corporations, except in cases of fraud injuriously affecting citizens of the State.⁵⁰

§ 460. (a) **Injunction at the instance of dissenting shareholder.**—A bill by a single shareholder to enjoin the declaration of future dividends, which is simply to prevent a violation of law, may be granted on his behalf, and that of all other shareholders, this being a duty common to all, and a probable benefit to all.⁵¹ But a petition, by a single shareholder, to restrain a dividend already declared, will be refused on the ground that the declaration of the dividend gives the shareholders a legal right to the payment thereof, which the court can not interfere with in their absence.⁵²

§ 461. (b) **Injunction at the instance of creditors.**—The payment of a dividend may be restrained by the creditors of an insolvent corporation,⁵³ but not when the insolvency was caused by a great fire after the dividend was declared and the money to pay it appropriated.⁵⁴ Nor can they maintain a bill to restrain it from declaring dividends, in order to keep the assets in a proper state of security for the payment of their debt.⁵⁵

South Devon Ry. Co., 9 Hare, 313; Mills v. Northern Ry. Co., L. R. 5 Ch. 621. But see Ward v. Sittingbourne, etc. R. Co., L. R. 9 Ch. 488. *Of*. "Stock Dividends and their Restraint," by M. Dwight Collier (1884), 7 Am. Bar Assn. Rep. 256.

⁴⁶ Underwood v. New York, etc. R. Co., 17 How. Pr. 537.

⁴⁷ Stringer's Case, L. R. 4 Ch. 475.

⁴⁸ Yool v. Great Western Ry. Co., 20 L. T. (N. S.) 74.

⁴⁹ Brown v. Monmouthshire Ry., etc. Co., 13 Beav. 32; Stevens v. South Devon Ry. Co., 9 Hare, 313.

⁵⁰ Howell v. Chicago, etc. R. Co., 51 Barb. 378.

⁵¹ Carlisle v. South Eastern Ry. Co. (1850), 1 Macn. & G. 689;

Fawcett v. Laurie (1860), 1 Drew. & S. 192.

⁵² Fawcett v. Laurie (1860), 1 Drew. & S. 192; Carlisle v. South-eastern Ry. Co. (1850), 1 Macn. & G. 689. *Of*. Davis v. Bank of England, 1 Macn. & G. 481; Coles v. Bank of England, Douglas, 407; City of Ohio v. Cleveland, etc. R. Co., 6 Ohio St. 489; Carpenter v. New York, etc. R. Co., 5 Abb. Pr. 277; King v. Paterson, etc. R. Co., 29 N. J. 82, 504.

⁵³ Karnes v. Rochester, etc. R. Co., 4 Abb. Pr. (N. S.) 107.

⁵⁴ Lamar v. American Fire Ins. Co., 6 Paige, 482.

⁵⁵ Mills v. Northern Ry., etc. Co. (1870), L. R. 5 Ch. 621. Nor will a dividend be enjoined at the suit of another company claiming the

§ 462. **Recovery of dividends illegally paid.**—Before a corporate creditor can proceed against stockholders to recover back an unlawful dividend, paid them out of the capital stock, to the prejudice of the rights of such creditor, he must obtain judgment against the corporation, and return of execution in whole, or in part, unsatisfied.⁵⁶ Where dividends have been declared by the directors and received by the shareholders, they may, nevertheless, be reclaimed by the directors themselves, if they have been illegally declared under a misapprehension of the right to declare them.⁵⁷ And since dividends, declared at a time when the corporation was insolvent, or in contemplation of insolvency, are in the nature of a fraud upon creditors, a creditors' bill will lie to reach, and subject them to execution,⁵⁸ although the shareholders had received them innocently, having no actual knowledge of the fact that the capital stock was impaired.⁵⁹ But equity will not require stockholders to surrender, for the benefit of creditors of an insolvent corporation, dividends declared and distributed at a time when the corporation was solvent.⁶⁰

§ 463. **Interest, and the statute of limitations run from demand and refusal.**—In New York, interest being in the nature of damages for default of payment, is not dependent upon de-

right of distress for non-payment of toll charges. *South Yorkshire Ry. Co. v. Great Northern Ry. Co.*, 9 Ex. 55.

⁵⁶ *Brewer v. Michigan Salt Assn.* (1885), 58 Mich. 351.

⁵⁷ *Lexington, etc. Co. v. Page*, 17 B. Mon. 412; s. c. 66 Am. Dec. 165.

⁵⁸ *First Nat. Bank v. Smith* (1881), 6 Fed. Rep. 215; *Wood v. Dummer*, 3 Mason, 308; *Railroad Co. v. Howard*, 7 Wall. 392; *Curran v. State*, 15 How. 304; *Bartlet v. Drew*, 57 N. Y. 587; *Johnston v. Laffin*, 5 Dill. 65, note; *Hastings v. Drew* (1879), 76 N. Y. 9; *Osgood v. Laytin*, 48 Barb. 463; s. c. 5 Keyes, 521; *McLean v. Eastman*, 21 Hun, 312; *Bank of St. Marys v. St. John*, 25 Ala. 566; *Gratz v. Redd*, 4 B. Mon. 178; *Heman v. Britton* (1886), 88 Mo. 549; *Bartholomew v. Bentley*, 15 Ohio, 659; *Rance's Case*, L. R. 6 Ch. 104. *Cf. Williams v. Boice*, 38

N. J. Eq. 364; *Pacific R. Co. v. Cutting, Jr.*, 27 Fed. Rep. 638; *Paschall v. Whitsett*, 11 Ala. 472. But see *Spear v. Grant*, 16 Mass. 9, 15; *Vose v. Grant*, 15 Mass. 505.

⁵⁹ *Main v. Mills*, 6 Biss. 98, and note; *Hastings v. Drew* (1879), 76 N. Y. 9; *Osgood v. Laytin*, 3 Keyes, 521; *Sagory v. Dubois*, 3 Sand. Ch. 466; *Lexington Life, etc. Ins. Co. v. Page*, 17 B. Mon. 412; s. c. 66 Am. Dec. 165; *Gratz v. Redd*, 4 B. Mon. 178; *Bank of St. Marys v. St. John*, 25 Ala. 566; *Clapp v. Peterson*, 104 Ill. 26; *National Trust Co. v. Miller*, 33 N. J. Eq. 155. *Cf. Sawyer v. Hoag*, 17 Wall. 610; *Railroad Co. v. Howard*, 7 Wall. 392; *Curran v. State*, 15 How. 304; *Wood v. Dummer*, 3 Mason, 308.

⁶⁰ *Reid v. Eatonton Co.*, 40 Ga. 98; *Main v. Mills*, 6 Biss. 98; *In re Mercantile, etc. Co.*, L. R. 4 Ch. 475.

mand.⁶¹ But elsewhere, interest and the Statute of Limitations do not begin to run until demand and refusal.⁶² In a recent case in Louisiana it has been held that dividends being payable on demand, until demand and refusal, prescription does not begin to run against the person entitled; and that, accordingly, where the stock of an expiring corporation is merged into the stock of a new one organized as its successor, acquiring its franchises, and assuming its obligations, a provision inserted in the charter of the new company forfeiting dividends not claimed within three years from the time when declared, is not binding upon the old stockholders, except from the time when, expressly or by implication, they consent thereto by assuming the quality of stockholders in the new company. An old stockholder, who has been ignorant of his rights and of the transfer, and who claims his dividends as soon as informed of their existence, can not be affected by the provision, except *in futuro*.⁶³

§ 464. **Preferred dividends.**—The holders of preferred or guaranteed stock are entitled to a preferred dividend, payable in priority to dividends on the common stock. Preferred dividends are fully treated in the next following chapter upon preferred or guaranteed stock.⁶⁴

§ 465. **Life estate and remainders in shares of stock.**—Where shares of stock held by an estate are given in trust to be paid to one for life, or a term of years, with remainder over to the remainderman or reversioner, the question is, what dividends constitute such income and profits which go to the beneficiary, the life tenant, and what dividends inure as addition to the principal or corpus, or capital which belongs to the estate of the remainderman? In laying down rules for the settlement of the contest between the life tenant and the remainderman, courts widely differ, and upon some points are directly in conflict.

§ 466. (a) **The different rules.**—The different rules which are followed, are classed as, (1) the American or Pennsylvania rule, (2) the Massachusetts rule, and (3) the English rule.

⁶¹ Adams v. Fort Plain Bank, 36 N. Y. 255; Boardman v. Lake Shore, etc. R. Co., 34 N. Y. 157, 188; Prouty v. Michigan Southern R. Co., 1 Hun, 655, 667.

⁶² Philadelphia, etc. R. Co. v. Cowell, 28 Pa. St. 329; s. c. 70 Am. Dec. 128; Philadelphia, etc.

R. Co. v. Hickman, 28 Pa. St. 318; Keppel v. Petersburg R. Co., Chase's Dec. 167, 213; State v. Baltimore, etc. R. Co. (1847), 6 Gill, 363.

⁶³ Armant v. New Orleans & C. R. Co. (La. 1890), 7 So. Rep. 35.

⁶⁴ See *post*, § 468.

The American rule is adopted by most of the states of the Union, and looks to the time when the dividend was earned, and to the method of its accumulation, and holds that the dividend belongs to the remainderman if it accrued before creation of the life estate. But if the fund producing the dividend was earned or accrued after creation of the life estate, the dividend is income or profits, and belongs to the life tenant.⁶⁵ "No matter whether the dividend be in cash, or scrip, or stock."⁶⁶ "Where a corporation, having actually made profits, proceeds to distribute such profits among the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits."⁶⁷ Dividends declared out of capital, or funds representing capital, as in the proceeds of property or franchises, are not income or profits, and do not go to the life tenant.⁶⁸ It is now uniformly held, both in England and this country, that ordinary cash dividends, declared from the profits or earnings of the corporation, do not go to the corpus of the trust in which shares are held, but belong to the *cestui que trust* as income.⁶⁹ In the case of accumulated surplus the American rule is that when at last the distribution is made, what was earned in his time should go to the tenant for life, and what was accumulated before the commencement of the life interest, should go to the principal fund.⁷⁰ This rule is

⁶⁵ *Earp's Appeal* (1857), 28 Pa. St. 368; *Vinton's Appeal* (1882), 99 Pa. St. 434.

⁶⁶ Per Judge Clark, in *Estate of Smith*, 140 Pa. St. 344, 23 Am. St. Rep. 237.

⁶⁷ *Moss' Appeal*, 83 Pa. St. 264, 24 Am. St. Rep. 164.

⁶⁸ *Vinton's Appeal*, 99 Pa. St. 434, 44 Am. Rep. 116; *Gifford v. Thompson*, 115 Mass. 478; *In re James*, 78 Hun, 121, 146 N. Y. 78.

⁶⁹ *Price v. Anderson*, 15 Sim. 473; *Johnson v. Johnson*, 15 Jur. 714; *Bates v. Mackinley*, 31 Beav. 280; *Wright v. Tucket*, 1 Johns. & Hern. 266; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Read v. Head* (1863), 6 Allen, 174; *Ware v. McCandlish*, 11 Leigh, 595; *Cuming v. Boswell*, 2 Jur. N. S. 1005; *Bar-*

clay v. Wainwright, 14 Ves. 66; *Norris v. Harrison*, 2 Madd. 268; *Preston v. Melville*, 16 Sim. 163; *Clive v. Clive, Kay*, 600; *Murray v. Glasse*, 17 Jur. 816; *Beach on Wills*, § 211.

⁷⁰ *Richardson v. Richardson*, 75 Me. 575; s. c. 4 Am. Prob. Rep. 352; *Vinton's Appeal*, 99 Pa. St. 434; s. c. 3 Am. Prob. Rep. 231; *Biddle's Appeal*, 99 Pa. St. 278; s. c. 3 Am. Prob. Rep. 442; *Clarkson v. Clarkson*, 18 Barb. 646; *Van Doven v. Olden*, 19 N. J. Eq. 176; *Ashurst v. Field*, 26 N. J. Eq. 1; *Earp's Appeal* (1857), 28 Pa. St. 368; *Moss' Appeal*, 83 Pa. St. 264; *Lord v. Brooks*, 52 N. H. 72; *Wiltbank's Appeal*, 64 Pa. St. 256; *Roberts' Appeal*, 92 Pa. St. 407; *Thompson's Appeal*, 89 Pa. St. 36;

illustrated by a case where a testator left the income of stock which at his death, by reason of an accumulated surplus, had increased in value a certain amount per share, and the surplus, some time afterward, was converted into new stock, and it was held that the amount of the increased value of the old shares at the testator's death, subtracted from the value of the new stock after issue, left a sum which represented profits since the death of the testator and belonged to the tenant for life.⁷¹ And in a late case it was decided that one who was entitled to the "net annual income" of corporation stock, could rightfully claim all dividends and bonuses distributed among the stockholders, which were divided from, and represented, the surplus earnings of the corporation, but could not so claim any portion of the capital stock of the corporation which had been purchased by the corporation on credit of its bonds, and distributed among the stockholders, although such stock, when distributed, was charged to the profit and loss account of the corporation.⁷²

The Massachusetts rule, otherwise known as "the rule in Minot's case," which is that adopted also in Rhode Island, and in Georgia, and several other States, and by the United States, is the simple rule that cash dividends, however large, are income belonging to the life tenant, and that stock dividends, however made, are capital, and belong to the remainderman,⁷³ and this seems to be the rule in England: "When a testator or 'settlor' directs, or permits the subject of his disposition to remain as shares or stocks in a company, which has the power either of distributing its profits as dividends, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator, or settlor in the shares, and consequently what is paid by the company as dividend, goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, inures to the benefit

In re Thompson's Estate, 11 Week. N. Cas. (Pa.) 482; *Hite v. Hite* (Ky. 1887), 2 Ry. & Corp. L. J. 568; *Wheeler v. Perry*, 18 N. H. 307.

⁷¹ *Earp's Appeal* (1857), 28 Pa. St. 368.

⁷² *Gilkey v. Paine* (1888), 80 Me. 319. It was said in this case that the equitable and proper di-

vision of the shares between an owner of a life interest in the original stock and the remainderman, was to give the stock dividend to the latter, but the income on the stock distributed as a dividend to the life tenant.

⁷³ *Minot v. Paine* (1868), 99 Mass. 101; *New England Trust Co. v. Eaton* (1886), 140 Mass. 532.

of all who are interested in the capital.”⁷⁴ The Supreme Court of the United States holds that, the life tenant of stock does not take a stock dividend declared during that tenancy.⁷⁵ Under the Massachusetts rule, in deciding whether the distribution is a stock or cash dividend, the actual and substantial character of the transaction must be considered, and not its nominal character merely.⁷⁶ Accordingly, a dividend, representing profits, is to be regarded as income, though permanent improvements to an equal amount had previously been made, and it is just sufficient to pay for a voted increase in the capital stock which the stockholders are at liberty to subscribe for in proportion to the number of their shares; and it is not a mere substitute for a stock dividend when the stockholder is at liberty to sell his right to subscribe for the new stock.⁷⁷

Under the English rule, established in 1799, the usual dividend, whether of cash, stock, or property, belongs to the life tenant, but any such dividend, when extraordinary, belongs to the remainderman.⁷⁸ Under later cases, an extraordinary cash dividend belongs to the life tenant.⁷⁹

Intention of the Testator or Donor.—Under all rules, whether certain dividends go to the life tenant, depends upon the intention of the testator or donor.⁸⁰ In England the distinction is between

⁷⁴ Bouch v. Sproule, 12 App. Cas. 385.

⁷⁵ Gibbons v. Mahon (1890), 136 U. S. 549.

⁷⁶ Daland v. Williams, 101 Mass. 571; Rand v. Hubbell, 115 Mass. 461; Gifford v. Thompson, 115 Mass. 478.

⁷⁷ Davis v. Jackson (Mass. 1890), 8 Ry. & Corp. L. J. 246. In this case it was said of a stock dividend: “But where the form of its transaction has not that effect, there is no reason why courts should be astute to bring it about. The remainder-men rely upon the fact that before the dividend was declared debts to an equal amount had been incurred for permanent improvements. But the mere incurring of a debt for capital did not, of itself, amount to an appropriation to capital of all the income on hand. The corporation was still free to choose

how it would deal with its gains. When it did choose, it elected to distribute them. If the plaintiff trustees had seen fit to keep the money and to sell their rights, they could have done so, and neither the corporation nor the *cestuis qui trustent* could have complained. Of course the trustees could not affect the respective rights of the defendants by their determination. If they had kept the dividend it would have been a bold claim on the part of the remainder-men that it was theirs because the corporation was in debt for additions to capital.”

⁷⁸ Witts v. Steere, 13 Ves. Jr. 363; Bates v. Mackinley (1807), 31 Beav. 280.

⁷⁹ Ellis v. Barfield, 64 Law T. (N. S.) 625; Sugden v. Alsbury, 45 Ch. Div. 237.

⁸⁰ *In re James*, 146 N. Y. 78, 48 Am. St. Rep. 774.

a regular dividend, which is held without controversy to be income, even when it is increased beyond the usual amount,⁸¹ and the extra dividends, whether in stock or in cash, which are by the great preponderance of English authority still held to be accretions to the capital of the trust fund.⁸² Thus, an extra dividend of five per cent. issued, instead of increasing the regular dividend, although earned in the same way and in the same period as the regular dividend, is given to the remainderman.⁸³ But bonuses, when made from profits, have been given to the life tenant,⁸⁴ especially where declared from profits of the last half year,⁸⁵ as a bonus of one per cent. on Bank of England stock made in addition to the regular dividend,⁸⁶ and where a semi-annual dividend was simply two per cent. larger than usual.⁸⁷ The English and Massachusetts decisions agree that the character of the distribution, whether regular or extra or stock or cash, must be determined by a reference to the vote of the corporation or its directors. The court will not go behind this vote and investigate the sources from which the corporation obtained the money or stock which it distributes, for it is held that neither courts nor trustees can investigate such matters with accuracy; and in many cases no investigation can be made.⁸⁸

§ 467. (b) **Apportionment of dividends. Life tenant.**—When a life tenant dies before the dividend is declared, the rule is that it is not apportionable, but belongs entirely to the corpus of the trust fund.⁸⁹ If he dies after declaration of the dividend, but before it becomes due, it all goes to his estate.⁹⁰ In these cases, the dividend in England is apportioned between the estate of the life tenant and the corpus, and in the United States the tendency is to so hold.⁹¹

⁸¹ *Barclay v. Wainewright*, 14 Ves. 66; *Witts v. Steere*, 13 Ves. 363.

⁸² *Brander v. Brander*, 4 Ves. 800; *Irving v. Houston*, 4 Paton H. of L. Cas. 521; *Paris v. Paris*, 10 Ves. 185; *Clayton v. Gresham*, 10 Ves. 288; *Witts v. Steere*, 13 Ves. 363; *Hooper v. Rossiter*, *McClellan*, 527; *Price v. Anderson*, 15 Sim. 473; *In re Barton's Trust*, L. R. 5 Eq. 238.

⁸³ *Witts v. Steere*, 13 Ves. 363.

⁸⁴ *Murray v. Glasse*, 17 Jur. 816.

⁸⁵ *Plumbe v. Neild*, 6 Jur. N. S. 529.

⁸⁶ *Preston v. Melville*, 16 Sim. 163.

⁸⁷ *Barclay v. Wainewright*, 14 Ves. 66.

⁸⁸ *Minot v. Paine*, 99 Mass. 101; *Irving v. Houston*, 4 Paton H. of L. Cas. 521, 531.

⁸⁹ *Brundage v. Brundage* (1875), 60 N. Y. 544.

⁹⁰ *Paton v. Sheppard* (1839), 10 Sim. 186.

⁹¹ *Thomas v. Gregg* (1894), 78 Md. 545, 23 L. R. A. 294.

B.

NEW STOCK.

§ 467a. Rights and remedies of existing stockholders.—Where a stockholder, to obtain money for the corporation, pledges his stock, which is lost by failure of the corporation to pay, the stockholder can not sustain his claim for issue of new stock to him, in lieu of that lost, but stands merely as a corporate creditor. Every stockholder, who is such at the time of the issue of new stock, has the preferred right to subscribe thereto, each in proportion to his holding of shares of the original stock. Of this right he cannot be denied by the officers, or by a majority of the stockholders.⁹² And this rule applies as well to stock dividends.⁹³ The stockholder's right to such participation in the new stock, passes to his transferee of shares of the original stock, transferred after the issue of new stock has been authorized by the corporation.⁹⁴ Where the preferred stock was issued by resolution of the stockholders, conditioned that the corporation, at its election, might retire it, each preferred stockholder, having acquired his stock subject to an express contract, denying him the right to share in new stock issued for its retirement, thereupon became a stranger to the corporation.⁹⁵

§ 467b. Stockholder's right to subscribe to new stock.—A stockholder of the old stock, at the time of the vote to augment the capital of a company, has a right in the new stock, in proportion to the amount of his interest in the old, of which he can not be rightfully deprived by the other stockholders.⁹⁶ This right

⁹² *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Gibbons v. Mahon*, 4 Mackey D. C. 136, 136 U. S. 549; *Miller v. Ill. Cent. R. Co.*, 24 Barb. (N. Y.) 312.

⁹³ *Ohio Ins. Co. v. Nunne-macher*, 15 Ind. 294.

⁹⁴ *Jones v. Concord, etc. R. Co.*, 67 N. H. 119, 68 Am. St. Rep. 650; *Baltimore, etc. Co. v. Hambleton*, 77 Md. 341.

⁹⁵ *Weiderfield v. Northern Pac. Ry.* (Minn. 1904), 129 Fed. 305 (U. S., C. C. A.).

⁹⁶ *Gray v. Portland Bank*, 3 Mass. 363 (1807); s. c. 3 Am. Dec. 156, where Sedgwick, J., said: "At the time of the vote to

augment the capital of the bank, all the stockholders were partners. The augmentation was supposed to be, and intended for the benefit of the joint concern; the capacity to augment was in virtue of their joint interest; and it could only be done by the will of the majority, and that in pursuance of their original association. The law by which the partnership existed and by which the united interest was regulated, was that alone by which the augmentation could be made. Whenever a partnership adopts a project, within the principles of their agreement, for the purpose of

is now usually given by statute, so that when a company determines to increase its capital stock, each holder of the original stock has a right to subscribe for and purchase a proportionate amount

profit, it must be for the benefit of all the partners in proportion to their respective interests in the concern. Natural justice requires that the majority should not have authority to exclude the minority. What is there in this case which should make it an exception from that general principle? There is nothing, that I can perceive, in the nature of the thing. Suppose it to have been morally certain that the augmentation would have been double in value, to the amount of the money necessary to make it; could a combination of a majority have deprived the minority of their proportion? The whole number of shares was one thousand; could the proprietors of five hundred and one have engrossed the whole, and deprived their partners of their shares? It is impossible. At the time of the vote to augment the capital, a banking house had been purchased, and become the property of the institution. In this the plaintiff was personally interested, in proportion as his interest in the bank was to the amount of the whole stock. After the capital is increased, the banking house is, as it was before, the joint property of the stockholders; and the consequence of excluding him from the new stock without any compensation, is depriving him without any consideration of two-thirds parts of his property in this house. This shows, in a very glaring light, how unfounded is the principle for which the defendants contend." Sewall, J., also referring to the partnership increase in the stock, said: "Considering an incorporation for a bank, as I

think it may be more correctly stated, to be a trust created with certain limitations and authorities, in which the corporation is trustee for the management of the property, and each stockholder a *cestui que trust* according to his interest and shares, then a limitation of the capital employed in the trust, that it shall not be less than one sum, and not exceeding a certain greater sum, is not a power granted to the trustee to create another interest for the benefit of other persons than those concerned in the original trust, or for their benefit in any other proportions than those determined by their subsisting shares. It is clear that a power of that kind might be given, but not by the limitation supposed, which plainly relates to one and the same stock. Whether the least or the greatest, or any intermediate sum be employed in it, the trust is the same, and for the use and benefit of the same persons. A share in the stock or trust, when only the least sum has been paid in, is a share in the power of increasing it, when the trustee determines, or rather when the *cestui que trusts* agree upon employing a greater sum, within the limits provided in the purposes of the trust." *Reese v. Bank of Montgomery*, 31 Pa. St. 78; s. c. 72 Am. Dec. 726; *In re Wheeler*, 2 Abb. Pr. N. S. 364; *Pratt v. American Bell Telephone Co.*, 141 Mass. 225; s. c. 55 Am. Rep. 65; *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Eidman v. Bowman* (1871), 58 Ill. 444; *Jones v. Morrison*, 31 Minn. 140; 26 & 27 Vic., ch. 118, § 17. *Contra*, *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294.

of the new stock at par.⁹⁷ Under an act which permits insurance corporations to increase their capital stock by increasing the number of shares, to be allotted *pro rata* to the stockholders according to their interest, stockholders can not be charged a bonus, and a court of equity will enjoin the company from refusing to allow a stockholder to receive his allotment at par without paying the bonus.⁹⁸ And generally, a stockholder may enjoin the corporation from any attempt to deprive him of this right.⁹⁹ Or he may sue the company by a special count in *assumpsit* and recover for the loss.¹ But a clause in a charter, conferring upon the directors the power to increase the stock "on such terms and conditions, and in such manner as to them shall seem best," is held to exclude the shareholders' right to demand that they be allowed to subscribe for the new.² The proportion of new stock must be approximated as nearly as it may be fixed in integral shares.³ Shareholders, of course, have no right to demand a gratuitous distribution of the new stock in proportion to the amount of original stock held by them.⁴ Nor can a majority of the stockholders of a corporation, without the consent of the minority, dispose of new

⁹⁷ Cunningham's Appeal, 108 Pa. St. 546. If the original ordinary stock or shares are at a premium, at the time of the issue of the new, the latter is to be offered at par to the holders of the former in proportion, as nearly as conveniently may be, to the number of original shares held by them respectively. 26 & 27 Vic., ch. 118, § 17.

⁹⁸ Cunningham's Appeal, 108 Pa. St. 546, Paxson, J., dissenting as to the remedy in equity.

⁹⁹ Dousman v. Wisconsin, etc. Co. (1876), 40 Wis. 418, where it was held that the injunction should be upon the corporation itself and not upon its directors personally, for they may be changed from time to time and thus the decree be rendered ineffective.

¹ Gray v. Portland Bank, 3 Mass. 364; s. c. 3 Am. Dec. 156; Eidman v. Bowman, 58 Ill. 444; Sewall v. Eastern R. Co., 9 Cush. 5. In actions for damages the plaintiff must prove demand and

tender of payment within a reasonable, or the specified, time. Wilson v. Bank of Montgomery, 29 Pa. St. 537. The measure of damages is the amount by which the market value of the new shares at the time they were issued exceeds the par value thereof, with interest on the excess. Gray v. Portland Bank, 3 Mass. 364; s. c. 3 Am. Dec. 156; Reese v. Bank of Montgomery, 31 Pa. St. 78; s. c. 72 Am. Dec. 726; Eidman v. Bowman, 58 Ill. 444. Each shareholder must sue in his own name only, the liability of the corporation in these cases being several and not joint. Dousman v. Wisconsin, etc. Co., 40 Wis. 418; Williams v. Savage Manuf. Co., 3 Md. Ch. 418.

² Ohio Ins. Co. v. Nunnemacher, 15 Ind. 294, 296; s. c. 10 Ind. 234.

³ Reese v. Bank of Montgomery, 31 Pa. St. 78; s. c. 72 Am. Dec. 726; 26 & 27 Vic., ch. 118, § 17.

⁴ Miller v. Illinois, etc. R. Co., 24 Barb. 312, 330.

stock without regard to its actual value.⁵ The stockholder must avail himself of the right within the time prescribed, or if none be fixed, within a reasonable time.⁶ A stockholder, who has not taken his proportion of new shares of stock in a corporation, is deprived of any right to a premium obtained on a sale thereof, pursuant to a vote of the stockholders, unless the vote in terms so provides.⁷ The holders of scrip, convertible at a certain time into the stock of the company, are not entitled to share *pro rata* with the stockholders in an increase of stock made before the time for the conversion of the scrip certificates into stock.⁸ A subscriber for original stock generally becomes a stockholder upon acceptance of his subscription, whether paid for or not; but not so as to new stock; when new stock is issued as increase of the capital stock, after the organization, the subscriber will not become a stockholder until he has paid for such new stock.⁹

§ 467c. **Liability of holders of new stock.**—The recital in certificates issued to, and received by, old shareholders, that the shares were fully paid up and free from all claims and demands on the part of the company, can not relieve them from liability to creditors, even if valid against the corporation.¹⁰ In a recent case after an irregular increase was made in the capital stock, a portion of the new shares was distributed among the stockholders, upon the understanding that they were the owners of the new stock in proportion to the amounts they respectively held of the old, and the certificates issued to them recited that the stock was paid up. The corporation then became indebted to complainants, who had notice of the increase of the capital stock, but not of the disposi-

⁵ Jones v. Morrison, 31 Minn. 140.

⁶ Brown v. Florida Southern Ry. Co., 19 Fla. 472; Hart v. St. Charles Street R. Co., 30 La. Ann. 758, where it is also held that a verbal notification by the shareholder that he will take the new stock is sufficient to render the company liable in damages for disposing of it to others; Terry v. Eagle Lock Co., 47 Conn. 141; Sewall v. Eastern R. Co., 9 Cush. 5. By the statute, in England, if the offer be not accepted within a month, it will be deemed to have been declined. But the directors are empowered to allow a share-

holder who on account of absence abroad or other satisfactory cause, omitted to signify his acceptance, to take the stock after the expiration of that time. 26 & 27 Vic., ch. 118, § 20.

⁷ Mason v. Duval Mills, 132 Mass. 76.

⁸ Pratt v. American Bell Telephone Co., 141 Mass. 225; s. c. 55 Am. Rep. 465; Miller v. Illinois Central R. Co., 24 Barb. 312.

⁹ Baltimore, etc. Co. v. Hambleton, 77 Md. 341.

¹⁰ Hawley v. Upton, 102 U. S. 316; Stutz v. Handley (1890), 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407.

tion made of it, and afterwards the corporation became insolvent. Upon this state of facts, the stockholders were held to be liable to complainants for the full amount of the new stock so issued to them, and not paid for.¹¹ While these stockholders entered into no express undertaking to pay for these shares, but intended, and expected to receive and hold them as fully paid, in accordance with the recital of the certificates issued therefor, still this acceptance and holding of the certificates, until the insolvency of the company, operates to impose upon them the legal obligation to pay up the shares in order to discharge the demands of creditors.¹² There is no difference in principle between making a stockholder pay a larger per cent. on his shares than he has expressly agreed and undertaken to pay, and compelling a shareholder to pay up the whole amount represented by certificates which he has accepted, and holds under contract as paid-up shares, but which have not, in fact, been paid. If the unpaid balance may be reached and subjected to the payment of corporate debts, in disregard of the contract, why may not the unpaid whole of outstanding shares be likewise reached and subjected, notwithstanding the agreement that they should be treated or considered as fully paid?¹³

¹¹ *Stutz v. Handley* (1890), 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407.

¹² *Stutz v. Handley* (1890), 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407; *Upton v. Tribilcock*, 91 U. S. 47, 48, where the shareholder had paid twenty per cent. of the shares, and the certificate, issued to him for the whole amount, had stamped across its face the word "Non-assessable." The court held that "the acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder." The legal effect of the certificate was to make the remaining eighty per cent. payable on demand. The court said: "We see no qualification of this result in the word 'non-assessable,' assuming it to be incorporated into and to form a part of the contract. It is quite extravagant to allege that this word operates as a waiver of the

obligation, created by the acceptance and holding of a certificate, to pay the amount due upon the shares. A promise to take shares of stock imports a promise to pay for them. The same effect results from an acceptance and holding of a certificate." The rule thus laid down was reaffirmed in the subsequent cases of *Sanger v. Upton*, 91 U. S. 64; *Webster v. Upton*, 91 U. S. 67, 71; *Chubb v. Upton*, 95 U. S. 666; *Hawley v. Upton*, 102 U. S. 316.

¹³ *Stutz v. Handley* (1890), 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407. So in *Hawley v. Upton*, 102 U. S. 316, the shareholder's express written agreement with the corporation was to pay \$200 (or twenty per cent. of its par value) for ten shares of the increased stock. As between him and the corporation, this would have been held valid, but as against creditors it was held not binding, and he was required to

§ 467d. Liability upon new shares issued as a bonus.—This liability for the full amount represented by the unpaid stock, on the insolvency of the corporation, extends to persons to whom

pay up the remaining eighty per cent., the court saying that "as the company could not sell its stock at less than par, what was done amounted in law to a subscription for the stock, and nothing else. It is true the stock he took purported to be non-assessable; but that, in law, could only mean that no assessment would be made beyond the percentage he had specially bound himself to pay, unless the legal liabilities of the company required it." All the Upton Cases dealt with increased or new stock, and the Supreme Court, in favor of the representative of creditors, disregarded the special contracts made between the corporation and the shareholders, and compelled the latter to pay in full for their shares. To the same effect, see the well-considered case of *Flinn v. Bagley*, 7 Fed. Rep. 785. In harmony with the principle enforced in these cases is the decision of the Kentucky court of appeals in the case of *Haldeman v. Ainslie*, 82 Ky. 395, in which the capital stock of the corporation, organized under the same general law as the Clifton Coal Company, was fixed at \$1,200,000; and it was provided, by section 5, of the articles of incorporation, that each subscriber, upon executing his note for \$1,000, payable in bank, and paying \$500 in cash, should become entitled to paid-up stock of four hundred shares (\$40,000). The private property of stockholders was exempt from liability for corporate debts, and the charter further provided that "the highest amount of indebtedness to which the corporation is at any time to subject itself shall be the sum of \$15,000." The managing officers contracted debts far beyond this

limit, and the corporation became insolvent. The court held that creditors could compel the payment of the entire stock (of \$1,200,000), if necessary to satisfy their demands. The court says: "The effect of the limitation upon the amount to be paid by the subscribers for their stock would not exempt them from liability to a creditor who had dealt with a corporation in ignorance of the articles of association, limiting the amount of the indebtedness to be created by the corporation or those conducting it. . . . The public had the right to believe that each subscriber, taking four hundred shares of stock at \$100 per share, had either paid up his stock, or was liable for the amount; and when trusting the corporation upon the faith of its ability to pay, and without any knowledge as to the restrictions contained in the contract between the stockholders, a creditor of the corporation could compel the payment of the entire stock, if necessary to satisfy his demand." The case of *Christensen v. Eno*, 106 N. Y. 97, was especially pressed as sustaining defendants' position in *Stutz v. Handley*, 41 Fed. Rep. 332, where, however, the court said: "That case is certainly an authority in favor of defendants, but it is not in harmony with the authorities above referred to. The facts of the case were that the Illinois & St. Louis Bridge Company issued to Eno twenty-five shares of its capital stock, upon which forty per cent. was not paid, but was credited as paid when the stock was issued. The complainant, a judgment creditor of the corporation, sought to compel Eno to pay up the unpaid forty per cent. toward

a portion of the new stock was issued as an inducement to purchase bonds of the corporation, though they, too, received certificates reciting that the stock was paid up, since their acceptance and holding of the stock is in legal effect, a subscription therefor which imports a promise to pay.¹⁴ An agreement by which persons, organizing a corporation, are to have bonds of the corporation to an amount equal to the stock subscribed for, secured by mortgage on the corporate property, is illegal and void, and can not be enforced against the corporation, even though the rights of no creditors of the corporation are involved.¹⁵ So far as the

the satisfaction of his debt. The court, following the English cases cited by counsel for defendant, and without even referring to the decisions of the Supreme Court of the United States, held that the creditors could not recover, because Eno had entered into no contract with the company to pay the unpaid forty per cent. I am unable to reconcile this decision with the principles announced and applied by the Supreme Court in the above-cited Upton Cases, which are binding upon and should be followed by this court." *Stutz v. Handley* (1890), 41 Fed. Rep. 332.

¹⁴ *Stutz v. Handley* (1890), 41 Fed. Rep. 332; s.c. 7 Ry. & Corp. L. J. 407, where the court said: "On behalf of all the defendants who accepted and held certificates of the new stock, 'distributed' to them along with bonds, it is urged that they cannot be held liable thereon to creditors, because they were in no sense subscribers for such stock, and entered into no contract and assumed no obligation to pay therefor. It is claimed for them that neither the company nor the old stockholders could enforce such a liability upon or against them, and that creditors can assert no better or superior rights. Assuming that the subscription paper of December 30, 1886, which stated that 'it is agreed that \$50,000 of the \$200,000 capital stock be dis-

tributed *pro rata* among the subscribers to the above bonds,' constituted a contract between the subscribers for the bonds and the corporation, rather than an agreement between themselves, made with the consent and approval of the old stockholders, are creditors, who dealt with the company without notice or knowledge of that arrangement, precluded from recovering of defendants who accepted and held certificates of stock thereunder? The property of the company was considered ample security for the payment of the bonds, and the distribution of stock to the subscribers for the bonds was, not in fact, or by the terms of the subscription paper, in any proper sense a sale of such stock at and for its market value."

¹⁵ *Morrow v. Iron, etc. Co.* (1889), 87 Tenn. 262; s. c. 5 Ry. & Corp. L. J. 206. It was said by the court that "whether this basis of organization' be construed to be a contract whereby each subscriber to the stock was to be given a bond as a bonus, or each subscriber to the bonds was to be given paid-up stock as a bonus, or as an agreement by which each contributor to the capital stock was to receive the obligation of the company, secured by a primary mortgage, that he should be repaid the amount of his subscription with interest, such agreement would clearly be illegal and ineffective as to existing

rights of creditors are involved and affected, precisely the same objection exists against the subscriber for bonds of corporations taking increased stock as a bonus, that exists against the taking of original stock as a bonus, on one and the same consideration.¹⁶

§ 467e. **Power to issue new stock.**—It is comparatively a new question in this country whether an active corporation, a

or subsequent creditors of the corporation, upon the ground that the payment for the stock was unreal and simulated, or that the bond had been issued upon no consideration;" citing *Sawyer v. Hoag*, 17 Wall. 610; and *Scovill v. Thayer*, 105 U. S. 143. And after approving of the principle of these cases, that the unpaid stock of a corporation constitutes a trust fund for the benefit of general creditors, which can by no contrivance or device be released, the court held that the legal effect of the scheme, by which every subscriber was to have bonds, and also stock of the company, each to the amount of the subscription, was to throw all the risks and hazards of the business upon the public, who should deal with the corporation; while the contributors were to reap all possible gains, and be secured against loss in the event the enterprise proved unprofitable. Such a contract was considered invalid, even as to the corporation.

¹⁶ *Stutz v. Handley* (1890), 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407, where the court continued: "In each case the party thus dealing with the corporation seeks, on the payment or contribution of one amount, to acquire both a debt against the company and a *pro rata* share and interest in the enterprise, without risk to himself. The legal effect of such an arrangement, either as to increased or original stock, is an undertaking on the part of the corporation to return or repay his contribution or loan, with interest, confer upon him all the rights of a shareholder

and exempt him from all obligation to account for the trust fund represented by his share. The transaction casts upon the public, dealing with the corporation, all the risks and hazards of the enterprise; and allows the holders of the shares, while reaping all the benefits and advantages of its success without liabilities for losses, to call for and require a repayment of his advance. The settled principles of the law, which impress upon the capital stock of a corporation the character of a trust fund, and establish trust relations between holders of such stock while unpaid, and creditors of the corporation, will not sanction such a contract when the rights of creditors are involved. In this respect no valid distinction exists between original and new stock. The Supreme Court in *Chubb v. Upton*, 95 U. S. 667, places the increased stock of a corporation upon the same footing as the original stock, and has steadily refused, as against creditors, to recognize any disposition thereof which could not have been made of the original stock. The settled doctrine of that court is that creditors without notice are not affected by any arrangement or device between the corporation and those accepting shares of its stock which fall short of actual payment therefor in good faith. In *Sawyer v. Hoag*, 17 Wall. 618, 619, the transaction was valid as between the corporation and the shareholders, but was held invalid as against the representatives of creditors."

“going concern,” may not, for the successful prosecution of its business, issue and sell new stock for the best obtainable price. The question coming before the Supreme Court of the United States, the Court said: “To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has the right to trace every share of stock issued by such corporation, and inquire whether its holder, or the person from whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock, and putting them upon the market for the best price that can be obtained, and so long as the transaction is *bona fide*, and not a mere covering for “watering” the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it.”¹⁷

¹⁷ *Handley v. Stutz* (1890), 139 U. S. 417.

CHAPTER XVII.

PREFERRED OR GUARANTEED STOCK.

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| <p>§ 467f. Definition and nature of preferred stock.</p> <p>468. Statutory authority essential to its issue.</p> <p>469. Validity of preferred stock.</p> <p>470. Acquiescence in unauthorized issue.</p> <p>471. Preferred dividend. Cumulative and non-cumulative dividends.</p> <p>472. Scrip dividend—Bond dividend.</p> <p>473. Payable only out of net profits.</p> <p>474. Arrears of preferred dividend.</p> <p>475. Enforcement of payment of dividends.</p> <p>476. Preferred shareholders are not corporate creditors.</p> <p>477. Whether the shareholder of preferred stock may be given a lien.</p> <p>477a. Cannot be stockholder</p> | <p>and creditor at same time.</p> <p>478. Preferred dividend deferred to debts.</p> <p>479. Right of preferred shareholders in distribution of corporate assets upon dissolution.</p> <p>480. Exchange of common stock for preferred.</p> <p>481. "Special stock" in Massachusetts.</p> <p>482. Rights of preferred shareholders.</p> <p>483. (a) Right to vote at corporate meetings.</p> <p>484. (b) Upon consolidation.</p> <p>485. (c) Upon increase or reduction of the capital stock.</p> <p>486. (d) Upon dissolution and winding-up.</p> <p>487. (e) Liabilities of preferred stockholders.</p> |
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References:

Dividends. Chapter 16, Section 433.

§ 467f. **Definition and nature of preferred stock.**—Preferred stock is that which entitles the holders to priority in dividends out of the net profits, or in preference to the holders of the common stock. The latter are entitled to *pro rata* dividends with all other holders except the holders of preferred stock. Preferred shares are those, the owners of which are entitled to receive dividends from the corporate profits to a certain extent, in preference to the payment of dividends to other shareholders upon the common stock. They differ from other shares only in being entitled, as against them, to payment of dividends in priority to them.¹ They are indifferently called preferred, preference, preferential,

¹ "Preferred Stock," by John D. Lawson (1881), 20 Am. L. Reg. 633; Totten v. Tison, 54 Ga. 139;

Chaffee v. Rutland, etc. R. Co. (1882), 55 Vt. 110; Henry v. Great Northern Ry. Co., 4 Kay & J. 1.

or guaranteed shares.² It is otherwise called "guaranteed stock." The guaranty is conditioned upon the receipt of profits available for the payment of the dividend. "Such a contract is a charge on all accruing profits at the stipulated rate, before anything is divided among the ordinary shareholders. This is substantially interest, and chargeable, exclusively, on profits."³ Dividends on preferred or guaranteed stock are called "preferred or guaranteed dividends."⁴ The issue of preferred stock creates no relation of debtor and creditor between the corporation and the preferred stockholder. The dividend, like any other, is payable only out of the profits that accrue to the corporation. Until the dividend is declared, it does not become a debt.⁵ It is simply a contract of the stockholders, as to the division among themselves of the profits of the corporation, and is not forbidden by any rules of public policy.⁶ Unless authorized by statute or by consent of all the stockholders, it is too late to issue preferred stock after the organization of the corporation with common stock "only," and such issue may be enjoined by any dissenting holder of common stock.⁷ As also in the case of attempt to issue second preferred stock, where preferred and common stock are already issued.⁸ When authorized to issue preferred stock, the corporation may impose whatever conditions it may deem proper.⁹ Where expressly authorized, to issue preferred stock, a majority of the stockholders may exercise the power by vote, against the dissent of the minority.¹⁰ "We know nothing in the constitution or the law, that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscription thereto. No rights are secured until a subscription is made. Each subscriber would know for what class of stock he put down his name, and what right he got when he thus became a stockholder. There need be no deception or mistake; there would be no trenching upon rights

² *Henry v. Great Northern R. Co.*, 4 Kay & J. 1.

³ *Henry v. Great Northern Ry. Co.*, 1 De Gex & J. 606.

⁴ *Miller v. Ratterman*, 47 Ohio St. 141.

⁵ *Belfast, etc. R. R. v. Belfast*, 77 Me. 445; *Chaffee v. Rutland, etc. R. R.*, 55 Vt. 110.

⁶ *Coltraine v. Blake*, 113 Fed. Rep. 785.

⁷ *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

⁸ *Melhado v. Hamilton*, 28 L. T. Rep. 578.

⁹ *Hackett v. Northern R. R.* 36 N. Y. Misc. Rep. 583.

¹⁰ *Belfast, etc. Co. v. City of Belfast*, 77 Me. 445.

previously acquired; no contract, express or implied, would be broken or impaired.”¹¹ Preferred stock partakes of the nature of what may be called interest-bearing stock, or ordinary common stock upon which the company has promised to pay interest. This interest, however, in so far as it differs from an ordinary dividend, is a preference dividend and subject to the law governing preferred stock.¹² This kind of stock is usually issued by companies which have expended their original capital, for the purpose of obtaining further capital, and therefore when the authority to issue it is given, it is necessary that it should be employed for that purpose alone, and the company can not pay dividends with such stock.¹³ Accordingly, the issue of preferred stock can not be justified, except for the purpose of strengthening the company's standing or enlarging its business. When the corporation has reached a crisis in its affairs, and the shareholders are unable, or unwilling to sink any more money in the enterprise, but yet are ready to give those who will do so, a preference as to any profits which the increased means may enable the concern to make, the transaction is fair and equitable.¹⁴ Preferred shareholders have the same voice in the control of the company, as a general rule, as the other stockholders, together with the right to vote at any meeting of the holders of the capital stock. But to this rule there may be exceptions; and it is competent for a company, in issuing certificates of preferred stock, to stipulate therein that the holders shall not have or exercise the right to vote upon it, at any meeting of the stockholders of the company.¹⁵

¹¹ *Kent v. Quicksilver Min. Co.*, 77 N. Y. 159.

¹² *Painesville, etc. R. Co. v. King*, 17 Ohio St. 534; *Pittsburgh, etc. R. Co. v. County of Allegheny*, 63 Pa. St. 126; *Troy, etc. R. Co. v. Tibbits* (1884), 18 Barb. 297; *Miller v. Pittsburg, etc. R. Co.*, 40 Pa. St. 237; s. c. 80 Am. Dec. 570; *Lockhart v. Van Alstyne* (1875), 31 Mich. 76; *Barnard v. Vermont, etc. R. Co.*, 89 Mass. 512; *Waterman v. Troy, etc. R. Co.*, 74 Mass. 433; *Wright v. Vermont, etc. R. Co.*, 66 Mass. 68; *Cunningham v. Cunningham*, 78 Mass. 411; *Richardson v. Vermont, etc. R. Co.*, 44 Vt. 613; *Rutland R. Co. v. Thrall*, 35 Vt. 543; *McLaughlin v. Detroit,*

etc. R. Co., 8 Mich. 100; *Evansville, etc. R. Co. v. City of Evansville*, 15 Ind. 395; *City of Ohio v. Cleveland, etc. R. Co.*, 6 Ohio St. 489; *In re National, etc. Co.*, 10 Ch. Div. 118; *Salisbury v. Metropolitan Ry. Co.*, 38 L. J. Ch. N. S. 249. *Cf. Bardwell v. Sheffield, etc. Co.*, L. R. 14 Eq. Cas. 517.

¹³ *Hoole v. Great Western R. Co.*, L. R. 3 Ch. 262.

¹⁴ *Lockhart v. Van Alstyne*, 31 Mich. 76.

¹⁵ *Miller v. Ratterman* (Ohio, 1890), 8 Ry. & Corp. L. J. 69. The court here said: “The provision is not unusual. It is sometimes found in the statute itself. Nor is it unreasonable. The promise to

§ 468. **Statutory authority essential to its issue.**—Preference stock is frequently authorized by statute, charter or articles of incorporation.¹⁶ And the general rule is that the power to issue preferred or guaranteed stock exists only when conferred by statute or by charter.¹⁷ The creation of preferred stock may be authorized by an alteration in the charter of the corporation, or by other subsequent act of legislation, as well as by the original charter or act.¹⁸ And such legislation is not unconstitutional.¹⁹ The power need not be granted in express words. Thus, under an act which provides that where a company is unable to meet its engagements, the directors may prepare a scheme or arrangement with their creditors which must be assented to by three-fourths of the mortgagees, holders of debenture stock and other obligations and confirmed by the court of chancery, many schemes involving the issue of preferred stock, have been adopted.²⁰ And

the preferred stockholders was to award them the first net earnings—the holders of the common stock to share in such of the net earnings as they might, by good management, be able to make over and above the eight per cent. As the burden was upon the common stockholders, the power to manage might fairly be left with them. In any view, it is fair to treat the proviso as but an arrangement between two classes of stockholders which did not concern the public. It is true that one characteristic of stock, generally is that it can be voted upon. But this is not essential. Indeed, instances may arise where it is good policy to prohibit the voting upon stock. *Ryan v. Railway*, 10 Am. Law Rec. 263; *Ex parte Holmes*, 5 Cow. 426; *Railway Frog Co. v. Haven*, 101 Mass. 398; *State v. Hunton*, 28 Vt. 594. And the point here is, not whether any question of public policy intervenes to make it improper for the preferred stockholders to possess a right to vote, but whether any question intervenes to make it imperative that they shall have that right."

¹⁶ *St. John v. Erie R. Co.* (1874), 22 Wall. 136; s. c. 10 Blatchf. 271;

Davis v. Proprietors, 8 Metc. 321; *Taft v. Hartford*, etc. R. Co. (1866), 8 R. I. 310; *In re Anglo-Danubian*, etc. Co., L. R. 20 Eq. 339; *Henry v. Great Northern R. Co.*, 1 De G. & J. 606; *Matthews v. Great Northern*, etc. R. Co., 28 L. J. Ch. 375.

¹⁷ *Taylor v. South*, etc. R. Co., 4 Woods, 575; *Sturge v. Eastern*, etc. R. Co., 7 De Gex. M. & G. 158.

¹⁸ *Kent v. Quicksilver Min. Co.* (1879), 78 N. Y. 159; *Rutland*, etc. R. Co. v. *Thrall*, 35 Vt. 537; *Covington v. Covington*, etc. Co. (1873), 10 Bush, 69.

¹⁹ *Covington v. Covington*, etc. Co. (1873), 10 Bush, 69.

²⁰ *Railway Clauses Act 1867*, 30 & 31 Vict., ch. 127, §§ 6-17; *Matthews v. Great Northern Ry. Co.*, 28 L. J. Ch. 375; *Webb v. Earle*, L. R. 20 Eq. 556; *Corry v. Londonderry*, etc. R. Co., 29 Beav. 263; *Stevens v. Merchants R. Co.*, L. R. 8 Ch. 448; *In re Devon*, etc. R. Co., L. R. 8 Ch. 610; *London*, etc. Assn. v. *Wrexham*, etc. R. Co., L. R. 18 Eq. 566; *Munns v. Isle of Wight R. Co.*, L. R. 8 Eq. 655; *In re East*, etc. R. Co., L. R. Eq. 87; *In re Potteries*, etc. R. Co., L. R. 3 Ch. 67; *In re Cambrian R. Co.*, L. R. 3 Ch. 278.

under an act authorizing a corporation to increase its capital stock in such manner as it may deem advisable, or to such extent as might be deemed advisable, to borrow money at a rate of interest not exceeding seven per cent. and to issue proper certificates convertible into stock at the pleasure of the holder, it was held that the corporation was authorized to issue seven per cent. guaranteed stock.²¹ Instead of issuing preferred stock, the corporation may issue common stock, and agree to pay interest upon it, enforceable as a contract in the nature of an agreement to pay a dividend,²² provided the interest be payable from profits alone.²³ So, also, it has been decided that under a power to increase the capital stock, the corporation, by a majority vote, may issue preferred stock, the privilege of so doing being founded upon the power of corporations to borrow money.²⁴ The power to borrow money may be relied upon as authority for issue of preferred stock, where it is redeemable by repayment of the money.²⁵ And, again, the power to issue preferred stock, when not expressly conferred, may even be implied from the terms used in the articles of association of a corporation. As, where the articles of association provided that the directors might, with the sanction of a special resolution of the company, given at a general meeting, increase the capital by the issue of new shares, the increase of capital to be made in such manner, to such amount, and to be subject to such rules, regulations, privileges and conditions as the company in general meeting should think fit.²⁶ The stockholders may ratify and validate at a subsequent meeting, preferred stock issued without previous authority.²⁷

§ 469. Validity of preferred stock.—The validity of preferred stock has been sustained, upon principle, in many American

²¹ *Gordon v. Richmond, etc. R. Co.* (1884), 78 Va. 501.

²² *Bernard v. Vermont, etc. R. R.*, 89 Mass. 512.

²³ *Richardson v. Vermont, etc. R. R.*, 44 Vt. 613.

²⁴ *Rutland, etc. R. Co. v. Thrall*, 35 Vt. 536; *Harrison v. Mexican, etc. R. Co.*, L. R. 19 Eq. Cas. 358.

²⁵ *West Chester, etc. Co. v. Jackson*, 77 Pa. St. 321.

²⁶ *Harrison v. Mexican Ry. Co.*, L. R. 19 Eq. 358. The court said in this case: "The capital is to be raised or to be increased in such manner, and with and subject

to such rules, regulations, privileges and conditions as the company think fit. . . . I think there is no limit to the privilege that may be attached to the shares by the general meeting, as far as regards participation in dividends, or any other right whatever." While, however, the power to issue preferred stock need not be given in express words, it is not to be lightly inferred from the language of charters and statutes. *Moss v. Syres*, 32 L. J. Ch. 711.

²⁷ *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

cases.²⁸ The issue of preferred stock has been considered as partaking of the nature of a loan, and therefore not *ultra vires*, where there was a condition for payment of interest until the company should go into operation;²⁹ where there was a provision for the redemption of the stock;³⁰ where the preferred stock was surrendered, and a bond and mortgage taken in its stead, the preferential shareholders thereafter not being entered as members of the corporation;³¹ and where such stock was secured by bond and mortgage, the holders being expressly prohibited by statute from becoming members of the corporation.³² The courts have no power to give the shareholders a preference over creditors, although the preferred stock, in terms, is to be a lien on the property.³³ A mortgage to repay to preferred stockholders their investment, as also to secure regular corporate creditors, is alto-

²⁸ *Hazlehurst v. Savannah, etc. R. Co.*, 43 Ga. 15; *Totten v. Tison* (1875), 54 Ga. 139; *Rutland, etc. R. Co. v. Thrall* (1863), 35 Vt. 537; *Richardson v. Vermont, etc. R. Co.*, 44 Vt. 613; *Prouty v. Michigan, etc. R. Co.* (1874), 1 Hun. 655; *West Chester, etc. R. Co. v. Jackson* (1875), 77 Pa. St. 321; *Bates v. Androscoggin, etc. R. Co.* (1862), 49 Me. 497; *Wright v. Vermont, etc. R. Co.* (1853), 12 Cush. 68; *Waterman v. Troy, etc. R. Co.*, 18 Gray, 433; *Cunningham v. Vermont, etc. R. Co.*, 12 Gray, 411; *Barnard v. Vermont, etc. R. Co.* (1863), 7 Allen, 512; *Evansville R. Co. v. Evansville*, 15 Ind. 395; *Lockhart v. Van Alstyne* (1875), 31 Mich. 81; *McLaughlin v. Detroit, etc. R. Co.*, 8 Mich. 100; *Covington v. Covington, etc. Co.*, 10 Bush, 69. It has been said in the leading case upon the subject: "We are not prepared to say that at the first the corporation might not have lawfully divided the interest in its capital stock into shares arranged into classes, preferring one class to another. The charter gave power to make such by-laws as it might deem proper, consistent with constitution and law; and to issue certificates of stock representing the value of the

property. We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscription thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put his name, and what right he got when he thus become a stockholder. There need be no deception or mistake; there would be no trenching upon rights previously acquired; no contract, express or implied, would be broken or impaired." *Folger, J. in Kent v. Quicksilver Min. Co.* (1879), 78 N. Y. 177.

²⁹ *Richardson v. Vermont, etc. R. Co.*, 44 Vt. 613.

³⁰ *West Chester, etc. R. Co. v. Jackson* (1875), 77 Pa. St. 321.

³¹ *Totten v. Tison* (1875), 54 Ga. 139.

³² *Burt v. Rattle* (1877), 31 Ohio St. 116. And see *Rutland, etc. R. Co. v. Thrall* (1863), 35 Vt. 536; *Hazlehurst v. Savannah, etc. R. Co.*, 43 Ga. 13.

³³ *Black v. Hobart Tea Co.* (N. J. 1902), 53 Atl. Rep. 826.

gether invalid.³⁴ The argument used in favor of the right to create preferred stock, is, that a corporation has power to borrow money and give security therefor, and that the issuing of preferred stock is merely one way of pledging the assets of the company for that purpose, and hence justifiable. The answer given to this is, that the transaction is not a loan and borrowing, because it does not create a debt which can be redeemed, but the holders of preferred stock have a perpetual lien upon the corporate profits.³⁵ The argument against the power is simply that by taking shares in a corporation with a fixed capital divided into a specified number of shares, one becomes the owner of a certain interest in the enterprise, measured by the proportion which the amount of his shares bears to the whole capital. This entitles him to a corresponding proportion of the profits, and he can not afterwards be deprived of that fixed proportion on any pretense, without a violation of the original contract.³⁶ Thus, a majority of the shareholders of a company, in order to induce persons to take some of the stock unsold, can not authorize the directors to make an arrangement for giving to them a preferential dividend.³⁷ This assumes that there is, at the outset, a fixed capital, and also that there is no power granted to create preferred stock. When the special charter, or the general law, of a corporation organized under a general law, gives that power, there is no room for the objection that the original contract has been violated. The law in that case is the contract, and the shareholder expects to be bound by anything contained therein.³⁸

§ 470. Acquiescence in unauthorized issue.—The right to create a preferred stock is merely a question of contract, and if all agree to a modification of the original agreement, it is legalized.³⁹ Thus, while a corporation, already organized, can not, after issuing common stock, create preferred stock, except by

³⁴ *Reagan v. First Nat. Bank*, 157 Ind. 623.

³⁵ *Per Folger, J. obiter*, in *Kent v. Quicksilver Min. Co.* (1879), 78 N. Y. 177.

³⁶ "Preferred Stock," Editorial Article (1882), 16 Am. L. Rev. 460.

³⁷ *Hutton v. Scarborough, etc. Co.*, 2 Dr. & Sm. 514; s. c. 4 De G., J. & S. 672. *Hazlehurst v. Savannah, etc. R. Co.*, 43 Ga. 13, con-

licts with this case, but was not a well considered opinion.

³⁸ "Preferred Stock," (1882), 16 Am. L. Rev. 461, citing *Prouty v. Michigan, etc. R. Co.* (1874), 1 Hun, 655; *West Chester, etc. R. Co. v. Jackson* (1875), 77 Pa. St. 321.

³⁹ "Preferred Stock," Editorial Article (1882), 16 Am. L. Rev. 160; *Lockhart v. Van Alstyne* (1875), 31 Mich. 81.

virtue of authority conferred by its charter or by-laws, it may, nevertheless, do so with the consent of all the shareholders, whose rights would be affected thereby.⁴⁰ And, by their acquiescence, the shareholders are estopped to deny the validity of the issue.⁴¹ When an attempt is made to issue second preferred stock, where preferred and common stock are issued already, a dissenting stockholder will be refused an injunction, unless he act promptly, and prevent, in the minds of interested parties, any reason for belief in his acquiescence.⁴² If without authority, directors, or a majority of the stockholders, issue, or undertake to issue, preferred stock, such dissenting stockholder may, in equity, enjoin or cancel the issue, but he will be estopped, by his laches, or acquiescence, as against all other interested persons.⁴³ Especially, where third persons have dealt in the preferred stock of the company, relying in good faith upon the existence of corporate authority to issue it, it is unnecessary that there should have been an express assent thereto on the part of the stockholders to work an equitable estoppel upon them.⁴⁴ Mere negative conduct is sufficient to create an estoppel, where, to hold the issue invalid, would be detrimental to third parties.⁴⁵ Accordingly, where a corporation by a new by-law created and issued preferred stock, the common stockholders, having for four years, with full knowledge of the issue of such stock, and of the fact that the two kinds of stock were dealt in at different places, acquiesced in the corporate action, were held to be estopped by acquiescence and delay from claiming that the preferred stock was not entitled to all the privileges intended to be conferred upon it.⁴⁶ And though, ordinarily, the power of the

⁴⁰ Kent v. Quicksilver Min. Co. (1879), 78 N. Y. 159, where the court said: "It was not expressly prohibited by the charter, nor by any statute, to this corporation to classify the shares of its capital stock, so that one class should have greater right and value than another. It was not *malum in se* so to do unless it was that a vested right was thereby affected; but that was not a public evil; it was a wrong that affected private persons only and one which they might assent to."

⁴¹ Taylor v. South, etc. R. Co., 4 Woods, 575; Hazlehurst v. Savannah, etc. R. Co., 43 Ga. 13. See,

also, Branch v. Jesup, 106 U. S. 468.

⁴² Bannigan v. Bard, 134 U. S. 291, 134.

⁴³ Kent v. Quicksilver Min. Co., 78 N. Y. 159; Branch v. Jesup, 106 U. S. 468.

⁴⁴ Kent v. Quicksilver Min. Co. (1879), 78 N. Y. 159.

⁴⁵ Kent v. Quicksilver Min. Co., (1879), 78 N. Y. 159.

⁴⁶ Kent v. Quicksilver Min. Co. (1879), 78 N. Y. 159. The court here said: "We suppose acquiescence or tacit assent means the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after

corporation to issue preferred stock can be exercised only by the shareholders, yet, if the directors, without previous authority from the shareholders, issue it, their act may be validated by a subsequent ratification by the shareholders.⁴⁷ The purchaser of preferred stock may himself be estopped to deny its validity. Thus, where he purchased such stock, issued without statutory authority, was active in passing the resolution authorizing its issue, voluntarily subscribed and paid for it, held it for many months, voted upon it, and used it to obtain control of the corporation's affairs, upon the insolvency of the corporation he can not assert its invalidity and recover the money he paid for it.⁴⁸ Where the corporation, in pursuance of the by-laws, issued preferred stock, though there was, at the outstart, a minority of the stockholders who gave no assent thereto, their tacit acquiescence and delay in action for four years was held as indefensible laches, and estoppel which amounted to assent and ratification where, by circular letter, issued to the stockholders, they were informed and offered opportunity to subscribe, and a large number subscribed, and for

knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they can not be taken without loss."

⁴⁷ *McLoughlin v. Detroit, etc. R. Co.*, 8 Mich. 100.

⁴⁸ *Banigan v. Bard* (1889), 30 Fed. Rep. 13; *s. c. Ry. & Corp. L. J.* 170; *s. c. affirmed* (1890), 134 U. S. 291; *s. c. 8 Ry. & Corp. L. J.* 14. The court below, in this case, said: "For the purposes of this case I shall assume that the unanimous consent of all the stockholders not having been affirmatively expressed by vote or by equivalent act, the preferred stock was invalid. If so, the acquiescence of the stockholder can not give it validity, and he is not estopped from asserting that it is invalid. *Scovill v. Thayer*, 105 U. S. 143. If a stockholder could be estopped, Banigan would necessarily be, because he was one of the promoters of the scheme, urged his co-stockholders to buy, voted upon it, and for the purpose of favorably ex-

plaining the company's position to the firm which was to take and negotiate its paper, asserted that it could issue preferred stock, and had done so, to the amount of \$25,000. Notwithstanding the Massachusetts authorities to the contrary (*Tube Works v. Machine Co.*, 139 Mass. 5; *Reed v. Machine Co.*, 141 Mass. 454), I am not favorably impressed with the doctrine that as against the assignee or receiver of an insolvent corporation, the owner of preferred stock, who has voluntarily subscribed and paid for it for the purpose of promoting the scheme, and has received his certificate therefor, and the terms and conditions upon which the subscription was made have been fully complied with by the corporation, can not recover the amount paid. In *Winters v. Armstrong*, 37 Fed. Rep. 508, Judge Jackson guards against such a broad principle, and it is not in accordance with the teaching of *Scovill v. Thayer*, 105 U. S. 143."

the stock paid money into the assets and business of the corporation.⁴⁹

§ 471. Preferred dividend. Cumulative and non-cumulative dividends.—The holder of preferred stock is entitled to a preferred dividend, which is payable to that class of shareholders in priority to dividends payable to holders of the common stock.⁵⁰ Unless otherwise provided by the charter, or other statute, preferred stock and common stock may all be made common, if all the stockholders agree thereto.⁵¹ Preferred stockholders are subject to a statutory liability, the same as holders of the common stock.⁵² A dividend, when spoken of in reference to “a going concern,” means a fund which the corporation sets apart from its profits to be divided among its members. A dividend among preference stockholders is understood to imply that the sum divided has been realized as profits, though the earnings do not yield a dividend to the holders of the common stock.⁵³ The preferred stockholders, therefore, have a pledge of the funds legally applicable to the purposes of a dividend.⁵⁴ But as to any excess of dividends to which preferred stock may be entitled beyond the guaranteed per cent., it must stand on the same footing with the common stock.⁵⁵ Thus, where the certificate of preferred stock provides, that after the payment of the guaranteed percentage, the preferred stockholders shall share in any surplus beyond a certain percentage, which may be divided upon the common stock, the preference shareholders are, after receiving their guaranteed percentage, to be deferred until the common shareholders have received their specified percentage; and then all stockholders are to be on the same footing as to any remaining surplus.⁵⁶

A preferred dividend is cumulative, or non-cumulative.—The preferred dividend is cumulative where the preferred stockholders participate in a division of the profits remaining after pay-

⁴⁹ Kent v. Quicksilver M. Co. (1879), 78 N. Y. 159.

⁵⁰ Thompson v. Erie R. Co., 11 Abb. Pr. N. S. 188; Belfast, etc. R. Co. v. Belfast (1887), 77 Me. 445; Chaffee v. Rutland, etc. R. Co. (1882), 55 Vt. 110; Taft v. Hartford, etc. R. Co., 8 R. I. 310, 333.

⁵¹ Synott v. Cumberland, etc. Assn., 117 Fed. Rep. 379.

⁵² Railroad Co. v. Smith, 48 Ohio St. 219.

⁵³ Cooley, J., in Lockhart v. Van Alstyne (1875), 31 Mich. 76; Taft v. Hartford, etc. R. Co., 8 R. I. 310.

⁵⁴ Taft v. Hartford, etc. R. Co., 8 R. I. 310, 335.

⁵⁵ Gordon v. Richmond, etc. R. Co. (1884), 78 Va. 501; Harrison v. Mexican Ry. Co., L. R. 19 Eq. 358; Ragland v. Broadnax, 29 Gratt. 401.

⁵⁶ Bailey v. Railroad Co. (1872), 17 Wall. 96; s. c. 1 Dill. 174.

ment of the preferred dividend declared upon the preferred stock, and an equal dividend on the common stock. The preferred dividend is so cumulative unless the contract provides that it shall be non-cumulative. The contract may provide what disposition shall be made of the surplus profits, after payment of the preferred, and the common dividend.⁵⁷

§ 472. **Scrip dividend. Bond dividend.**—Sometimes, by consent, the accumulated profits are expended in betterments, and scrip issued in lieu of payment. Such scrip dividend is a debt of the corporation, due to the scrip-holder.⁵⁸

Bond Dividend.—The corporation may pay dividends on preferred stock, with certificates exchangeable for its bonds, and thereby be estopped to refuse to deliver the bonds, on the ground of illegality of the dividend, or that the bond issue was *ultra vires*.⁵⁹

§ 473. **Payable only out of net profits.**—Preferred stock is entitled to dividends only out of the net profits of the enterprise.⁶⁰ The dividends thereon are not payable absolutely as interest is, but the preference is limited to profits whenever earned.⁶¹ The dividends are equivalent to annual or semi-annual payments, and, under the general form of certificate in these cases, depend on no contingency except that the net profits of the association shall be sufficient to pay them.⁶² They are, therefore, in the nature of "interest chargeable exclusively upon profits."⁶³ If instead of issuing preferred stock, the corporation issues common stock, with contract to pay interest thereon, the contract is enforceable in the nature of an agreement to pay a dividend, and is lawful if it re-

⁵⁷ Campbell v. American, etc. Co., 122 N. Y. 455.

⁵⁸ Gordon's Ex'rs v. Richmond, etc. R. R., 78 Va. 501.

⁵⁹ Chaffee v. Rutland R. R., 55 Vt. 110.

⁶⁰ Union Pacific R. Co. v. United States (1878), 99 U. S. 402; Nickals v. New York, etc. R. Co., 15 Fed. Rep. 575; Boardman v. Lake Shore, etc. R. Co. (1881), 84 N. Y. 157; Prouty v. Lake Shore, etc. R. Co., 52 N. Y. 363; Thompson v. Erie Ry. Co., 45 N. Y. 465; Chaffee v. Rutland R. Co. (1882), 55 Vt. 110; Elkins v. Camden, etc. R. Co., 36 N. J. Eq. 233; Belfast, etc. R. Co. v. Belfast (1887), 77 Me. 445.

⁶¹ Chaffee v. Rutland R. Co. (1882), 55 Vt. 110, 126; Corry v. Londonderry, etc. Ry. Co., 29 Beav. 263; McGregor v. Home Insurance Co., 33 N. J. Eq. 181; St. John v. Erie R. Co., 10 Blatch. 271; s. c. 22 Wall. 136; Lockhart v. Van Alstyne (1875), 31 Mich. 76; Taft v. Hartford, etc. R. Co. (1864), 8 R. I. 310.

⁶² Bates v. Androscoggin, etc. R. Co., 49 Me. 491.

⁶³ Henry v. Great Northern Ry. Co., 1 De Gex & J. 606, 637; 4 Kay, 1; Crawford v. North Eastern, etc. R. Co., 3 Jur. N. S. 1093.

quires payment alone out of profits.⁶⁴ Even an express guaranty to pay a certain dividend on preferred stock, entitles the holder to dividends only when there are profits out of which they can be paid.⁶⁵ Although there be net profits applicable to the payment of a dividend, the preferred stockholder can not demand it as a matter of right. It is discretionary with the corporate management whether it will apply the surplus profits to the payment of any dividends, either common or preferred, or otherwise it will use them for improvement of the corporate business, or property where the conditions warrant it, and the courts will not interfere with such discretion.⁶⁶ And this is the rule even though the preferred dividend is non-cumulative.⁶⁷ In case of breach of trust by the directors in non-payment of dividend on the preferred stock, the remedy of a preferred stockholder is by a bill in equity

⁶⁴ *Barnard v. Vermont, etc. R. R.*, 89 Mass. 512; *Richardson v. Vermont, etc. R. R.*, 44 Vt. 613.

⁶⁵ *Lockhart v. Van Alstyne* (1875), 31 Mich. 76; *Taft v. Hartford, etc. R. Co.* (1864), 8 R. I. 310; *Scott v. Central R. Co.*, 52 Barb. 45. There is always a condition, either expressed or implied, that they shall be paid only from the earnings of the enterprise. *Williston v. Michigan Southern R. Co.*, 13 Allen, 400; *Curran v. State*, 15 How. 304; *Pittsburgh, etc. R. Co. v. Allegheny Co.*, 63 Pa. St. 126; *Evansville, etc. R. Co. v. Evansville*, 15 Ind. 395; *In re Bristol, etc. Ry. Co.*, L. R. 6 Eq. 448. Accordingly a general guaranty of dividends by a railroad company on its preferred stock is not a guaranty for payment in any event, but only in the event that the dividends are earned. *Miller v. Ratterman* (Ohio, 1890), 8 Ry. & Corp. L. J. 69. The court in this case said: "It was not a stipulation to pay dividends in any event, but a stipulation to pay only out of surplus; for the company must be presumed to have proceeded in view of the terms of the second section of the act referred to, and the general rule of law on the

subject. That rule is that payment of dividends to preferred stockholders differs from such payment to the holders of common stock only in that they are entitled to dividends in priority to any dividends upon the common stock. Dividends to either are to come from one common source, to wit, from funds properly applicable to the payment of dividends; that is to say, net earnings. In the nature of things, this must be so. As well might one member of a partnership be permitted to appropriate to his own use assets of the firm to the prejudice of creditors as for a stockholder of a corporation to do it. A contract to permit this to be done would be contrary to public policy, and void. *Pierce, R. R.* 124, 125; *St. John v. Railway Co.*, 22 Wall. 136; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Taft v. Hartford, etc. R. Co.*, 8 R. I. 310; *Railroad Co. v. King*, 17 Ohio St. 534; 1 Ohio Rev. Stat., Smith & B. 935."

⁶⁶ *New York, etc. R. R. v. Nickals*, 119 U. S. 296; *Field v. Lamson, etc. Co.*, 162 Mass. 388; *Feld v. Roanoke Inv. Co.*, 123 Mo. 603.

⁶⁷ *McLean v. Pittsburgh, etc. Co.*, 59 Pa. St. 112.

for relief.⁶⁸ A contract to pay dividends on preferred stock at all events, whether any profits are made or not, would be contrary to public policy and void.⁶⁹ Where the preferred stock provides that the corporation shall buy it back at par and interest at a specified time, the provision, though invalid, does not invalidate the stock or release the subscriber from paying for it.⁷⁰ But such a certificate, regardless of its form, may constitute a debt, instead of preferred stock.⁷¹ But it has been decided, where a corporation authorized to issue preferred stock, after it had received a certain sum for each share, which shares should be payable in full on dissolution next after the payment of debts, guaranteed that each share should receive semi-annual dividends of four dollars, that the guaranty was absolute and independent of the profits earned.⁷²

§ 474. **Arrears of preferred dividend.**—Arrears of preferred dividends must be paid, before a dividend can be declared upon the common stock,⁷³ and when so payable, they are called cumula-

⁶⁸ *Storrow v. Texas, etc. Assn.*, 87 Fed. 612.

⁶⁹ *Miller v. Ratterman* (Ohio, 1890), 8 Ry. & Corp. L. J. 69; *St. John v. Railway Co.*, 22 Wall. 136; *Lockhart v. Van Alstyne* (1875), 31 Mich. 76; *Evansville, etc. R. Co. v. City of Evansville*, 15 Ind. 395.

⁷⁰ *Long v. Guelph, etc. Co.*, 31 C. P. Rep. (Can.) 129.

⁷¹ *Savannah v. Silverberg*, 108 Ga. 281, 33 S. E. 908.

⁷² *Williams v. Parker* (1884), 136 Mass. 204.

⁷³ *Dana v. Fiedler*, 12 N. Y. 40; s. c. 62 Am. Dec. 130; *Prouty v. Michigan, etc. R. Co.*, 1 Hun. 655; *Elkins v. Camden, etc. R. Co.*, 36 N. J. Eq. 233; *Lockhart v. Van Alstyne* (1875), 31 Mich. 76; *Taft v. Hartford, etc. R. Co.* (1864), 8 R. I. 310; *Henry v. Great Northern Ry. Co.*, 1 De G. & J. 606, where the defendant's counsel having likened the right of a preference shareholder to the right to bring a cup of a certain measure to be filled at each dividend meeting, if there were enough to fill it, *Knight Bruce, L. J.*, said: "I may be excused for suggesting another case. Let us suppose a right to have a

tun of wine from a vineyard. Is that the same merely as a right to have a tun of wine from a vintage? I do not think so. In the former case, the deficiency of an earlier would have to be supplied by a later vintage. Not so, possibly, in the other. Here, as I apprehend, the plaintiffs have a vineyard, and not merely the chance of a particular vintage to look to." *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Webb v. Earle*, L. R. 20 Eq. 556; *Sturge v. Eastern, etc. Ry. Co.*, 7 De Gex, M. & G. 158; *Matthews v. Great Northern, etc. Ry. Co.*, 28 L. J. Ch. 375; *Crawford v. North Eastern Ry. Co.*, 3 Jur. N. S. 1073; *Stevens v. South Devon Ry. Co.*, 9 Hare, 313; *Coey v. Belfast, etc. Ry. Co.*, 1 R. 2 C. L. 112; *Smith v. Cork, etc. Ry. Co.*, 1 L. R. 3 Eq. 356; *Coates v. Nottingham, etc. Ry. Co.*, 30 Beav. 86; *Corry v. Londonderry, etc. Ry. Co.*, 29 Beav. 263; *Lindley on Partnerships* (2nd ed.), 781. *Contra*, *Belfast, etc. R. Co. v. Belfast*, 77 Me. 445; *Hazeltine v. Belfast & Moosehead R. Co.* (1887), 79 Me. 411; s. c. 1 Am. St. Rep. 330.

tive. The certificate generally specifies whether the stock is cumulative or "non-cumulative." Preferred dividends, in law, are cumulative, unless otherwise provided by the contract of subscription. It is the settled law both in England and America that the preferred dividend, and all arrears, are payable as soon as there are available profits accumulated, and before any payment of a dividend on the common stock.⁷⁴ As to arrears of dividends, unless they are reserved, the transferee of the preferred stock succeeds to all the rights of his assignor, and a subsequent assignment of arrears by the assignor conveys nothing.⁷⁵ But in England the statutes now declare that if in any year "there are not profits available for the payment of the full amount of preferential dividend or interest for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company."⁷⁶ In some cases, however, under this act, arrears have been held collectible. Thus, where preference shareholders had allowed the surplus profits of one year to be applied in payment of dividends to ordinary shareholders, instead of in payment of dividends to them, they were not prevented from claiming arrears against the profits of succeeding years.⁷⁷ And where the whole net earnings of one year were appropriated to repairs, paying the preferred shareholders nothing, it was held that the arrears for that year might be recovered out of the profits of any subsequent year, although dividends had been paid in former years that should have been spent for repairs.⁷⁸ Under by-laws which from their terms show that the whole net earnings are intended to be paid in each year, the dividends upon the preferred stock are not cumulative.⁷⁹ When arrears are recoverable, interest thereon may be recovered also.⁸⁰

⁷⁴ Boardman v. Lake Shore, etc. R. R., 84 N. Y. 157; West Chester, etc. R. R. v. Jackson, 77 Pa. St. 321.

⁷⁵ Manning v. Quicksilver Min. Co., 24 Hun, 360.

⁷⁶ The Companies Clauses Act of 1863, 26 & 27 Vic. ch. 118, § 14.

⁷⁷ Matthews v. Great Northern Ry. Co., 28 L. J. Ch. 375; Smith v. Cork, etc. Ry. Co., 1 L. R. 3 Eq. 356.

⁷⁸ Dent v. London Tramways Co., 16 Ch. Div. 344.

⁷⁹ This is the case where a by-

law of a railroad company provided that "dividends on the preferred stock shall first be made semi-annually from the net earnings of said road, not exceeding a certain per centum per annum; after which dividend, if there shall remain a surplus, a dividend shall be made upon the non-preferred stock up to a like per cent. per annum, and should a surplus then remain of net earnings after both of said dividends, in any one year, the same shall be di-

⁸⁰ Boardman v. Lake Shore, etc. R. Co., 84 N. Y. 157.

§ 475. **Enforcement of payment of dividends.**—A court of equity will, by injunction and other proper remedies, protect the rights of the holders of preferred stock.⁸¹ For a distinction is made by the courts, between declaring dividends upon preferred and on common stock. The directors of the corporation have a discretion as to the latter, but their action with respect to the former is subject to review by a court of equity.⁸² But equity even, will not interfere with a dividend unless it appear that somebody in particular was hurt or liable to be injured. It will not interfere for the sake of vindicating general principles after all danger has passed.⁸³ Where, however, the directors of a corporation neglect or refuse to pay a dividend to the preferred stockholders when the finances of the corporation justify it, and the stockholders are equitably entitled to receive it, a court of equity has jurisdiction of a bill to compel payment thereof.⁸⁴ And the

vided *pro rata* upon all the stock.” *Hazeltine v. Belfast, etc. R. Co.* (1887), 79 Me. 411; s. c. 1 Am. St. Rep. 330. And so, also, where there is a statutory provision that dividends on preferred stock shall “not exceed” a certain percentage, and less than that percentage is paid, the deficit cannot be claimed out of the profits of subsequent years. *Elkins v. Camden, etc. R. Co.*, 36 N. J. Eq. 233; *Beach on Railways*, § 289.

⁸¹ *Prouty v. Michigan, etc. R. Co.*, 1 Hun, 655; *Thompson v. Erie Ry. Co.*, 45 N. Y. 468; *Boardman v. Lake Shore, etc. R. Co.* (1881), 84 N. Y. 157; *Bailey v. Hannibal, etc. R. Co.*, 1 Dill, 174; *Ellsworth v. New York, etc. R. Co.*, 98 N. Y. 648; *Henry v. Great Northern, etc. Ry. Co.*, 4 Kay & J. 1; s. c. 1 De Gex & J. 606; *Sturge v. Eastern, etc. Ry. Co.*, 7 De Gex, M. & G. 158; *Smith v. Cork, etc. Ry. Co.*, 1 R. 3 Eq. 356. *Cf. Chase v. Vanderbilt*, 62 N. Y. 307.

⁸² *Williston v. Michigan, etc. R. Co.*, 95 Mass. 400; *Taft v. Hartford, etc. R. Co.* (1864), 8 R. I. 310; *Belfast, etc. R. Co. v. Belfast*, 77 Me. 445; *Bates v. Androscoggin, etc. R. Co.*, 49 Me. 491; *West Chester, etc. R. Co. v. Jackson*, 77 Pa.

St. 321; Prouty v. Lake Shore, etc. R. Co., 52 N. Y. 563; *Hazeltine v. Belfast & M. H. L. R. Co.* (1887), 79 Me. 411; *St. John v. Erie Ry. Co.* (1874), 22 Wall. 136; *Bailey v. Railroad Co.*, 17 Wall. 96; *Thompson v. Erie Ry. Co.*, 45 N. Y. 468; *Dickinson v. Railroad Co.*, 7 W. Va. 390; *Richardson v. Vermont, etc. R. Co.*, 44 Vt. 613; *Rutland, etc. R. Co. v. Thrall*, 35 Vt. 536; *Barnard v. Vermont, etc. R. Co.*, 89 Mass. 512.

⁸³ *Chaffee v. Rutland R. Co.* (1882), 55 Vt. 110, 133; *Moore v. Hudson, etc. R. Co.*, 12 Barb. 156; *Stevens v. South Devon R. Co.*, 9 Hare, 313; *Browne v. Monmouthshire Ry. etc. Co.*, 13 Beav. 32.

⁸⁴ *Hazeltine v. Belfast, etc. R. Co.* (1887), 79 Me. 411; *Boardman v. Lake Shore, etc. R. Co.* (1881), 84 N. Y. 157; *Rutland, etc. R. Co. v. Thrall*, 35 Vt. 536; *Williston v. Michigan, etc. R. Co.*, 95 Mass. 400; *Barnard v. Vermont, etc. R. Co.*, 89 Mass. 512; *Davis v. Proprietor, etc.*, 49 Mass. 321; *Taft v. Hartford, etc. R. Co.* (1864), 8 R. I. 310; *Belfast, etc. R. Co. v. Belfast* (1887), 77 Me. 445; *Bates v. Androscoggin, etc. R. Co.*, 49 Me. 491; *Richardson v. Vermont, etc. R. Co.*, 44 Vt. 613; *West Chester*

payment of dividends upon common stock will be restrained until the holders of guaranteed stock have been paid.⁸⁵ So, also, a preferential shareholder may file a bill to restrain the company from making a dividend prejudicial to his rights, without waiting until there are funds to make a dividend.⁸⁶ Preferred shareholders can not, however, maintain an action at law to enforce the payment of dividends which have not been declared.⁸⁷

§ 476. Preferred shareholders are not corporate creditors.—Dividends upon preferred stock are not a debt that is guaranteed, but constitute a right to a dividend from the earnings and income of the corporation. The right to a dividend is not a debt. There is no debt until the dividend is declared. The obligation and right to declare it, does not arise until there is a fund from which it can properly be made.⁸⁸ Therefore preferred shareholders are not creditors of the company.⁸⁹ Except as to the matured and un-

etc. *R. Co. v. Jackson*, 77 Pa. St. 321; *Bryant v. Ohio College*, 1 Cin. 67; *St. John v. Erie Ry. Co.* (1874) 22 Wall. 136; *Bailey v. Railroad Co.*, 17 Wall. 96; *Prouty v. Lake Shore, etc. R. Co.*, 52 N. Y. 563; *Thompson v. Erie Ry. Co.*, 45 N. Y. 468; *Chase v. Vanderbilt*, 37 N. Y. Super Ct. Rep. 334; *Dickinson v. Railroad Co.*, 7 W. Va. 390.

⁸⁵ *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Dana v. Fiedler*, 12 N. Y. 41; s. c. 62 Am. Dec. 130; *Prouty v. Michigan, etc. R. Co.*, 1 Hun, 655.

⁸⁶ *Sturge v. Eastern, etc. R. Co.*, 7 De. G., M. & G. 158.

⁸⁷ *Williston v. Michigan, etc. R. Co.*, 95 Mass. 400.

⁸⁸ *Chaffee v. Rutland R. Co.* (1882), 55 Vt. 110, 127; *In re London, etc. Co.*, L. R. 5 Eq. 525. In the principal case it was said that it became necessary for the defendant, consisting of the second mortgage bondholders, to raise money to pay up the first mortgage in order to save the property from going on that mortgage. Two ways were open to them—one to borrow money, the other to sell stock. They decided to try the latter method. The pressure was severe upon them and the amount to be raised was large. The stock,

in order to be sold, must be carefully guarded. The issue of the preferred stock in this case was made as it usually is, that is, when the corporation has reached a crisis in its affairs, and the corporators are unwilling or unable to put more or sufficient money into the business, but are nevertheless disposed to give those who will do so a preference in profits. Careful guards are therefore usually thrown around preferred stock in the charter or contract, as was done in this case; but this did not change the character of the transaction. It was still an obtaining of funds by sale of stock, and not a borrowing of money on mortgage.

⁸⁹ *Warren v. King*, 108 U. S. 389; *Belfast, etc. R. Co. v. Belfast* (1887), 77 Me. 445; *Chaffee v. Rutland, etc. R. Co.* (1882), 55 Vt. 110; *Taft v. Hartford, etc. R. Co.* (1864), 8 R. I. 310; *Pittsburg, etc. R. Co. v. County of Allegheny*, 63 Pa. St. 126; *Lockhart v. Van Alstyne* (1875), 31 Mich. 76; s. c. 18 Am. Rep. 156; *Bates v. Androscoggin, etc. R. Co.*, 49 Me. 491; *Hamlin v. Toledo, etc. R. R.*, 78 Fed. 664; *People, etc. v. St. Louis, etc. R. R.*, 176 Ill. 512; *Field v. Lamson, etc. Co.*, 162 Mass. 388.

paid guaranteed dividends due on preferred stock.⁹⁰ The relation of a holder of preferred stock is, in some of its aspects, similar to that of a creditor; but he is not a creditor save as to dividends, after they are declared. Nor does he sustain a dual relation to the corporation. He is either a stockholder or a creditor. He can not, by virtue of the same certificate, be both. If the former, he takes a risk in the concerns of the company, not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts, in case the corporation becomes insolvent. If the latter, he takes no interest in the company's affairs, is not concerned in its property or profits as such, but his whole right is to receive an agreed compensation for the use of the money he furnishes, and the return of the principal when due. Whether he is the one or the other, depends upon a proper construction of the contract he holds with the company.⁹¹ Thus, under an act to enable railroad companies to redeem their bonded debts, which authorizes the issue of certificates of preferred stock and does not authorize the issue of certificates of indebtedness, the owners of certificates are stockholders, and not creditors of a corporation whose stockholders adopt a resolution authorizing the issue of a preferred stock, reciting that the stock is to be issued under and by virtue of the provisions of this act, which is referred to by its title and date of enactment, which resolution is made a part of the certificates thereafter issued by the company. For the terms of the act thereby become, in legal effect, a part of the certificates, and the certificates so issued will be held

⁹⁰ *Heller v. National, etc. Bank*, 89 Md. 602, 73 Am. St. Rep. 212.

⁹¹ *Miller v. Ratterman* (Ohio, 1890), 47 Ohio St. 141. In this case it was further said that "a mortgage creditor, although denominated a 'preferred stockholder,' is a mortgage creditor nevertheless, and interest is not changed to dividend by calling it a dividend." "The question is not what did the parties call it, but what do the facts and circumstances require the court to call it? The aptness of this language arises in a case where it has been determined that such holder is a creditor. It may not furnish material aid in ascertaining the fact

whether he is such or not. However, what the parties in the given case have called the subject of the contract is of no little significance in determining their purpose, and when that purpose is ascertained it is of much importance in giving construction to the contract. The object of all rules of construction is to arrive at the meaning of the parties. What was the object to be accomplished? What did the parties intend, and are the means taken in harmony with that intent and with the law applicable to the subject. These are questions addressed to the court in this case, and when answered the case is decided."

to be certificates of stock, unless, considering the whole transaction, it is clear that the purpose was to create a debt, and unless a debt was in fact created.⁹² And under an act empowering certain counties to subscribe for preferred stock of a certain railroad, to bear seven per cent. interest, it was held that a county was not to be a creditor, but a stockholder, and that an expression in the certificate "prior and in preference to any dividend upon the capital stock of the company" is objectionable as implying that the county was not a stockholder.⁹³ Without express legislative authority, a corporation can not give the preferred stockholder any claim for dividend superior to the rights of creditors, to subject the corporate assets to the payment of debts due them. This would be contrary to public policy. Where in a late case the certificate of preferred stock recited that it was a lien on the corporate property, the court said: "If the purpose, in providing for these peculiar shares was to arrange matters so that under any circumstances a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby."⁹⁴

§ 477. **Whether the shareholder of preferred stock may be given a lien.**—Sometimes under express authority by statute, certificates in the form of certificates of preferred stock are given as security to creditors, with lien upon the property, and providing for payment to them of a "dividend" of a certain per cent. before payment of any dividend upon the common stock; but such is held to be a certificate of indebtedness and not a certificate of stock.⁹⁵ Such stock is not technically preferred stock, or governed by the ordinary rules. The statute governs the rights of holders.⁹⁶ The holders of so-called preferred stock, may be secured by mortgage, and will be treated as *bona fide* creditors.⁹⁷ In the absence of express provision, preferred stockholders, as against the corporation, have no rights by way of lien or otherwise, superior to the lien of mortgage bond-holders.⁹⁸

⁹² *Miller v. Ratterman* (Ohio, 1890), 47 Ohio St. 141, construing Ohio Laws of 1870, 89.

⁹³ *State v. Cheraw, etc. R. Co.*, 16 S. C. 524.

⁹⁴ *Hamlin v. Continental Trust Co. etc.*, 47 U. S. App. 422, 78 Fed. 664.

⁹⁵ *Real Estate, etc. Co. v. Silverberg*, 108 Ga. 281.

⁹⁶ *Heller v. National, etc. Bank*, 89 Md. 602, 73 Am. St. Rep. 212.

⁹⁷ *Totten v. Tison*, 54 Ga. 129.

⁹⁸ *Mercantile Trust Co. v. Baltimore, etc. Co.*, 82 Fed. 360.

§ 477a. Cannot be stockholder and creditor at same time.—

As the preferred stockholder cannot at the same time be a creditor of the corporation, it can not give him a mortgage to secure payment of the preferred dividend, any more than it can by mortgage secure payment of dividends to the holder of common stock. In either case, dividends are payable only out of the net earnings of the corporate business. Preferred stockholders can have no preference over creditors of the corporation, and can be given no mortgage or other lien upon the corporate earnings. That such a mortgage has no validity, is, with few exceptions, the consensus of judicial decisions.

Income bondholders, with voting power allowed them by consent of all the stockholders, may be secured by mortgage, as in case of holders of other bonds of the corporation; but they nevertheless remain bondholders, though, in a few decisions, they have been referred to as preferred stockholders. "A mortgage creditor, although denominated preferred stockholder, is a mortgage creditor nevertheless, and interest is not changed into a dividend by calling it a dividend."⁹⁹

§ 478. Preferred dividend deferred to debts.—The stockholder must come after the creditors, for their lien is prior to the right of every stockholder.¹ Therefore earnings may be devoted to payment of a floating debt in preference to the payment of dividend upon preferred stock.² But, after payment of current expenses and interest upon its bonded indebtedness, a company can not in lieu of paying the remaining net earnings as a dividend to preferred stockholders, set it apart to provide a sinking fund

⁹⁹ *Burt v. Rattle* (1876), 31 Ohio, 116.

¹ *Chaffee v. Rutland R. Co.* (1882), 55 Vt. 110, 126, citing *National Bank v. Douglass*, 1 McCrary, 86; *Railroad Co. v. Howard*, 7 Wall. 392; *Wood v. Dummer*, 3 Mason, 308; *Mumma v. Potomac Co.*, 8 Pet. 286; *Curran v. Arkansas*, 15 How. 304.

² *Chaffee v. Rutland, etc. R. Co.* (1882), 55 Vt. 110, 127. In this case the court disposes thus of the contrary claim: "The only earnings and income was the rental, which was insufficient to pay the operating expenses and the floating debt. Upon the plaintiff's the-

ory there was an unqualified obligation to declare and pay dividends to preferred stockholders from the earnings and income, notwithstanding there were debts of the company greater than the earnings and income. Under this claim the rule universally recognized in the books that the property of a corporation is a trust fund, pledged for the payment of the debts of the corporation, and the distinction everywhere upheld between the stockholder and a creditor, would have been disregarded. In our view the terms of the charter neither force nor import such construction."

for the payment of its bonded debt.³ And, accordingly, owners of preferred railroad stock entitled to an annual non-accumulating dividend, dependent on a declaration of profits by a board of directors, can compel payment to themselves, when the board has reported more than sufficient net profits for the payment of the dividend, but has determined to use it all for the improvement of the road.⁴ But equity will not interfere when by so doing an injustice would be wrought upon corporate creditors and the other stockholders, by taking money from the treasury without which the enterprise would be crippled.⁵ Preferred stockholders, who are entitled to receive interest in preference to the payment of dividends on the common stock, and after payment of the mortgage interest, are not to be considered prejudiced by the corporation issuing mortgage bonds consolidating prior and subsequent indebtedness.⁶ For the execution of a mortgage upon the whole line of a railroad for the purpose of raising funds for the company, and subsequent to the issuance by the corporation of preferred stock, is not in derogation of the rights of the ordinary preference stockholders.⁷ Again, where preferred stock was entitled to preferred dividends out of the net earnings of the road after payment in full of mortgage interest and delayed coupons, and subsequently to the issue of this stock the company leased new roads and borrowed money for the repair and equipment of the road, as it had a right to do, the rent of the new road and the interest on this borrowed money had priority over the preferred stock.⁸

§ 479. Right of preferred shareholders in distribution of corporate assets upon dissolution.—Ordinarily preferred stockholders are given no priority in the distribution of the capital of a corporation upon its dissolution or winding up. The prefer-

³ *Hazletine v. Belfast, etc. R. Co.* (1887), 79 Me. 411; s. c. 1 Am. St. Rep. 330. Here a railroad company leased its road for a term of fifty years, expiring in 1920, at the annual rent of \$36,000, the lessee undertaking to maintain the track, etc., and keep it in repair. There was a mortgage upon the road for \$150,000, payable in 1890; the annual interest thereon being about \$9,000. The company had no floating or unsecured debt, and there was a sum of \$22,412 of cash in the treasury after payment of the current expenses and interest on

the mortgage. And it was held that the company was not entitled, as against the preferred stockholders to retain the sum of \$19,900 as a contribution to a sinking fund to pay off the mortgage debt when it became due.

⁴ *Nickals v. New York, Lake Erie, etc. Ry. Co.*, 15 Fed. Rep. 575.

⁵ *Culver v. Reno, etc. Co.*, 91 Pa. St. 367.

⁶ *Thompson v. Erie R. Co.*, 45 N. Y. 468; s. c. 42 How. Pr. 68.

⁷ *Garrett v. May*, 19 Md. 177.

⁸ *St. John v. Erie Ry. Co.*, 22 Wall. 137; s. c. 10 Blatch. 271.

ence generally given is merely a preference in the distribution of profits. When this is the case and there is no provision for the division of the capital upon the breaking up of the corporation, any surplus remaining after the payment of debts must be distributed among the shareholders according to their shares, without reference to their rights in respect to dividends.⁹ A preference, however, in the distribution of capital, as well as in the distribution of profits, is not very unusual,¹⁰ and is sometimes authorized by the articles of association,¹¹ being under some circumstances the

⁹ *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181; *In re London, etc. Co.*, L. R. 5 Eq. 519; *Griffith v. Paget*, 6 Ch. Div. 511, where Malins, V.-C., said: "All these companies are commercial partnerships, and are, in the absence of express provisions, statutory or otherwise, subject to the same considerations. If, in an ordinary commercial partnership, one or more of the partners has a larger share of the profits than is the proportion borne by his share of the capital to the capital of the others, whether on account of his services (which is the more frequent ground in cases of partnership for giving the larger share), or on account of the services of others given to the partnership, which is sometimes, done especially in the case of a second or third, generation, that privilege ceases when the partnership is dissolved. If you give an annuity out of profits to a widow during the continuance of the partnership, she having no share of the capital, of course that *ex vi termini* will come to an end at the dissolution of the partnership. If you give a managing partner a salary, or a larger share of the profits than his proportion of the capital, of course at the dissolution the management comes to an end and his large share of the profits. But, in the ordinary case, when the profits are unequally divided, that is, unequally as regards the share of

capital, the same rule prevails, and that is quite independent of the circumstances whether the excess of profits is given for services or given to a sleeping partner for the use of his name or otherwise. When the partnership comes to an end, the right of the share of the profits comes to an end also, and you distribute the assets, after providing for the profits earned up to the time of distribution, in proportion to the partners' shares of the partnership capital. That is the general rule of law in a commercial partnership. Therefore you would distribute the assets simply in proportion to the capital. This is a commercial partnership. Therefore if there were no provision to be found anywhere, you would distribute the assets in proportion to the capital, and the mere arrangement for the division of profits *inter se* during the continuance of the partnership, would have no direct bearing on the division of the capital, as distinguished from profits earned up to the time of the dissolution, after the dissolution of the company."

¹⁰ *Taft v. Hartford, etc. R. Co.* (1864), 8 R. I. 310; *West Chester, etc. R. Co. v. Jackson*, 77 Pa. St. 321.

¹¹ *Melhado v. Hamilton*, 21 W. R. 619; *Hutton v. Scarborough, etc. Co.*, 2 Drew. & Sm. 514. Thus where a company, having power to increase its capital to such amount and upon such terms and either

only means of raising a working capital for the business.¹² So, under a general statute, directing that in the distribution of capital the holders of preferred stock shall be first paid, before any distribution is made to the holders of the common stock, preferred stock is entitled to preference in the distribution of capital.¹³ In distributing the assets after payment of debts, no account should be taken of dividends previously paid to preferred stockholders.¹⁴

§ 480. Capital stock. Nature and amount. Exchange of common stock for preferred.—The issue of certificates of indebtedness by a corporation in place of the preferred stock and immediate retirement of such certificates by the issue of common stock in their stead, does not operate as reduction of the capital stock, nor as increase of the common stock.¹⁵ Preferred stock may be issued for the purpose of exchanging and retiring the common stock.¹⁶ In the absence of any charter or statutory restriction, and where no discrimination is unfairly made between stockholders, common stock may be exchanged for preferred

with or without special privileges or preferences to the holders of the shares in the increased capital, as it should deem expedient, raised further capital by the issue of shares entitled to a preferential interest of ten per cent. per annum, the amount of the shares to be repaid on six months' notice, with twenty-five per cent. bonus, the payment of interest, repayment and bonus to take place before any dividend, interest or other money was payable to the original shareholders, it was held that the company had conferred a preference as to capital as well as dividends upon the new shareholders, and that they were entitled to the surplus in preference to the original shareholders. *In re Bangor, etc. Co.*, L. R. 20 Eq. 59.

¹² *In re Bangor, etc. Co.*, L. R. 20 Eq. 59.

¹³ *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181. Under Virginia Act of December 13, 1865, authorizing the defendant corporation to increase its capital stock to such extent as might be requisite

to enable it to liquidate all arrears of debts, interest and dividends, and to make such portion of the increased capital stock as it might deem advisable a guaranteed stock, on which dividends of not exceeding seven per cent. per annum might be guaranteed, it was held that in case of a division of assets, these guaranteed stockholders must be paid, if need be, to the exclusion of the holders of common stock. *Gordon v. Richmond, etc. R. Co.*, 78 Va. 501.

¹⁴ *Griffith v. Paget*, 6 Ch. Div. 511.

¹⁵ *Weiderfield v. Northern Pac. Ry.* (Minn. 1904), 129 Fed. 305 (U. S. C. C. A.).

¹⁶ *West Chester, etc. R. Co. v. Jackson* (1875), 77 Pa. St. 321. The New York "Stock Corporation Law" of 1890, provides: Every domestic corporation having preferred and common stock may upon the written request of the holder of any preferred stock by a two-thirds vote of the directors, exchange the same for common stock, and issue certifi-

stock.¹⁷ If the proposition to common stockholders to take preferred stock, on the surrender of part of these shares or an additional payment, or the like, contains any time limit, it is of the essence of the offer.¹⁸ If no time is thus fixed, the right must be exercised within a reasonable time. The principle on which it is held that where, in an executory contract, one stipulates to do some act, and no time is limited, it is to be done in a reasonable time, applies where one is entitled to a privilege, or receives an offer, of which he may at his own option take advantage. He must avail himself of the privilege and exercise his option within a reasonable time.¹⁹ A delay of thirty-three years has been held unreasonable.²⁰

§ 481. "Special stock," in Massachusetts.—The characteristics of the special stock of Massachusetts are, that it is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be expressed in the certificates; the corporation is bound to pay a fixed half-yearly sum or dividend upon it as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock; and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed.²¹ The guaranty of dividends upon this stock is not conditioned upon the profits of the enterprise.²² And where there are no profits, they must be paid out of any property owned by the company; the holders of stock of this kind being regarded as creditors of the corporation in respect of the guaranteed dividends.²³ As the statute defines

cates for common stock therefor share for share, or upon such other valuation as may have been agreed upon in the scheme for the organization of such corporation, or the issue of preferred stock; but the total amount of capital stock shall not be increased thereby. N. Y. Laws of 1890, ch. 564, § 47.

¹⁷ *Holland v. Cheshire R. Co.*, 151 Mass. 231.

¹⁸ *Pearson v. London, etc. R. Co.*, 14 Sim. 541; *Muhlenberg v. Philadelphia, etc. R. Co.*, 47 Pa. St. 16; *Holland v. Cheshire R. Co.*, 151 Mass. 231; *Loomis v. Chicago, etc. Ry. Co.*, 97 Fed. 755, 102 Fed. 233.

¹⁹ *Wilson v. Clements*, 3 Mass. 1, 13; *Atwood v. Cobb*, 16 Pick. 227; *Loring v. Boston*, 7 Metc. 410, 414; *Holland v. Cheshire Ry. Co.* (Mass. 1890), 24 N. E. Rep. 206; s. c. 8 Ry. & Corp. L. J. 49.

²⁰ *Holland v. Cheshire R. Co.* (Mass. 1890), 8 Ry. & Corp. L. J. 49.

²¹ Mass. Stats. of 1855, ch. 290, of 1870, ch. 224, §§ 25, 39; Pub. Stat., ch. 106, §§ 42, 61; *American Tube Works v. Boston, etc. Co.* (1885), 139 Mass. 5.

²² *Williams v. Parker* (1884), 136 Mass. 204; *Allen v. Herrick*, 81 Mass. 274.

²³ *Allen v. Herrick*, 81 Mass.

the mode in which special stock may be issued, a departure from the statutory requirements invalidates the issue; as, for instance, where at a meeting called to consider whether preferred stock shall be issued, a vote to issue special stock is had, or where the record fails to show the assent of the required number of stockholders. And a holder of stock thus illegally issued can not, by estoppel or otherwise, become a member in respect to such shares.²⁴ But a holder of special stock which is illegally issued, may prove against the estate of the corporation in insolvency the amount paid by him for the stock, deducting any dividends received, although he did not rescind the contract before insolvency.²⁵

§ 482. **Rights of preferred stockholders.**—The contemplated rights of the preferred stockholder are governed largely by the contract. The percentage of the dividend is always fixed at the time of the issue.²⁶ The same rules, when applicable, govern as in common stock, as to the extent of the preference, and this, if not otherwise shown, is evidenced by the certificate, and acquiescence of the corporation in the certificate.²⁷ The preferred stockholder has the same rights as the common stockholders in the management of the corporation, except as any such right may have been expressly withheld by the terms of the contract. "Holders of 'preferred stock' have no special control over the corporation or its management. Stockholders are the constituent elements of a corporation, and in this case there is no other difference between the two classes than this: one is to be paid interest out of a certain fund, if raised, to the exclusion of the other, if such fund is inadequate to pay both. The corporation is in no sense the trustee for the holders of preferred stock. Its duty is to each alike according to the conditions attached to the stock of each."²⁸ Preferred stockholders have a perpetual, inextinguishable prior right to a portion of the earnings of the company before the holders of the common stock may have anything therefrom, unless forbidden in the charter or by statute. The classification of the capital stock into the two classes of preferred stock and com-

274; *Williams v. Parker* (1884), 136 Mass. 204.

²⁴ *American Tube Works v. Boston, etc. Co.*, 139 Mass. 5.

²⁵ *Reed v. Boston, etc. Co.* (1886), 141 Mass. 454.

²⁶ *Scott v. Baltimore, etc. R. R.*, 93 Md. 475.

²⁷ *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. 497; *Stafford v. Produce Co.*, 61 Ohio St. 160, 76 Am. St. Rep. 371.

²⁸ *Thompson v. Erie Ry. Co.*, 42 How. Pr. (N. Y.) 68.

mon stock may be made, but it must be made in the first instance before any subscriptions are made. Then each subscriber will know for what class he subscribes. Where the by-laws declare the whole amount of the capital stock, divide it into shares of equal amount, and the shares are issued therefor, it is then too late to issue preferred stock, without the unanimous consent of the stockholders. Their rights to their shares are vested rights, protected by the constitutional provision which forbids the impairment of vested rights. There is no power in the corporation nor in a majority of the stockholders, to provide by by-law for the creation of a preferred stock so as to bind a minority of the stockholders not assenting thereto.²⁹

§ 483. (a) **Right to vote at corporate meetings.**—Preferred stockholder has the same right as holders of common stock to vote at corporate meetings,³⁰ except where it is expressly provided that the preferred stock carries with it no right to vote.³¹ He is entitled to a certificate of stock showing his preference right.³²

§ 484. (b) **Upon consolidation.**—Upon consolidation and merger of the corporation that issued the preferred stock to a new corporation, it must issue the preferred dividend, in every way according to the obligation of the old company.³³

§ 485. (c) **Upon increase or reduction of the capital stock.**—Upon increase or reduction of the capital stock, holders of the preferred stock have the same rights and privileges as holders of the common stock.³⁴

§ 486. (d) **Upon dissolution and winding up.**—Upon dissolution and winding up, the preferred stockholders have no greater right than holders of common stock, to share in the distribution of the corporate assets.³⁵ Neither the preferred or common stockholders are entitled to anything until the corporate creditors are paid.³⁶ The stock was preferred in respect to dividends, and

²⁹ *Kent v. Quicksilver M. Co.* (1879), 78 N. Y. 159.

³⁰ *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Mackintosh v. Flint, etc. Co.*, 32 Fed. 350, 34 Fed. 582.

³¹ *Miller v. Ratterman*, 47 Ohio St. 141.

³² *State v. Cheraw, etc. R. R.*, 18 S. C. 524.

³³ *Boardman v. Lake Shore, etc. R. R.*, 84 N. Y. 157.

³⁴ *Jones v. Concord, etc. R. R.*, 67 N. H. 119, 68 Am. St. Rep. 650; *In re Quebrada, etc. Co.*, 40 Ch. Div. 363.

³⁵ *Gordon's Ex'rs v. Richmond, etc. Co.*, 78 Va. 501.

³⁶ *Heller v. National, etc. Bank*, 89 Md. 602, 73 Am. St. Rep. 212, 45 L. R. A. 438.

not as to the capital stock. In its distribution, the preferred holder becomes a common stockholder.³⁷

§ 487. (e) **Liabilities of preferred stockholders.**—The holders of preferred stock, in the absence of contrary express provision, are subject to the same liabilities as holders of the common stock; as, in case of corporate insolvency, to the full payment of their subscriptions,³⁸ and are subject to statutory liability, the same as common stockholders, as where stockholders are held individually liable to creditors beyond the par value of their share.³⁹ And they, the same as the common stockholders, are liable to corporate creditors for illegal dividends paid on their stock.⁴⁰

³⁷ Coltrane v. Baltimore, etc. Assn., 110 Fed. 281.

³⁸ Sanger v. Upton, 91 U. S. 56.

³⁹ Railroad Co. v. Smith, 48 Ohio St. 219.

⁴⁰ American, etc. Co. v. Eddy (Mich. 1902), 89 N. W. 952.

CHAPTER XVIII.

LIENS UPON STOCK.

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| <p>§ 488. Lien of the corporation.
 489. Waiver of the lien.
 490. Distinction between statutory and other liens.
 491. Notice of the lien.</p> | <p>§ 492. Statutory and charter liens.
 493. Extent of the lien.
 494. Effect of transfer and notice upon lien.
 495. Enforcement of the lien.</p> |
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References:

Mortgage. Priority of liens. Chapter 48, Section 1180.

Taxation. Chapter 19, Section 496.

Execution attachment and garnishment of shares. Section 651.

§ 488. **Lien of the corporation.**—At common law a corporation has no lien upon the shares of its capital stock for any debt due from its shareholders to the company.¹ It may be created, however, by statute,² or by usage and a known course of dealing,³ or by an agreement between the shareholders,⁴ or by a by-law of the company.⁵ In an early case in Pennsylvania there was no by-law of the banking company or written regulation of its board of directors, giving a lien upon the stock, but the court held that a lien arose from the borrowing of money from the bank with knowledge of its usage in that regard, and said, “a course of dealing—a usage, an understanding, a contract express or implied—is the lien of the parties and a law to them, provided they are

¹ *Gimmell v. Davis* (1892), 75 Md. 546; *Case v. Citizens*, etc., 100 U. S. 446, 958.

² *Union Bank v. Laird* (1817), 2 Wheat. 390; *National Bank v. Watsonstown Bank* (1881), 105 U. S. 217; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283.

³ *Morgan v. Bank of North America*, 8 Serg. & R. 73, 88; s. c. 11 Am. Dec. 575.

⁴ *Vansands v. Middlesex County Bank*, 26 Conn. 144.

⁵ *John, etc. Co. v. Woodside* (1898), 87 Md. 146; *Bank of Holly*

Springs v. Pinson, 58 Miss. 421; s. c. 38 Am. Rep. 330; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; s. c. 100 Am. Dec. 388; *Spurlock v. Pacific R. Co.*, 61 Mo. 319; *Pendergast v. Bank of Stockton*, 2 Sawy. 108; *Knight v. Old Nat. Bank*, 3 Clifford, 429; *In re Bachman*, 12 Nat. Bankr. Reg. 223; *McDowell v. Bank*, 1 Harr. (Del.) 27; *St. Louis, etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; *People v. Crockett*, 9 Cal. 112; *Child v. Hudson's Bay Co.*, 2 P. Wms. 207.

not repugnant to the charter or the laws of the land. . . . The bank had an undoubted right to say to any stockholder, "We discount your note; but remember until it is paid we shall hold your stock in security. You shall not be permitted to transfer it until you pay us."'⁶ The lien of the corporation is only to secure it upon debts of the registered shareholder. It does not extend to the interest of an unregistered transferee, for debts due from him to the company.⁷

§ 489. **Waiver of the lien.**—Allowance by the corporation, of registry of a transfer of the stock and issue of new certificate to the transferee, is a waiver of its lien as to debts of the transferer. Failure to assert a lien established by custom or agreement, or created by by-law, may operate as a waiver thereof. But a charter or statutory lien, notice of which is embodied in the stock certificates, is not ordinarily waived by mere failure to assert it,⁸ unless the language of the statute which is construed to create a lien, is to the effect that the shares shall not be transferred until the prior holder's indebtedness to the company has been paid; in which case the company waives its lien by permitting registration without previous payment; and the transferee thus registered obtains a complete and unincumbered title.⁹ If it appear that advances were made to the stockholder upon personal credit alone, or on some other security, without reference to the stock, this would constitute a waiver of the lien; but otherwise waiver is not to be lightly presumed.¹⁰ Merely taking additional security is not a waiver.¹¹ And so, in a case in California, it was held that

⁶ *Waln v. Bank of North America*, 8 Serg. & R. 89; *Hammond v. Hastings* (1890), 134 U. S. 401.

⁷ *Helm v. Swiggett*, 12 Ind. 194.

⁸ *Reese v. Bank of Commerce*, 14 Md. 271; s. c. 74 Am. Dec. 536; *Hoffman, etc. Co. v. Cumberland, etc. Co.*, 16 Md. 456; s. c. 77 Am. Dec. 311; *McCready v. Rumsey*, 6 Duer, 574; *First Nat. Bank v. Hartford, etc. Ins. Co.*, 45 Conn. 22. *Cf. National Bank v. Watson-town Bank*, 105 U. S. 217; *In re Hoylake Ry. Co.*, L. R. 9 Ch. 257, 259.

⁹ *Cecil Bank v. Watson-town Bank*, 105 U. S. 217; *Hill v. Paine River Bank*, 45 N. H. 300; *In re Hoylake Ry. Co.*, 9 Ch. 257; *In re*

Northern Assam Tea Co., L. R. 10 Eq. 458; *Higgs v. Assam Tea Co.*, L. R. 4 Ex. 387.

¹⁰ *Jennings v. Bank of California* (1889), 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 150, 151, where it was said that the facts that the bank's cashier testified that "if a party is in good standing, we don't question his right to a transfer," and that the stockholder was allowed a large overdraft, do not show that the loan was made on his personal credit alone, so as to waive the lien on the stock. *Cf. Union Bank v. Laird*, 2 Wheat. 390.

¹¹ *Union Bank v. Laird*, 2 Wheat. 390.

a reorganization of a banking company, and the adoption of by-laws providing that certificates of stock "shall be transferable by indorsement and delivery thereof, the transfer to be complete and binding upon the bank only when recorded upon the books of the bank," is not a waiver of the stipulation in the certificate or of the lien created thereby.¹² A waiver as to part of the shares is not a waiver as to all.¹³

§ 490. **Distinction between statutory and other liens.**—There is this distinction, however, between a lien created by charter or statute and one created in any other way, to wit, that all persons are affected with notice of the former.¹⁴

§ 491. **Notice of the lien.**—If the lien is expressly given by charter or statute, it is notice to all purchasers of shares,¹⁵ without its recital in the stock certificates.¹⁶ There is no presumption of notice in respect to a lien established by custom, agreement or by-law.¹⁷ A transfer of shares to a *bona fide* purchaser for value, vests the title between the seller and the corporation free of equities of which the purchaser was ignorant, although provided for by a by-law of the corporation.¹⁸ Accordingly, it is customary, where there is no charter or statutory lien, to embody in the certificates representing the shares, a notice that the company will not permit registration of a transfer of the stock until payment of all indebtedness due to it from the shareholder. This notice may be embodied in the certificate whether there is any by-law so prescribing or not, notwithstanding that the terms on which stock may be transferred are prescribed by statute.¹⁹ And when the stockholder accepts a certificate containing such a condition, without objection, and thereafter borrows money from the corporation, he assents to the condition, and the company has an equitable lien on the stock for the amount due it.²⁰ In a Connecticut case in

¹² *Jennings v. Bank of California* (1889), 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 149.

¹³ *First Nat. Bank v. Hartford Ins. Co.*, 45 Conn. 22. *Contra*, *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. St. 345.

¹⁴ *Vide supra*, § 492. *Cf.* *Hammon v. Hastings* (1890), 134 U. S. 401.

¹⁵ *Dorr v. Life Ins., etc. Co.* (1898), 71 Minn. 38.

¹⁶ *Hammon v. Hastings* (1890), 134 U. S. 401.

¹⁷ As to the force of by-laws creating a lien, *vide supra*, §§ 164, 165.

¹⁸ *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359.

¹⁹ *Jennings v. Bank of California* (1889), 79 Cal. 323; s. c. 12 Am. St. Rep. 145.

²⁰ *Jennings v. Bank of California* (1889), 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 148.

point, the shareholder brought suit for damages against a banking company for refusing to transfer his shares. No lien was given the bank, either by its by-laws or by charter or by statute. The stock certificates, however, contained a condition to the effect that the transfer upon the bonds should be subject to the indebtedness of the stockholder; and the court held that the acceptance of the certificate without objection, and a subsequent loan by means of the discount of a note, effected a contract which created an equitable lien for the amount of the indebtedness.²¹ The fact that the condition is inserted in the certificate by the president, cashier, and secretary of the bank, without authority of the board of directors, is immaterial as against the borrower, as these officers will be presumed to have authority to arrange the terms of the loan.²² The fact that there was no usage from which such a lien could arise, is no defense to its enforcement, where it does not appear that there was any usage against it.²³ An assignee of the certificates of shares which are transferable only on the books of the company, takes not the legal title but a mere equity which must yield to the superior equity of the company's lien.²⁴ And, at any rate, the condition respecting the lien usually contained in the certificates themselves, is sufficient to put the assignee upon inquiry.²⁵ The lien does not extend to debts contracted after the

²¹ Vansands v. Middlesex Bank, 26 Conn. 144.

²² Jennings v. Bank of California (1889), 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 149, where the court said: "The officers who transact the ordinary business of a corporation are presumed to have authority to do all acts which are usual and incidental thereto. McKiernan v. Lenzen, 56 Cal. 63, 64; Donnell v. Lewis County Bank, 80 Mo. 171; Reynolds v. Collins, 78 Ala. 97; Case v. Citizens' Bank, 100 U. S. 455."

²³ Jennings v. Bank of California (1889), 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 150.

²⁴ Under Cal. Civil Code, § 324, providing that a transfer of stock by indorsement, and delivery of the certificate, "is not valid, except between the parties, until the same is entered on the books,"

an assignee of the certificate takes subject to the bank's equity, and, as the condition is sufficient to put him on inquiry, he is not a *bona fide* purchaser. Jennings v. Bank of California (1889), 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 151, citing Vansands v. Middlesex Bank, 26 Conn. 153, 154; Taylor v. Weston, 77 Cal. 534; Stebbins v. Phenix Ins. Co., 3 Paige, 361; Union Bank v. Laird, 2 Wheat. 393; McReady v. Rumsey, 6 Duer, 582.

²⁵ Jennings v. Bank of California (1889), 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 151, distinguishing Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 362, where no condition was embodied in the certificate and the by-law relied on was not referred to therein nor printed thereon.

company has received notification of the transfer;²⁶ but the unregistered assignee of the certificates having given no notice to the company, is in no better position as to advances to his assignor after the transfer than as to those made before. For, according to the usual form, the indebtedness secured is that of the person in whose name the stock stands on the books of the company.²⁷ But notice of an equitable claim given a company, is effectual only for a reasonable time, and operates only as a notice not to allow registration of a transfer without giving the claimant an opportunity to establish his right.²⁸

§ 492. **Statutory and charter liens.**—In England, and in many of the American States, corporations have a statutory lien upon the stock of their shareholders for debts due from them to the company,²⁹ which, unless especially restricted to a certain

²⁶ *Conant v. Seneca County Bank*, 1 Ohio St. 298. See, however, *Union Bank v. Laird*, 2 Wheat. 390. It is held in England that the company has no priority of lien over an equitable incumbrancer who advanced money on a deposit of the certificates, with notice to the company, before the debt to the company became due. *Bradford Banking Co. v. Briggs, etc. Co.*, 31 Ch. Div. 19; s. c. 12 App. Cas. 29. See, also, *Miles v. New Zealand, etc. Co.*, 32 Ch. Div. 266.

²⁷ *Jennings v. Bank of California* (1889), 79 Cal. 323; s. c. 12 Am. St. Rep. 145. In *Norton v. Norton*, 43 Ohio St. 509, a stockholder who owed the corporation which issued the stock, had pledged the shares for a debt, and had delivered them to his pledgee with an absolute power to sell and demand a transfer on the corporate books; but the pledgee not having exercised that power, it was held that the corporation might attach the stockholder's interest, compel a sale, and have the surplus remaining after the payment of the pledgee's debt applied to the payment of the debt due the corporation; and that the attachment took precedence over

a later attachment by another creditor by garnishee process served on the pledgee.

²⁸ *Societe Generale de Paris v. Tramways Union Co.*, 14 Q. B. Div. 424, 448; *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29.

²⁹ *E. g.* Va. Code of 1860, ch. 57, §§ 21, 22, 24; Wis. Rev. Stat., § 1751; Pa. General Railroad Law of 1849; Oregon Miscel. Laws, ch. 32, § 3230; The Companies Clauses Act of 1845, 8 Vic., ch. 16, § 16. The New York "Stock Corporation Law" of 1890 enacts that no share shall be transferable until all previous calls thereon shall have been fully paid in. N. Y. Laws of 1890, ch. 564, § 40. There was a similar provision in the General Railroad Law of 1850, ch. 140, § 8. See, also, N. Y. Laws of 1881, ch. 468, § 12; *National Bank v. Watsontown Bank*, 105 U. S. 217; *Allen v. Montgomery R. Co.*, 11 Ala. 437, 451; *Pittsburg, etc. R. Co. v. Clarke*, 29 Pa. St. 146; *Everhart v. West Chester R. Co.*, 28 Pa. St. 339; *Rogers v. Huntington Bank*, 12 Serg. & R. 77; *Ryder v. Alton, etc. R. Co.*, 13 Ill. 516; *Gaff v. Flesher*, 33 Ohio St. 107. All railroad companies incorporated in Pennsylvania under special acts are subject to

class of debts, extends to all debts owing from the shareholder to the corporation,³⁰ in whatever capacity, it has been said, he may hold the shares.³¹

§ 493. **Extent of the lien.**—The lien extends to all the stock of the shareholder, and all dividends upon it, although the debt may be for calls upon only a part of his stock.³² The lien extends to all debts of the stockholder to the corporation, whenever created, and whether due or to become due, either upon his stock or otherwise.³³ Stock registered on the corporate books in the name of a fictitious person, is subject to a lien for debt of the real owner. Especially does the lien extend to unpaid calls on the original subscription,³⁴ and to all of the shares for balances due on other shares.³⁵ But, if the statute gives the company no lien for any other debts of the stockholder than for unpaid shares,

the General Railroad Law of February, 19, 1849, unless their charters contain provisions inconsistent with those of the general law. Where, therefore, a stockholder in a company, organized under a special act, transferred his shares while indebted to the company, it was held that the company had a lien on the shares to the amount of the indebtedness. *Mount Holly Paper Co.'s Appeal*, 99 Pa. St. 513. Although the statute or charter only specifies "shares and stock," the lien extends to dividends also. *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; s. c. 19 Am. Dec. 306; *Stebbins v. Phoenix Fire Ins. Co.*, 3 Paige, 350; *Bates v. New York Ins. Co.*, 3 Johns. Cas. 238; *Grant v. Mechanics' Bank*, 13 Serg. & R. 140; *Hague v. Danderston*, 2 Ex. 147.

³⁰ *Taylor on Corporations*, § 604.

³¹ In England it has been said that under the Companies Act of 1862, when a company was by its articles of association entitled to a lien upon the shares of a shareholder for all debts owing by him to the company, the lien attached even to shares held by a trustee and had priority as against the *cestui que trust*. *Browne & Theo-*

bald's Ry. Law, 75, citing *New London, etc. Bank v. Brocklebank*, 21 Ch. Div. 302. But a conveyance in trust to sell to any one agreeing to assume the subscriber's indebtedness to the company, does not render the trustee liable as a purchaser within the meaning of the statute of Oregon. *Powell v. Willamette Valley R. Co.*, 15 Oreg. 393; construing Oregon Miscel. Laws; ch. 32, § 3230.

³² *Stebbins v. Phoenix, etc. Co.* (1832), 3 Paige, 350.

³³ *Leggett v. Bank of Sing Sing* (1862), 24 N. Y. 283.

³⁴ *Pittsburgh, etc. R. Co. v. Clarke*, 29 Pa. St. 146; *Spurlock v. Pacific R. Co.*, 61 Mo. 319; *Shaw v. Rowley*, 5 Eng. Ry. & Canal Cas. 47. *Of Newry, etc. Ry. Co. v. Edmunds*, 2 Ex. 118; *Ambergate, etc. Ry. Co. v. Mitchell*, 4 Ex. 540; *Great North, etc. Ry. Co. v. Biddulph*, 7 Mees. & W. 243. But not to the unpaid balance on his subscription which has not been called. *Hall v. United States Ins. Co.*, 5 Gill (Md.), 484; *Kahn v. Bank*, 70 Mo. 262. See, however, *In re Bachman*, 12 Nat. Bankr. Reg. 223.

³⁵ *Stebbins v. Phoenix Fire Ins. Co.*, 3 Paige, 350; 8 Vic., ch. 16,

one who indorses a note given for a subscription, is entitled to have the stock applied to pay the debt for the unpaid subscription, in preference to the other debts due from his principal to the company, even though one of its by-laws provides that the interest of any stockholder shall be liable for the payment of all debts which may be due from him to the company, and that if there is more than one debt, the board of directors may prescribe which one shall be paid out of the debtor's stock. The by-law can only apply to the interest of the debtor stockholder in the stock after the lien of the stock debt is satisfied.³⁶

§ 494. **Effect of transfer and notice upon lien.**—A purchaser of stock stands charged with notice of the statutory lien upon it, and though he acquires absolute title from the transferrer, it is subject, nevertheless, to the lien, for all debts due by the transferrer to the corporation at the time of notice to the corporation, of the transfer.³⁷ The statutory lien is binding as to the creditors and assignees in insolvency of the shareholder, and also as to persons who purchase shares from prior holders, or take them as collateral security,³⁸ for all persons are presumed to know the law and are affected with notice of a statutory or charter lien, whether they have actual knowledge of it or not.³⁹

Lien by by-law.—Where the by-laws provide for lien on the corporate stock, but the stock certificate makes no mention of it, a pledgee or transferee of the stock, without notice, is not affected by such lien.⁴⁰

§ 16. *Contra:* Only to those shares upon which the call is made. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *Hubbersty v. Manchester, etc. Ry. Co., L. R. 2 Q. B. 471.*

³⁶ *Petersburg Saving & Ins. Co. v. Lumsden*, 75 Va. 327.

³⁷ *New Orleans, etc. Bank v. Wiltz* (1881), 10 Fed. 330.

³⁸ *Beach on Railways*, § 391, citing *Norton v. Norton*, 43 Ohio St. 509, and *Taylor on Corporations*, § 603.

³⁹ *Bank of Utica v. Smalley*, 2 Cowen, 770; s. c. 14 Am. Dec. 526; *McCready v. Rumsey*, 6 Duer, 594; *Union Bank v. Laird*, 2 Wheat. 390; *Bishop v. Globe Co.*, 135

Mass. 132; *St. Louis, etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; *Bohmer v. City Bank*, 77 Va. 445; *Grant v. Mechanics' Bank*, 15 Serg. & R. 140; *Downer v. Zanesville Bank*, *Wright (Ohio)*, 477. In Louisiana a pledge of shares of stock in a corporation is valid by the delivery of the certificate, although the pledgor is indebted to the corporation, and its charter prohibits transfers under such circumstances. Shares of stock are not "credits" within the meaning of the Louisiana Code, art. 3158. *Pitot v. Johnson*, 33 La. Ann. 1286.

⁴⁰ *Bank of Culloden v. Bank of Forsyth (Ga. 1904)*, 48 S. E. 226.

§ 495. **Enforcement of the lien.**—The lien can be enforced only by the corporation, and for its own exclusive benefit. The lien will not extend to notes of the stockholder purchased by the corporation.⁴¹ A corporation may refuse to allow any transfer of stock belonging to a stockholder indebted to the corporation, until the debt is paid or secured.⁴² It may have the stock under attachment, or proceedings in equity to pay the debt secured by the lien.⁴³ Ordinarily the lien can be enforced for the benefit of the corporation only.⁴⁴ But a surety, as, for example, an indorser of a note given in payment of a subscription, is entitled to be subrogated to the company's rights against his principal.⁴⁵ A lien created by the company's charter is of equal force with one created by statute, all persons being affected with knowledge thereof whether it be referred to on the certificates or not.⁴⁶

⁴¹ *Bank v. Bonnie* (Ky. 1897), 43 S. W. Rep. 407.

⁴² *First Nat. Bank v. Hartford, etc. Co.* (1877), 45 Conn. 22.

⁴³ *Wright, etc. Co. v. Hixon* (1899), 105 Wis. 153.

⁴⁴ *Bank of Utica v. Smalley*, 2 Cowen, 770; s. c. 14 Am. Dec. 526; *Crescent City, etc. Co. v. Deblieux* (1888), 40 La. Ann. 155; *Cross v. Phoenix Bank*, 1 R. I. 39; *White's Bank v. Toledo, etc. Ins. Co.*, 12 Ohio St. 601. But see *Kuhns v. Westmoreland Bank*, 2 Watts, 136.

⁴⁵ *Petersburg Saving & Ins. Co. v. Lumsden*, 75 Va. 327. In this case a by-law of a corporation organized subject to the provisions of the Virginia Code of 1860, ch. 57, §§ 21, 22, 24, required each stockholder to give his note, satisfactorily indorsed, for his unpaid stock. By the code the stock

of each stockholder is subject to a lien for the unpaid balance due on his shares; and it was held that on the failure of one of the stockholders to pay his note, the indorser was entitled to have the stock applied to his relief. And see *Klopp v. Lebanon Bank*, 46 Pa. St. 88; *West Branch Bank v. Armstrong*, 40 Pa. St. 278; *Hardcastle v. Commercial Bank*, 1 Harr. (Del.) 374, n.; *Hodges v. Planters' Bank*, 7 Gill & J. 306, 310; *Young v. Mough*, 23 N. J. Eq. 325.

⁴⁶ *Beach on Railways*, § 389; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; *German Security Bank v. Jefferson*, 10 Bush, 326; *Bradford Banking Co. v. Briggs*, 31 Ch. Div. 149, reversing s. c. 29 Ch. Div. 119. *Vide infra*, § 646.

CHAPTER XIX.

TAXATION OF CORPORATIONS AND OF STOCK.

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| <p>§ 496. The power to tax.</p> <p>497. (a) Delegation of the power, to municipal corporations.</p> <p>498. Methods of taxing.</p> <p>499. Tax on the franchise.</p> <p>499a. Franchise and property tax distinguished.</p> <p>500. Tax on the capital stock, levied upon the corporation.</p> <p>501. Tax on corporate property, real and personal.</p> <p>502. (a) Deductions from the tax.</p> <p>503. (b) For property exempt from taxation.</p> <p>504. (c) For capital stock invested in United States bonds.</p> <p>505. (d) For property otherwise taxed.</p> <p>506. (e) For the company's debts.</p> <p>506a. Taxation of corporate securities and loans.</p> <p>507. Tax on shares in the hands of stockholders.</p> <p>508. (a) Shares held by resident stockholders in foreign corporations.</p> <p>509. (b) Shares held by non-resident stockholders in domestic corporations.</p> <p>509a. (c) <i>Situs</i> of shares for the purpose of taxation.</p> <p>510. Double tax, by tax of capital stock, and also of shares.</p> <p>511. Exemption from tax.</p> <p>512. (a) As a contract irrevocable.</p> <p>513. (b) Exemption to be clearly expressed.</p> | <p>§ 514. (c) Loss of the exemption by long acquiescence in tax.</p> <p>515. (d) From municipal taxes.</p> <p>516. (e) Of charitable and other institutions.</p> <p>517. (f) The exemption is not transferable.</p> <p>518. (g) Repeal and forfeiture.</p> <p>519. (h) Exemption is a property right.</p> <p>520. (i) Of patent rights.</p> <p>521. Taxation of corporate business earnings.</p> <p>522. (a) Of gross receipts or of net earnings.</p> <p>523. (b) Of dividends.</p> <p>524. Tenure of corporate property as affecting liability to tax.</p> <p>525. Taxation of railroads and transportation companies.</p> <p>526. Taxation of railway bridge companies.</p> <p>526a. Taxation of national banks and moneyed capital.</p> <p>526b. Taxation of banks and savings banks. Who are bankers.</p> <p>527. Income tax.</p> <p>528. Inheritance tax.</p> <p>529. Taxation of foreign corporations.</p> <p>530 (a) "Doing business" in the state, construed.</p> <p>531. (b) Movable property of corporation.</p> <p>532. (c) Discriminations against foreign corporations.</p> <p>533. (d) Interstate railroads and other transportation companies.</p> |
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§ 534. (e) Sleeping and parlor car companies.

535. (f) Express companies.

536. (g) Telegraph and telephone companies. Insurance companies.

§ 536a. Taxation of water companies, gas companies, steamships.

537. Injunction to restrain enforcement of tax.

537a. Constitutionality of tax. Discriminating tax.

§ 496. **The power to tax.**—"The taxing power is an incident of the highest sovereignty. It is an essential part of every independent government. By the constitution, and by the principles which lie at the foundation of every organized society, the State may tax all the persons, natural and artificial, within her borders, and compel them to contribute such part of their property and income as the legislature may think right, to defray the expenses and meet the engagements of the government. The wealth of men who are associated together is not less subject to taxation than if it were owned by individuals. The right is as clear to tax an incorporated company as a mercantile partnership."¹ Private corporations are no less subject to the taxing power of the State than individuals, except where exempted by the State expressly, and for a consideration.² The State in taxing corporations, is not governed by its tax rate upon individuals. The rate may be greater or less, or equal thereto. The State may tax corporations without taxing individuals.³ A State may tax at higher rate domestic corporations which have their principal place of business without the State, than those having such place of business within the state.⁴ A domestic corporation is estopped to deny that it has a place of business within the State.⁵ The place where its actual place of business is, is the place where the corporation will be taxed.⁶ The State may enjoin a corporation from doing business, when delinquent by its non-payment of taxes due to the State.⁷ The State cannot tax bonds of a domestic corporation, held by nonresident bondholders.⁸ In the case of consolidation of

¹ *Bank of Pennsylvania v. Commonwealth*, 19 Pa. St. 144.

² *Commonwealth v. Lancaster Sav. Bank*, 123 Mass. 493.

³ *Singer Manuf. Co. v. Wright* (1887), 33 Fed. 121.

⁴ *Blue Jacket, etc. Co. v. Scharr* (W. Va. 1901), 40 S. E. 514.

⁵ *Chapman v. Doray* (1891), 89 Cal. 52.

⁶ *Detroit, etc. Co. v. Board of Assessors* (1892), 91 Mich. 382.

⁷ *In re Electro Pneumatic, etc. Co.* (1893), 51 N. J. Eq. 71.

⁸ *Railroad Co. v. Jackson*, 7 Wall. 262 (1868); *New York, etc. R. R. v. Pennsylvania* (1894), 153 U. S. 628.

corporations of different states, the consolidated corporation may be taxed in each State, upon the property it holds there, and for the capital stock it took over.⁹ The State has the power to tax federal corporations and other agencies of the government, to the same extent as the property of other corporations or individuals, subject to limitations of the constitution of the United States. For example, it may tax railroads, banking corporations, and others employed in the service of the United States government.¹⁰ A State may tax all property, real and personal, within its jurisdiction, regardless of the domicile of the owner, which property is not situated in the State merely temporarily or in *transitu*.¹¹ A statute, making personal property of a corporation created by the State, and though out of its limits, subject to taxation within it, is not repugnant to the State constitution requiring that taxes "shall be uniform on all property, subject to taxation within the territorial limits of the authority levying the tax."¹² A State may provide for the taxation of corporate franchise as property of the corporation.¹³

§ 497. (a) **Delegation of the power, to municipal corporations.**—The State may delegate its power to tax, to cities and other municipal corporations. A municipal corporation is the creature of the State and has only such power to tax corporations, as is constitutionally conferred by the legislature as expressed in the charter or other statute.¹⁴ Such power may be conferred upon the municipal corporation to tax for municipal purposes any property within its limits, such property to include the corporate capital stock, and shares of stock in the hands of shareholders.¹⁵

§ 498. **Methods of taxing.**—There are four principal methods of taxing corporations in America, varying in detail in the different States.¹⁶ These are, first, upon the corporate franchise,¹⁷ sec-

⁹ Chicago, etc. Ry. v. Auditor General (1884), 53 Mich. 79.

¹⁰ Union Pac. R. Co. v. Peniston, 18 Wall. (U. S.) 5.

¹¹ State v. Fidelity, etc. Co. (1904), 80 S. W. 544 (Tex. Civ. App.).

¹² Commonwealth v. Union, etc. Co. (Ky. 1904), 80 S. W. 490.

¹³ Bank of Cal. v. City, etc. (Cal. 1904), 75 Pac. 832.

¹⁴ Stetson v. City of Bangor, 56 Me. 274.

¹⁵ Union Bank v. City of Richmond, 94 Va. 316.

¹⁶ See generally upon the subject: "System of Taxation" (Harrisburg, 1890), by John A. Wright, being a memorandum submitted to the committee for revision of the revenue laws of Pennsylvania; "Careless Legislation on

¹⁷ *Vide infra*, § 499.

ond, upon the corporate property,¹⁸ third, upon the capital stock,¹⁹ and fourth, upon the business done or profits accruing therefrom.²⁰ An erroneous construction of the tax laws by officers whose duty it is to enforce them, does not bind their successors, nor the State in the proper assessment and collection of taxes, although the erroneous construction may have been followed from the time the laws were enacted.²¹ Statutes imposing taxes upon corporations are construed according to the intent of the legislature to tax, where a literal construction would defeat that intent.²² The State may recover judgment against a railroad company for taxes due upon the gross earnings of the road, notwithstanding the road has been placed in the hands of receivers, who were operating it and controlling its earnings during the time for which the taxes were levied.²³ And a claim of the State for taxes upon the franchise of a corporation, which in the possession of a receiver continues to be a going concern, is superior to the rights of mortgage bondholders, and the court may order it to be paid out of the gross earnings in the receiver's hands.²⁴

Place of Taxation. Mode of Assessment.—The State may make the place of the company's principal office the *situs* for

Corporate Taxation," by Edward Lyman Short, 29 Alb. L. J. 105; "Corporate Taxation," by Edward C. Moore, Jr. (1884), 18 Am. L. Rev. 749; "Taxation of Corporations under New York Laws of 1881," 28 Alb. L. J. 246; "Taxation of Corporations," by Prof. E. R. A. Seligman (1890), 5 Polit. Science Quart. 269, 439, 637, being a series of articles tracing the history of tax legislation in the American States, criticising the present methods, suggesting remedies for evils existing, and concluding with a valuable bibliography of the subject; "Tax on Bodies Corporate and Unincorporate," 30 Sol. J. & Rep. 23; "Taxation of Real Property and Corporations," by John H. Ames, 12 West. Jur. 140; "Letters on Corporations and Taxation" (New York, 1878), by James H. Coleman; "Taxation of Real Property and Corporations" (Des Moines, 1878), by John H. Ames.

¹⁸ *Vide infra*, § 501.

¹⁹ *Vide infra*, §§ 500-506.

²⁰ *Vide infra*, §§ 521-523.

²¹ *Lee v. Sturges* (1889), 46 Ohio St. 153. The erroneous construction in this case was that shares held by residents of Ohio of stock of foreign railroad corporations having property in that State on which they pay taxes, and of consolidated railroad companies, are not taxable in Ohio.

²² *City of Philadelphia v. Ridge, etc. Co.*, 102 Pa. St. 190.

²³ *Philadelphia, etc. R. Co. v. Commonwealth*, 104 Pa. St. 80; *Beach on Receivers*, 335.

²⁴ *Central Trust Co. v. New York, etc. R. Co.*, 110 N. Y. 250, citing *In re Receivership of Columbian Ins. Co.*, 3 Abb. Ct. of App. Dec. 239, and *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434; and distinguishing *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493.

taxation of its personalty, and exempt it from assessment at any other place within the State's jurisdiction.²⁵ A foreign express company's personalty outside the State, can not be counted in measuring the taxable values of its property within the State, on a mileage basis, assuming it to give the credit necessary to the conduct of the business of the corporation in the State, inasmuch as such aggregate assessments exceeded the value of the total good will of the company, as measured by the difference between the total value of its stock and the total value of the corporate assets.²⁶ Where a domestic railway fails to show that any part of its rolling stock is used exclusively outside of the State, its entire value is assessed for taxation by the State.²⁷ In determining the value of the corporation franchise for taxation, the value of the corporate stock is to be considered.²⁸ The value of United States bonds owned by a bank may be considered in determining the value of the capital stock for purpose of taxation. As used in the tax law, "capital stock" means, not the shares of stock, but the actual money or property paid in, and belonging to, the corporation.²⁹

§ 499. Tax on the franchise.—For the purpose of taxation the word, "franchise" includes every kind of corporate property, and the right to be a corporation.³⁰ The franchise tax is a license fee charged for the privilege of incorporation, or of doing business as a corporation in the State. It is generally proportioned to the amount of the capital stock, but is not to be confounded with the tax upon the capital stock. The franchise to be a corporation may be taxed separately from the corporate property; the fact being that the franchise grants, rights, privileges and exemptions, not enjoyed by individuals generally, give it taxable value.³¹ In Connecticut the corporate franchise tax applies only to foreign corporations seeking a charter in the State.³² In New York it is called the "organization of corporations tax;"³³ in Maine, the

²⁵ *Laymen v. Iowa, etc. Co.* (Iowa, 1904), 99 N. W. 205.

²⁶ *Fargo v. Hart* (1903), 193 U. S. 490; *Coulter v. Weir* (Ky. 1904), 127 Fed. 897 (U. S.; C. C. A.).

²⁷ *People v. Miller* (N. Y. 1904), 69 N. E. 1129.

²⁸ *Bank of Cal. v. City of, etc.* (Cal. 1904), 75 Pac. 832.

²⁹ *People v. Feitner* (1904), 87 N. Y. S. 304.

³⁰ *Adams Express Co. v. Kentucky* (1897), 166 U. S. 171.

³¹ *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556.

³² Conn. Gen. Stat. §§ 1912-1916.

³³ Payable also on subsequent increase of the capital stock. N. Y. Laws of 1886, ch. 143.

"tax on new corporations;"³⁴ in Missouri, the "corporation tax," or the tax on "corporations incorporating;"³⁵ in New Hampshire, "charter fees;"³⁶ in New Jersey, the tax from "certificates of incorporation;"³⁷ in Pennsylvania and Rhode Island, the "bonus on charters;"³⁸ and in West Virginia, it is designated the "license tax on charters and certificates of incorporation."³⁹ A franchise tax on a corporation that has done business only five and one-half months, should be apportioned, and not levied for the entire year.⁴⁰ The franchise of being a corporation is taxable under a statute defining taxable property in the State as including franchises and all other things capable of private ownership.⁴¹ A statute imposing an annual franchise tax upon all corporations doing business within the State, payable in the county where the corporation has its principal office, includes foreign corporations doing business in the State as well as domestic corporations.⁴²

§ 499a. **Franchise and property tax distinguished.**—Owing to the difficulty of distinguishing between the capital and the property in which it is invested, tests for determining whether a tax is on the property or the franchises may be regarded, generally, as uncertain and unsatisfactory; yet its determination is often necessary, for, if a franchise tax, the property in which the capital is invested becomes immaterial. The usual and most certain test is whether the tax is upon the capital stock, *eo nomine*, without regard to its value, or at its assessed valuation in whatever it may be invested. If the former, it is a franchise tax; if the latter, a tax upon the property.⁴³ In Mississippi there is a tax on banks called a privilege tax, the amount varying with their capital stock

³⁴ Me. Rev. Stat. ch. 48, § 18; Me. Pub. Laws of 1887, ch. 90.

³⁵ Mo. Const. art. x, § 21; Mo. Rev. Stat. § 2493.

³⁶ N. H. Gen. Laws, ch. 13, § 5.

³⁷ N. J. Pub. Laws of 1883, 62; Revision of N. J. Supl. 149.

³⁸ Pa. Laws of 1868, § 15, p. 113; Pa. Laws of 1874, § 44, p. 107; R. I. Pub. Stat. ch. 27, § 15.

³⁹ W. Va. Code, ch. 32, §§ 86-92, as amended by W. Va. Laws of 1887, ch. 29.

⁴⁰ People v. Miller (N. Y. 1904), 69 N. E. 1129.

⁴¹ Bank of Cal. v. City, etc. (Cal. 1904), 75 Pac. 832.

⁴² State v. Armour, etc. Co. (N. C. 1904), 47 S. E. 411.

⁴³ State v. Stonewall Ins. Co. (Ala. 1890), 8 Ry. & Corp. L. J. 308, citing Bank v. New York City, 2 Black, 620, and holding that Ala. Code, § 478, requiring that the chief officer of such a corporation shall make return of all taxable property, stating the number of shares of stock, their par and market value, and the items of property in which its capital stock is invested, was not intended to be determinative of the character of the capital stock, but only to prescribe a method of listing the

or assets. This is in lieu of all other taxes, and, accordingly, real estate owned by banks is accounted a part of their assets.⁴⁴ Under the Pennsylvania statute,⁴⁵ entitled "An act to enable the city of Pittsburgh to raise additional revenue," and prescribing that all real estate situated in that city owned or possessed by any railroad company should be subject to taxation for city purposes, in the same manner as other real estate in the city, the land, buildings and improvements of the railway companies were held subject to taxation, even though necessary to the exercise of the franchises of the respective companies.⁴⁶

§ 500. Tax on the capital stock, levied upon the corporation.—The capital stock is to be distinguished from shares of stock. The capital stock is always taxed against the corporation at the place of its domicile, and the tax is paid by the corporation. The value of the capital stock is measured independent of the value of the shares of stock. They are measured by their value in the market, and are taxed in the hands of the shareholders at the places of their residence.

There are eight methods of taxing the capital stock of corporations,⁴⁷ to wit: a tax upon the capital stock when the company, during any year, makes dividends amounting to six per cent. or more on the par value of its capital;⁴⁸ a tax upon the whole capital

property of the corporation, and furnish *data* from which to ascertain the assessable value of whatever its capital was invested in. *Of. Desty on Taxation*, 76.

⁴⁴ *Vicksburg Bank v. Worrell* (Miss. 1890), 7 So. Rep. 219, construing Miss. Code, §§ 557, 585, as amended by Miss. Laws of 1888.

⁴⁵ Pa. Act of Jan. 4, 1859.

⁴⁶ *Pennsylvania R. Co. v. Pittsburgh* (1886), 104 Pa. St. 522.

⁴⁷ See generally "Assessments of Capital Stock and Franchise of Corporations," by James K. Edsall, 7 Chicago L. N. 390; *Desty on Taxation*, 73; *Cooley on Taxation*, 230, 232.

⁴⁸ N. Y. Laws of 1880, ch. 542, § 3, as amended by N. Y. Laws of 1881, ch. 361. Under this act and N. Y. Laws of 1882, ch. 151, which authorizes the comptroller, upon becoming dissatisfied with the re-

port of any corporation, liable to this tax, whose capital is only partly employed within the State, to fix the amount of capital stock which shall be the basis for the tax, it has been held that the latter statute does not require that only the capital employed in the State shall be taken as a basis; that this basis is authorized only when the report of the corporation fails to satisfy the comptroller; and that where no such dissatisfaction appears, the rule under the former statute prevails. *People v. Horn Silver Mining Co.*, 105 N. Y. 76. Where a bridge owned by a corporation was duly declared a county bridge, the surplus of the damages assessed over the amount of capital stock, which was divided among the stockholders, was in the nature of profits, and a proper measure of the tax

stock at par;⁴⁹ upon the capital stock at its actual cash or market value;⁵⁰ upon so much of the capital stock as has been subscribed to and paid in;⁵¹ upon the capital stock plus the bonded debt of the company at market value;⁵² upon the capital stock plus the total debt, both funded and floating;⁵³ upon the capital stock less property otherwise taxed;⁵⁴ and upon the capital stock less the indebtedness of the corporation.⁵⁵ When the tax is upon the market value of the capital stock, evidence of the value of the shares when they have been withdrawn from the market may be ascertained from other sources; and, when they have been exchanged for other securities, the value fixed upon them in the exchange is a proper basis for the assessment.⁵⁶ Under the New York statute providing that if a corporation, during any year, makes dividends amounting to six per cent. or more on the par of its capital, then it is to pay a tax of one-quarter mill on the capital stock for each one per cent. of dividends; but if there are no dividends, or the dividends are less than six per cent., then the tax shall be at the rate of one and a half mills on each dollar of the value of the stock, it is held that it was the clear intention of the statute, where the dividend was less than six per cent. on the par value of the stock, that the tax should be one and a half mills on the actual value of the stock, although the aggregate tax would be greater than a tax computed on a dividend of six per cent.⁵⁷ Under a statute taxing the capital stock, after deduct-

upon the capital stock. *Matson's Ford Bridge Co. v. Commonwealth* (Pa. 1888), 11 *Atlan. Rep.* 813, not reported.

⁴⁹ *E. g.* Corporations in general; N. J. Act of April 18, 1884.

⁵⁰ At its market value: *Ind. Rev. Stat.* (1887), §§ 6357, 6359; *Ala. Civ. Code*, § 453, subs. 3; *Conn. Gen. Stat.* §§ 3919, 3920. At its true value: *Kan. Comp. L.* p. 9481, § 12. At its actual value: *Md. Laws* of 1878, ch. 178. At its cash value: *Ill. Rev. Stat.* ch. 120, § 3.

⁵¹ Thus in Maryland and Louisiana, the corporation is required to pay the tax upon its shares, collecting it again from the shareholders. *Md. Laws* of 1878, ch. 178; *La. Laws* of 1886, p. 132.

⁵² *Vide infra*, § 506a.

⁵³ *Vide infra*, § 506a. *E. g.* *Conn. Gen. Stat.* §§ 3919, 3920, taxing the stock of railway companies and also their funded and floating debts, less obligations held in trust as a sinking fund and less the tax on realty.

⁵⁴ N. Y. Laws of 1857, ch. 456, § 3. *Vide infra*, § 804; *Conn. Gen. Stat.* §§ 3919, 3920; *Ala. Civ. Code*, § 453, subs. 8; *Ill. Rev. Stat.* ch. 120, § 3. Less real and personal property in the State: *Kan. Comp. L.*, p. 9481, § 12.

⁵⁵ *Vide infra*, § 506.

⁵⁶ *Planters' Crescent Oil Co. v. Assessor of the Parish of Jefferson* (La. 1890), 6 *So. Rep.* 809, 41 *La. Ann.* 1137.

⁵⁷ *People v. Delaware & H. Canal Co.* (1890), 7 *N. Y. Supp.* 890, construing N. Y. Laws of 1880, ch.

ing therefrom the value of the company's real estate, the corporate franchise is not to be accounted real estate unless it be so defined by the statutes.⁵⁸ In Missouri the value of the capital stock of corporations, exempting national banks, less the value of real estate and fixtures, is returnable by the corporation to the State, with list of shareholders, and they are individually assessed upon the stock according to their holdings,⁵⁹ but the corporation is required to pay the tax so assessed against the shareholders.

§ 501. **Tax on corporate property, real and personal.**—The taxation of corporations upon their property, real or personal, was the method originally prevalent in the American States, and is still adhered to by many of them.⁶⁰ Thus, in New Jersey railway companies are taxed by the State for local purposes upon the value of their real estate in each taxing district outside of the main line, at the local rate, provided that be not greater than one per cent. of the value.⁶¹ In most of these States the tax is based upon the present value of the corporate property, while in others the cost of the property is taken as the basis of estimate.⁶² The latter rule still prevails in the local taxation of telegraph companies in New York.⁶³ It is not for the assessors to determine

542, § 3, as amended by N. Y. Laws of 1881, ch. 361.

⁵⁸ *People v. Commissioners of Taxes* (1887), 104 N. Y. 240, construing N. Y. Rev. Stat. ch. 13, tit. 1, sec. 2, and N. Y. Laws of 1857, ch. 456, § 3.

⁵⁹ *State v. Fleming* (Mo. 1904), 79 S. W. 1063.

⁶⁰ *Cooley on Taxation*, 223, 377, 383. *E. g.* Cal. Civ. Code, § 3608; Conn. Gen. Stat. (1888), §§ 3832, 3838; La. Laws of 1886, p. 132. In Colorado railway real estate is taxed where it lies. Colo. Gen. Stat. § 2847. And other railway property is taxed by the municipalities upon a valuation determined by the State. Colo. Gen. Stat. § 2847. In Iowa the real and personal property of manufacturing companies is taxed, the shares being exempt. Iowa Rev. Code (1888), p. 273. Railway property valued according to earnings per mile. Iowa Rev. Code (1888), §§ 1317-1322.

⁶¹ N. J. Law of March 27, 1888.

⁶² *Cooley on Taxation*, 223, 377, 383, and statutes cited *supra*. In fixing the value of the real estate of the Panama Railroad Company the commissioners of taxes took the cost of its real estate and improvements, consisting principally of the cost of construction of the road. Upon *certiorari* to correct the assessment, the company offered no evidence of the market value of its real estate, but introduced an estimate based on the capitalization of the company's average annual net income for several years preceding, making a deduction of the value of personal property. But it was decided that the latter estimate ought not to be taken, as it failed to exclude the value of the company's franchise, and that the commissioners' action should be sustained. *People v. Commissioners of Taxes* (1887), 104 N. Y. 240.

⁶³ N. Y. Laws of 1853, ch. 597.

the value of the corporate franchise. This is not to be considered in assessing the taxable capital of the corporation.⁶⁴ All personal property of a domestic corporation, though having its principal place of business out of the State, is taxable within it, where all such property of corporations created by the State is made taxable within or without the State.⁶⁵

§ 502. (a) **Deductions from the tax.**—Where the statute allows deductions from tax on bonds and like securities for debts due from others to the bondholder, the stockholder is entitled to like deduction on tax of shares in a national bank,⁶⁶ and to the same deductions made to a shareholder in a state bank.⁶⁷ Non-resident as well as resident shareholders are entitled to like deductions allowed to general taxpayers.⁶⁸ A deduction allowed upon national and state securities is invalid if denied to holders of shares in national banks.⁶⁹

§ 503. (b) **Deduction for property exempt from taxation.**—When a tax upon the capital stock is regarded as a tax upon property, the question then is whether, under the revenue law, the corporation is entitled to a deduction from the assessed value of its capital stock of such portion as is invested in bonds of the State. It is contended that no deduction can be made under the statute, except of such portions as may be invested in property otherwise taxed. The argument is that the capital stock includes everything in which it is invested, and that, expressly excepting the portion of its investments in property otherwise taxed, is the exclusion of such portions as may be invested in property non-taxable. But unless a deduction from the assessed value of the capital stock of the portion invested in bonds of the State is allowed, then there exists the anomaly of taxing in the form of capital stock, investments expressly exempted from all taxation. "If a part of the money capital of an individual be invested in State bonds, it will be conceded that such part is not liable to taxation. Why then should it be held that the portion of the capital of corporations so invested is taxable?"⁷⁰ So that it is held that

⁶⁴ *People v. Feltner* (1904), 87 N. Y. S. 304.

⁶⁵ *Commissioners v. Union, etc. Co.* (Ky. 1904), 80 S. W. 490.

⁶⁶ *First Nat. Bank v. Ayers* (1896), 160 U. S. 669.

⁶⁷ *McHenry v. Downer* (1897), 116 Cal. 20, 45 L. R. A. 737.

⁶⁸ *Mercantile Nat. Bank v. Shields* (1894), 59 Fed. 952.

⁶⁹ *Whitney Nat. Bank v. Parker* (1890), 41 Fed. 402.

⁷⁰ *State v. Stonewall Ins. Co.* (Ala. 1890), 8 Ry. & Corp. L. J. 308; Monographic Note "Taxation of Banking Capital Invested in

the section of the Alabama Code, providing that the capital stock of private corporations shall be taxable, except so much thereof as may be invested in property otherwise taxed, was only intended to prevent double taxation of taxable property, and does not render taxable such portion of the capital stock of an insurance company as is invested in Alabama State bonds, which, by another section, are made non-taxable.⁷¹

§ 504. (c) Deduction for capital stock invested in United States' bonds.—In accordance with the distinction above explained between taxation of capital stock at its par value and assessing it at its market value, it is held by the federal Supreme Court that the capital stock of an insurance company, invested in United States bonds, exempted by the acts of congress under which they were issued from taxation by the States, is not exempt from the tax imposed by the New York statute, on the "corporate franchise or business of corporations in that State, of one-quarter mill on the capital stock for each one per cent. of dividend of six per cent. or over."⁷² A state may tax the shares of stock of a corporation, although its assets are in part invested in bonds of the United States.⁷³ Under the Louisiana act, relating to taxation of national bank shares, making no deduction for that part of the bank's property entering into their value which consists of non-taxable State and federal securities, which deduction may, under the act, be made by individuals, the tax violates the federal statute prohibiting the assessment of shares of national banks at a greater rate than moneyed capital in the hands of individual

United States Bonds," 3 Am. L. Reg. (N. S.) 535.

⁷¹ *State v. Stonewall Ins. Co.* (Ala. 1890), 8 Ry. & Corp. L. J. 308, construing Ala. Code, § 453, subd. 9, and § 451, subd. 2.

⁷² *Home Ins. Co. v. New York* (1888), 119 U. S. 129, construing N. Y. Laws of 1880, ch. 542, as amended by N. Y. Laws of 1881, ch. 361, and holding further that this act is not unconstitutional as depriving any person, natural or artificial, of the equal protection of the laws; for, under its provisions, all corporations of the same kind are subject to the same tax. In the *Bank Tax Case*, 2 Wall. 200,

it was ruled that a tax laid on banks, on a valuation equal to the amount of their capital stock paid in, or secured to be paid in, is a tax on the property of the institution, and when that property consists of stocks of the federal government, the law levying the tax is void. In *McGuire v. Board of Revenue*, 71 Ala. 401, Stone, J., says: "But a tax on the capital stock of a bank whose capital is invested in government securities, not allowed to be taxed, would be a tax on such securities, and illegal."

⁷³ *Cleveland T. Co. v. Lander* (1902), 184 U. S. 111.

citizens, and it is immaterial that the same discrimination is made against other corporations.⁷⁴

§ 505. (d) Deduction for property otherwise taxed.—Statutes taxing the capital stock of corporations, frequently allow for the exemption of so much thereof as may be invested in property otherwise taxed.⁷⁵ Thus in New York corporations taxed upon their capital stock are entitled to deduct from the amount thereof the assessed value of real estate and shares in other companies otherwise taxed.⁷⁶ The object of this exemption is to avoid double taxation.⁷⁷ And when the stock of a corporation does not exceed in value the property which it represents, all of which is assessed to the corporation, it should not be assessed to the stockholders, under the provisions of the Vermont statute providing for deducting from the value of the stock the value of the real and personal property of the corporation represented by the stock and itself taxed.⁷⁸ It is immaterial what the cost of the real estate otherwise taxed may have been; it is only the actual present value thereof which may be deducted.⁷⁹

If the realty be situated in a foreign State, and the valuation assessed there can be ascertained, it will be adopted in New York, on the ground that to take the assessed value of real property in

⁷⁴ Whitney Nat. Bank v. Parker (1890), 41 Fed. Rep. 402, construing La. Act of 1888, § 27, and U. S. Rev. Stat. § 5219.

⁷⁵ E. g. Ala. Code, § 453, subd. 9; Vt. Rev. Laws, § 288.

⁷⁶ N. Y. Laws of 1857, ch. 456, § 3, which provides: "The capital stock of every company liable to taxation, except such part of it as shall have been accepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds exceeding ten per cent. of its capital, after deducting the assessed value of its real estate and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as other personal and real estate of the county." In

People v. Commissioners of Texas (1887), 104 N. Y. 240, it is held that in *certiorari* to correct an assessment of the capital stock of a corporation made by the commissioners of taxes, it is incumbent upon the company, before it is entitled to call upon the court to correct the assessment by increasing the sum to be deducted for the value of its real estate, to give evidence and furnish *data* showing that the actual value exceeded the sum fixed by the commissioners.

⁷⁷ State v. Stonewall Ins. Co. (Ala. 1890), 8 Ry. & Corp. L. J. 308.

⁷⁸ Willard v. Pike (1887), 59 Vt. 202, 9 Atl. 907.

⁷⁹ People *ex rel.* Fairfield Chemical Co. v. Commissioners of Taxes (1889), 52 Hun, 93; s. c. 6 Ry. & Corp. L. J. 172.

another State, where it is practicable and convenient to ascertain the facts, as the actual value, in the absence of some controlling circumstance which shows the contrary, is more apt to work substantial justice than any other mode.⁸⁰ Where an assessment is made which states, and which is based upon the value of real estate, in the absence of any other fact controlling it, the theory is, that the assessed value of the real property is its actual value. This holds good in regard to an assessment outside as well as within the State; and, in regard to assessments outside the State, they are to be regarded as evidence of the actual value. It is not necessary, in all cases, to regard an assessment as conclusive when made outside of the State; and it may not always be necessary or practicable to learn if there be any such assessment; but if it be known, then, in the absence of other evidence upon the subject, an assessed value is sufficient evidence of actual value for the taxing officers to act on. If there be other evidence, the

⁸⁰ In *ex rel. Fairfield Chemical Co.* (1889), 52 Hun, 93; s. c. 6 Ry. & Corp. L. J. 172, *supra*. In this case, Peckham, J., continued: "The general purpose of statutes relating to assessment and taxation is to bring within their grasp all property at its actual value. When the real estate is within our own jurisdiction, the assessed is regarded as the actual value thereof. Generally, the same theory holds good in regard to real property which is situate without the State. If the real property of the relator were situate here, the assessed value of the real property, \$42,400, would of course be the sum to be deducted from the value of the capital stock, even though \$150,000 had been paid for such property. By the relator's contention it is to have the benefit of a deduction of \$150,000 from the value of its capital stock, simply because its real property which is the cause of the deduction is situated in Connecticut, although it is only taxed there at a valuation upon such real estate of \$42,400. We think that sum may properly be assumed to be its value. Other-

wise, such a corporation is in a very much better position than one whose real property is held within our own State. If the relator's real property were held here, and subjected to precisely the same assessment as it is in fact in Connecticut, it is not questioned but that the balance of its taxable property would be, as stated by the defendants, \$32,600; yet, because of the simple fact that the real property is held just over our border and the same assessment is made, the resulting difference is that the relator has no taxable property. This is not just. The result is obtained by assuming that an assessed valuation in another State under a general tax law is no evidence upon which the taxing officers of this State can act as to the actual value of such real estate. We think it is some evidence, and enough to allow such officers to deduct the sum assessed as the actual value. If other evidence is given, it is still a question for the assessors to determine the actual value, in which the assessed value may figure conspicuously."

question is still one for the officers to decide, subject to review by the writ of *certiorari*, as in other cases.⁸¹ "But if the real estate should be in another State or country, or if for any other reason its assessed value can not be obtained, then, as the best and nearest substitute for it, the price paid, as the presumed value in the absence of proof or of any other standard, may be taken as the assessable value."⁸²

In the above opinion, it is the failure to obtain knowledge of the assessed value of the real estate which is the main ground for taking some other standard for assessment. That failure, it was assumed, might arise if the real estate should be situated in some other State or country, but there was no assumption that, as matter of law, no such knowledge could be obtained. The implication is that if it were in fact obtained, then it was the proper amount to be deducted from the value of the stock, because it might be assumed to be the actual value of the real property.⁸³

In another case, that of the Panama Railroad Company, it appeared that the real estate of the corporation was situated in New Granada, and that it paid an annual sum in gross to that government in lieu of taxes on its real estate, immunities and personal property. In this case there could be no assessed value of the real estate, and therefore there was no such way to establish its actual value, and hence it was held that an inquiry might be made into the price paid for the real estate, which in the absence of other and better evidence might be taken as representing the truer value.⁸⁴

§ 506. (e) Deduction for the company's debts.—In New York in determining the value of the capital stock of a corporation for the purposes of taxation, it is held that the indebtedness of the corporation should be deducted from the real value of the stock and the tax should be imposed upon the balance, provided the balance be not less than ten per cent. of the capital, which under the laws of that State is exempt from taxation.⁸⁵ And under the

⁸¹ *Ex rel. Fairfield Chemical Co.* (1889), 52 Hun, 93; s. c. 6 Ry. & Corp. L. J. 172.

⁸² *Dictum* in *People v. Commissioners*, 95 N. Y. 554.

⁸³ *Ex rel. Fairfield Chemical Co.* (1889), 52 Hun, 93; s. c. 6 Ry. & Corp. L. J. 172, distinguishing *People v. Commissioners*, 95 N. Y. 554, where the property in ques-

tion was not situated in a foreign State, and *People v. Commissioners*, 104 N. Y. 240, where there was no assessed valuation of the property by the foreign State.

⁸⁴ *People v. Commissioners*, 104 N. Y. 240.

⁸⁵ *People v. Coleman* (1888), 1 N. Y. Supp. 666; N. Y. Laws of 1857, ch. 456, § 3.

former revenue law of Kentucky, which required certain corporations to pay a tax on their property equivalent to the tax on real estate, corporations, as well as natural persons, were entitled to deduct their indebtedness from the value of property not required to be listed.⁸⁶

§ 506a. **Taxation of corporate securities and loans.**—The tax on the bonded debt or loans which is imposed in Maryland and Pennsylvania,⁸⁷ is only supplementary to the tax on capital stock, and is not, properly speaking, a tax upon the corporations themselves, since they deduct the amount of the tax from the interest due their creditors. "The debtor is simply the collector of the tax, and his remedy for collection is to deduct it from the interest; this and no more is the legal effect of the statute."⁸⁸

The constitutionality of the Pennsylvania act has been attacked upon various grounds; but it is held that the tax upon the bonds and securities issued by corporations is not unconstitutional in requiring the treasurer of the corporation to deduct the tax from

⁸⁶ *Commonwealth v. St. Bernard Coal Co.* (Ky. 1888), 9 S. W. Rep. 709.

⁸⁷ Md. Pub. Gen. Laws, art. 81, §§ 87-88; Pa. Act of June 30, 1885, Pa. Laws, 139. *Cf.* Ind. Rev. Stat. (1887), §§ 6357, 6359.

⁸⁸ *Lehigh Valley R. Co. v. Commonwealth* (1889), 129 Pa. St. 429; s. c. 7 Ry. & Corp. L. J. 13. In *Hunter's Appeal* (Pa. 1887), 10 Atlan. Rep. 429 (not reported), it was held that the Acts of June 7, 1879, of June 10, 1881, and of June 30, 1885, providing that all mortgages and money owing by solvent debtors, owned by any person or persons whatsoever, should be liable to taxation for State purposes, did not impose a tax on mortgages and other moneys at interest in the hands of corporations, in addition to the tax paid by them upon their capital stock, and invested in mortgages and loans, "persons" not including corporations, and it not being manifest therefrom that the legislature intended to impose double taxes on corporations. Although a corporation is in the hands of a receiver

appointed by the United States court, it is the duty of the treasurer, who is also the treasurer of the receiver, to assess the tax of three mills on its bonded indebtedness, as required by Act Pa. June 30, 1885, without awaiting June 30, 1885, and the receiver having paid the interest in full without deducting the tax, the company is liable therefor. *Commonwealth v. Philadelphia & R. C. & I. Co.* (Pa. 1890), 20 Atlan. Rep. 531. When interest on the bonded indebtedness of a corporation is paid at a rate less than stipulated on the coupons by the guarantor, who takes up and cancels the coupons, and surrenders them to the corporation, and charges it with the amount paid, the interest will be regarded as paid, and the corporation held liable for the tax on the indebtedness provided for by Act Pa. June 30, 1885, without awaiting a settlement between the guarantor and the corporation. *Commonwealth v. Philadelphia & R. C. & I. Co.* (Pa. 1890), 20 Atlan. Rep. 580.

the interest payable to the bondholders, on the ground that it is a taking of property without due process of law, since the law itself gives them notice of the tax, and the mode of its collection;⁸⁹ that the basis of estimate being made the nominal instead of the actual value of the securities, is not an unjust discrimination and does not violate the federal constitution in withholding from any person the equal protection of the laws;⁹⁰ that the law does not impair the obligation of the contract between the company

⁸⁹ Bell's Gap R. Co. v. Commonwealth (1890), 134 U. S. 232; City of Chester v. Commonwealth (1890), 134 U. S. 240.

⁹⁰ Bell's Gap R. Co. v. Commonwealth (1890), 134 U. S. 232; City of Chester v. Commonwealth (1890), 134 U. S. 240; Commonwealth v. Delaware Div. Canal Co. (1889), 123 Pa. St. 594, holding that the legislature has power to fix the face value of corporate obligations as their value for taxing purposes; that the tax was in the nature of a specific tax, not a tax upon actual value; that the legislature having fixed the nominal value of the bonds as the basis of taxation, no further assessment, properly so called, was required; that it was a proper exercise of legislative power to require the company's treasurer to "assess" the tax—that is to say, to determine the amount of the company's loans liable to taxation at their nominal value, and to apply thereto the rate fixed by law; the taxation being the result of the rule thus applied; Lehigh Valley R. Co. v. Commonwealth (1889), 129 Pa. St. 420; s. c. 7 Ry. & Corp. L. J. 13, where the court having cited the foregoing case with approval, continued: "Taxes have been levied and collected in Pennsylvania in this form for more than half a century. The fourth section of the Act of 1885 is but a transcript of the forty-second section of the Act of 1844, which provides the only method, since its passage, for the assessment and collection of taxes

upon municipal loans. The Act of 1844 is still in force, and its validity, until the very recent case of Commonwealth v. City of Chester, 122 Pa. St. 626, has never been disputed. On the trial of the cases involving the construction and validity of other statutes differing from that of 1844, this provision of the last-mentioned act has been uniformly and consistently recognized as a valid exercise of legislative power. (Maltby v. Railroad Co., 52 Pa. St. 140.) Specific taxes for a long series of years have been imposed within this State, not only upon particular classes of property, but upon classes of persons, and we have never known the power, when properly exercised, to have been called in question. Taxes are generally classified as specific, *ad valorem*, and for public benefit. The last two classes are necessarily based upon an assessment of actual values, whereas in the first class the value is either fixed by statute, or the tax is intended to subserve some supposed public interest or policy. 'Of the different taxes which the State may impose,' says Mr. Justice Field in Hagar v. Reclamation Dist., 111 U. S. 709, 'there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally specific taxes on things, or persons, or occupations.

and its creditors;⁹¹ and again, that this mode of taxation is not open to the objection that the corporation is taxed for property not its own, since the tax is in fact on the bondholder, and not on the corporation.⁹²

The Ohio statute entitled "An act to enable railroad companies to redeem their bonded debts," which authorizes the issue of certificates of preferred stock, does not authorize the issue of certificates of indebtedness; and hence holders of certificates issued by virtue of the provisions of the act are stockholders in, and not creditors of, the corporation; and are not required to list their shares for taxation in that State.⁹³ Bonds issued by a railway company are not "public stocks and securities" within the meaning of the tax acts of Massachusetts,⁹⁴ but are "debts due;" and money invested in them is "money at interest," for which the owner is entitled to the rights secured by those statutes, even though the company was created by and is, to some extent, subject to the control of the United States government.⁹⁵

In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded. Though differing from the ordinary forms pursued in courts of justice, the general system of procedure for the levy and collection of taxes, if not arbitrary, oppressive and unjust, has always been regarded as due process of law. *Kelly v. Pittsburgh*, 104 U. S. 78; *Davidson v. New Orleans*, 96 U. S. 97."

⁹¹ *Lehigh Valley R. Co. v. Commonwealth* (1889), 129 Pa. St. 429; s. c. 7 Ry. & Corp. L. J. 13, where the court said: "It is difficult to see how the imposition of a tax upon money at interest can be supposed to impair the obligations of the contract which se-

cures payment; the tax is upon the debt. The debtor is simply the collector of the tax, and his remedy for collection is to defalk it from the interest; this, and no more, is the legal effect of the statute. The whole question turns upon the validity of the tax; for, if the tax is valid, the creditor certainly cannot complain of the remedy provided for its collection. The contract is in no sense impaired; the debtor is held for the payment of the whole debt, but upon the exact footing of his contract. He is simply permitted to defalk such part thereof as he has under legal obligation paid, laid out, and expended on behalf of the creditor."

⁹² *Bell's Gap R. Co. v. Commonwealth* (1890), 134 U. S. 232.

⁹³ *Miller v. Ratterman* (Ohio, 1890), 47 Ohio St. 141, construing Ohio Act of April 16, 1870, and Ohio Rev. St. § 2746.

⁹⁴ Mass. Pub. Stats. ch. 11, § 4; Stat. of 1820, ch. 64, § 1.

⁹⁵ *Hale v. Hampshire County Commissioners* (1886), 37 Mass. 111.

§ 507. **Tax on shares in the hands of stockholders.**—A tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself or its stock and may be laid irrespective of any taxation of the corporation where no contract relations forbid.⁹⁶

§ 508. (a) **Tax on shares held by resident stockholders in foreign corporations.**—Shares, being personal property, follow the owner's domicile and are there taxable, and so the state may tax its citizens upon shares which they own in a foreign corporation.⁹⁷ For purposes of taxation in the United States, an English joint-stock company may be regarded as a corporation.⁹⁸

§ 509. (b) **Tax on shares held by non-resident stockholders in domestic corporations.**—The State creating the corporation may by statute give to the shares of stock the *situs* of the corporation, and so make shares held by non-residents taxable at the domicile of the corporation by compelling the corporation to pay the tax and giving it a lien on the stock for the tax so paid.⁹⁹ Bonds owned by a non-resident, and certificates of stock held by a non-resident in a domestic corporation, deposited in New York, are subject to the tax.¹ A transfer of stock, reserving the income to the donor for life, to take effect at his death, is subject to the tax.²

§ 509a. (b) **Situs of shares for the purpose of taxation.**—The legislature may change the *situs* for purpose of taxation from that of the domicile or place of business of the company.³ The actual place of business is the place where the corporation will be taxed.⁴ The rule is to levy the tax on resident stockholders in the cities, counties or towns of their residence, unless otherwise provided by statute.⁵ Municipal taxes are leviable upon the shares

⁹⁶ Cooley on Taxation, 231.

⁹⁷ *In re Greenleaf* (1900), 184 Ill. 226, 75 Am. St. Rep. 168; *MacKay v. San Francisco* (1896), 113 Cal. 392; *Stanford v. City, etc. Co.* (1900), 131 Cal. 34.

⁹⁸ *Liverpool, etc. Co. v. Oliver*, 10 Wall. (U. S.) 566.

⁹⁹ *Boston, etc. Co. v. Mercantile, etc. Co.* (Md. 1896), 34 Atl. 778; *Mercantile, etc. Co. v. Mellon* (1900), 196 Pa. St. 176, 46 Atl. 308; *State v. Merchants' Bank* (1901), 160 Mo. 640, 61 S. W. 676; *Trav-*

elers, etc. Co. v. Connecticut (1902), 185 U. S. 364.

¹ *In re Whiting* (1896), 150 N. Y. 27, 34 L. R. A. 232, 55 Am. St. Rep. 640.

² *Matter of Cornell* (1902), 170 N. Y. 423, 63 N. E. 435.

³ *Columbus, etc. Ry. v. Wright* (1894), 151 U. S. 470.

⁴ *Detroit, etc. Co. v. Board of Assessors* (1892), 91 Mich. 382; *In re McLean* (1892), 66 Hun. 122, 138 N. Y. 158.

⁵ *Revere v. Boston* (1877), 123 Mass. 375.

of stock only when authorized by law, and when the shares are owned by persons living within the municipal jurisdiction, but not upon shareholders living elsewhere, though within the state.⁶ But under express statutory authority a city may levy tax upon stock in a local bank, although some of the shareholders reside elsewhere.⁷

Accordingly, a State may tax personal property within the State regardless of domicile of the owner, and may tax other property of a resident owner though it is not actually within the State.⁸

§ 510. Double tax, by tax of capital stock, and also of shares.—The tangible property of a corporation and the shares of its stock are distinct kinds of property under different ownership, the former being the property of the corporation, the latter that of the shareholders, and it is held that although the company may pay taxes upon its property, yet a tax upon the shares is not unjust as being double taxation.⁹ But although the State has the power to levy double taxes, they are never to be presumed in the absence of explicit statutory language.¹⁰ In many States shares of stock are exempt by statute from taxation when the corporation itself is taxed.¹¹ Under such a statute it is held that the

⁶ *Craft v. Tuttle* (1866), 27 Ind. 332; *Griffith v. Watson* (1877), 19 Kan. 23.

⁷ *Union Bank v. City of Richmond* (1897), 94 Va. 316.

⁸ *Western Assur. Co. v. Halliday* (Ohio, 1903), 126 Fed. 257 (U. S., C. C. A.).

⁹ *Farrington v. Tennessee*, 95 U. S. 679, 687 (1877); *Belo v. Commissioners* (1880), 82 N. C. 415; *New Orleans v. Canal Co.*, 32 La. Ann. 51; *Emsly v. Memphis*, 6 Baxter, 553; *Pittsburgh R. Co. v. Commonwealth*, 66 Pa. St. 77; *Whitesell v. Northampton County*, 49 Pa. St. 526; *State v. Thomas*, 26 N. J. 181; *Frazer v. Seibern* (1866), 16 Ohio St. 614; *Salem Iron Co. v. Danvers* (1813), 10 Mass. 514; *Tremont Bank v. Boston*, 1 Cush. 142; *Toll Bridge Co. v. Osborn* (1868), 35 Conn. 7; *Cumberland M. R. Co. v. Portland*, 37 Me. 444; *Danville Banking Co. v. Parks*, 88 Ill. 170; *Porter v. Rockford, etc. R. Co.* (1875), 76 Ill.

561; *Conwell v. Connersville*, 15 Ind. 159; *Cook v. Burlington*, 59 Iowa, 251. *Cf. Ryan v. Commissioners* (1883), 30 Kan. 185.

¹⁰ *New Orleans v. Houston*, 119 U. S. 265; *Tennessee v. Whitworth*, 117 U. S. 136; *Republic Life Ins. Co. v. Pollock* (1874), 75 Ill. 292; "Taxation of Corporations," by Prof. E. R. A. Seligman (1890), 5 *Polit. Science Quart.* 636.

¹¹ *N. Y. Rev. Stat.* pt. 1, ch. xiii, tit. 1, § 7; *Gordon v. Baltimore*, 5 Gill. 231; *Ala. Rev. Code of 1884*, sec. 2, § 8; *N. C. Rev. Laws*, ch. 102, § 7; *S. C. Rev. Stat.* ch. xii, sec. 6, § 19; *Fla. Dig.* ch. 138, § 10; *W. Va. Code*, ch. 29, § 51; *Tex. Rev. Stat.* art. 4682; *Ohio Rev. Stat.* § 2746; *Mich. Laws of 1885*, ch. 153, § 2; *Wis. Rev. Stat.* sec. 1038, § 9; *Neb. Comp. Stat.* ch. 77, art. 1, § 7; *Idaho Rev. Stat.* §§ 1401, 1440; *Mont. Act of March 14, 1899*, § 9; *Utah Comp. Laws*, § 2009. In *Cheshire County Telephone Co. v. State* (1886), 63 N. H.

shareholder is not taxable even when the company does not fulfil its duty in returning its property for taxation.¹² In some States the constitutions forbid double taxation.¹³ Other States tax the shares but collect it from the company.¹⁴ In others again, in the assessment of the shares to the holders, a proportionate part of the value of the corporate property otherwise taxed, is deducted from each share.¹⁵ The State having jurisdiction of the person may tax him upon shares held in a foreign corporation whose property is beyond its jurisdiction,¹⁶ the *situs* of the shares being the residence of the owner when the contrary is not declared by statute.¹⁷ But the taxing powers of a State are limited to persons and property within and subject to its jurisdiction, and therefore do not extend to intangible personal property owned by a non-resident of the State. Thus, where one residing in the State of New York owns stock representing the debt of the city of Baltimore, it is not taxable by the State of Maryland.¹⁸ In the absence of constitutional restriction, the state may tax the shares of stock in the hands of the shareholder and also tax the corporation upon its corporate capital, property, and franchises, which in effect is double taxation¹⁹ Not only has it the power to tax doubly but trebly, in the absence of constitutional restraint, however unjust such taxation may be; as, where in Connecticut there was quadruple taxation, namely upon the real estate of the corporation, its capital stock, the shares of stock, and upon the capital stock and shares of its principal shareholder, a railroad corpora-

167, the principle was declared that no legal assessment of taxes can be made against corporate property at the same time that the stock of the corporation is taxed as to its owners.

¹² *Gillespie v. Gaston* (1887), 67 Tex. 599.

¹³ Cal. Const. art. xii, § 1, construed in *Burke v. Badlam* (1881), 57 Cal. 594.

¹⁴ Ga. Code, § 815; 13 Del. Laws, ch. 393; N. C. Machinery Act of March 11, 1899, § 16; Kan. Comp. Laws, ch. 107, § 6.

¹⁵ Tenn. Laws of 1868-69, ch. 9, § 9; La. Acts of 1888, No. 85, § 27; N. H. Gen. Stat. chs. 53-55; Vt. Rev. Laws, tit. 9, ch. 22, § 288;

Me. Rev. Stat., tit. 1, sec. 14, § 3; Minn. Gen. Stat., ch. xi; Neb. Act of 1879, § 32. And as to banks in New York, N. Y. Laws of 1866, ch. 761; of 1882, ch. 409, § 312.

¹⁶ *Ogden v. City of St. Joseph* (1887), 90 Mo. 522.

¹⁷ *Ogden v. City of St. Joseph* (1887), 90 Mo. 522.

¹⁸ *City of Baltimore v. Hussey* (1887), 67 Md. 112.

¹⁹ *U. S. Electric, etc. Co. v. State* (1894), 79 Md. 63; *Durham Co. v. Blackwell, etc. Co.* (1895), 116 N. C. 441; *Memphis v. Home Ins. Co.* (1892), 91 Tenn. 558; 19 S. W. 1042; *Stroh v. City of Detroit* (Mich. 1902), 90 N. W. 1029.

tion.²⁰ Although double taxation is not illegal, courts aim to construe statutes in a way to avoid that result, unless the statute clearly requires it.²¹ A national bank is taxable on stock it holds in another corporation, although it also is taxed thereon.²²

§ 511. **Exemption from tax.**—In the absence of constitutional restriction a State may exempt the corporate property from taxation. The exemption is a contract which the State can not afterwards repeal, unless it has reserved the right to alter or repeal it,^{22a} but an exemption by way of amendment without any consideration may be repealed.^{22b} A tax upon personal property of a corporation is not a prior lien unless the statute expressly makes it so.^{22c} In case of exemption of either corporate property, franchises or capital stock, the federal courts and some others hold that shares of stock are by implication exempt, though the contrary is held in others and by the United States Supreme Court.^{22d} Exemption of shares of stock impliedly exempts the capital stock and corporate property and franchises.^{22e} Exemption of a railroad corporation from state taxation, except when its dividends exceed eight per cent., is a contract with the State, and protected under the federal constitution.^{22f} Such exemptions cannot be impaired by subsequent legislation, but do not extend to subsequently built branch lines of railroad.^{22g} Exemption of the capital stock from taxation, means from tax on property and is not exemption from a license fee. That is an occupation tax.^{22h} In Illinois the exemp-

²⁰ Toll Bridge Co. v. Osborn (1868), 35 Conn. 7.

²¹ Com. v. Fall Brook, etc. Co. (1893), 156 Pa. St. 488, 26 Atl. 1071; Lewiston, etc. Co. v. Asotin County (1901), 24 Wash. 371, 64 Pac. 544.

²² Pacific Nat. Bank, etc. v. Pierce County (1899), 20 Wash. 675, 56 Pac. 936; Republic, etc. Co. v. Pollak (1874), 75 Ill. 292.

^{22a} Mobile & Ohio R. R. v. Tenn. (1894), 153 U. S. 486; Wilmington, etc. R. R. v. Alsbrook (1892), 146 U. S. 279; Pearsall v. Great Northern Ry. (1896), 161 U. S. 646.

^{22b} Manistee, etc. Co. v. Commissioner of Railroads (1898), 118 Mich. 349.

^{22c} State of Minnesota v. Central T. Co. (1899), 94 Fed. 244.

^{22d} New Orleans v. Citizens' Bank (1897), 167 U. S. 371; State v. Bank of Commerce (1895), 95 Tenn. 221; Richardson v. City of St. Albans (1899), 72 Vt. 1, 47 Atl. 100; State v. Heppenheimer (1896), 58 N. J. L. 633, 32 L. R. A. 643; Penrose v. Chaffraix, 106 La. 250, 30 South. 718.

^{22e} State v. Bank of Commerce (1892), 53 Fed. 735; Bank of Commerce v. Tennessee (1896), 161 U. S. 134.

^{22f} Mobile & Ohio R. R. v. Tennessee (1894), 153 U. S. 486.

^{22g} Wilmington, etc. Co. v. Alsbrook (1892), 146 U. S. 279.

^{22h} State v. Citizens' Bank, 52 La. Ann. 1086, 27 So. 709 (1899).

tion does not apply to assessments for improvements.²²ⁱ Exemption from local taxation does not include exemption from taxation by the State.^{22j} An exemption is not to be lightly presumed from the language of a charter or statute.^{22k} The power of taxation can be surrendered only by clear and unambiguous language which will not bear any reasonable construction consistent with a reservation of that power.^{22l} Thus an exemption from taxation of the capital stock and "all the property and effects" of a railroad company, will not be extended by implication to outlying and detached lands which the corporation had no power to acquire when the exemption was granted, but which were acquired under a power granted by a subsequent charter.^{22m} And, generally, exemptions of railway property extend only to property necessary to the construction, maintenance and operation of the road, and not to outlying lands acquired for resale or for the timber thereon.²²ⁿ

So an act which provides that "the taxes laid upon *manufacturing corporations*, by and under the revenue laws of this Commonwealth, be, and they are hereby, abolished as to such corporations," does not exempt from taxation the capital stock of a rolling-mill company "invested in dwellings which are reasonably necessary for the use of its employees," as those dwellings, although convenient and advantageous, have no necessary connection with the business for which the company was incorporated.^{22o} The same statute has been held to operate simply on capital employed in

²²ⁱ Illinois Central, etc. Co. v. Mattoon (1892), 141 Ill. 32.

^{22j} Wilkesbarre, etc. Bank v. Wilkesbarre (1892), 148 Pa. St. 601, 24 Atl. 111.

^{22k} *Vide supra*, § 63.

^{22l} Southwestern R. Co. v. Wright, 116 U. S. 231, and cases cited *supra*, § 63. Under Laws Wis. 1874, ch. 126, the State granted lands to a railroad company, to aid in the construction of its road, on condition that it should construct twenty miles each year until the road should be completed, patents for a certain amount of the land to be issued to the company on completion of each twenty miles. Laws Wis. 1879, ch. 22, provided that of all of such lands theretofore patented, or which might thereafter be patented, under the

law of 1874, should be exempted from taxation of all kinds for ten years. And it was held that the period of exemption did not begin to run as to each batch of land thereafter patented from the date of the patent, and continue ten years therefrom, but began to run at once as to all the land granted, and ceased entirely, as to all, at the end of ten years. State v. Harshaw (Wis. 1890), 45 N. W. Rep. 308.

^{22m} Ford v. Delta & Pine Land Co. (1890), 43 Fed. Rep. 181.

²²ⁿ McCulloch v. Stone (Miss. 1890), 8 So. Rep. 236.

^{22o} Commonwealth v. Mahoning Rolling-Mill Co. (1889), 129 Pa. St. 360, construing Pa. Act of June 30, 1885, § 20.

manufacturing, and not to exempt the capital of a manufacturing company invested in bonds, mortgages, city lots and store goods.²³ Likewise, a statute exempting from taxation the real property of a board of trade, so long as occupied by it for the purposes contemplated in its organization, does not exempt such portion of a building owned by the corporation and partly used for board of trade purposes, as is rented to third persons, although the rent is applied to the purposes of the board.²⁴ *An exemption of railways* has been held not to apply to a corporation which, under authority to construct and operate railways and to build and use steamships in foreign and domestic trade, constructed a short line of railway, sold it, and subsequently engaged chiefly in running a steamship line.²⁵ Again, under a general statute empowering towns by vote to exempt from taxation any establishment proposed to be erected and put in operation therein, and the capital used in operating the same, for the manufacture of fabrics of cotton or any other material, and declaring that the vote shall be a contract binding for the term specified therein, it is held that a vote to exempt "any establishment thereafter erected in this town for the manufacture of fabrics," is not sufficient to exempt an establishment not expressly mentioned in the vote.²⁶ But under a constitutional provision exempting from taxation the capital, machinery and other property employed in the manufacture of textile fabrics, property of that kind used in making cordage, rope and twine is not taxable.²⁷ Under the city code of Baltimore, which provides that, whenever the *per centum* of the *receipts of any passenger railway company* now required to be paid to the city for the use of the park fund shall be reduced, the reduction shall apply to the railways hereby authorized to be constructed, it is held that deductions by the city of Baltimore in compromising with street-railway companies in suits for the percentage of their passenger earnings due the city, is not such a reduction as will entitle all companies constructed under the

²³ Appeal of Commonwealth (1889), 129 Pa. St. 346.

²⁴ City of Louisville v. Louisville Board of Trade (Ky. 1890), 14 S. W. Rep. 408.

²⁵ International Navigation Co. v. Commonwealth (1886), 104 Pa. St. 38, construing Pa. Act of May 1, 1868.

²⁶ Franklin Falls Pulp Co. v. Franklin (N. H. 1890), 20 Atlan. Rep. 333, construing N. H. Gen. Laws, ch. 53, § 10.

²⁷ Waterbury v. Atlas Cordage Co. (La. 1890), 7 So. Rep. 783; Hernsheim v. Atlas Steam Cordage Co. (La. 1890), 7 So. Rep. 784, construing La. Const. art. 207.

provisions of that code to the same reduction.²⁸ Among the special privileges sometimes granted to private corporations is exemption or partial exemption from taxation. Where, as in some states, such exemption is prohibited by the State constitution, any grant of exemption to such a corporation, in violation of the prohibition, is void.^{28a} Where the only use of a tract of land belonging to a religious corporation was to take lumber from it for improvement of its other property, it was held not to be solely used for charitable and religious purposes so as to exempt it from taxation.^{28b}

Hospitals and Schools.—Where a hospital is incorporated with exemption of its property from assessment for taxation, and its charter authorizes the corporation to take, hold, lease and dispose of lands, the exemption is limited to such real estate as is necessary for the purposes of the corporation.^{28c}

§ 512. (a) **Exemption as a contract irrevocable.**—Unless there is some constitutional prohibition against it, a state legislature has the power, for a consideration, to grant to a private corporation partial or complete exemption from taxation for a limited period, or forever; and such a grant, without reservation, is a contract irrevocable under the provision of the federal constitution forbidding any State to pass any law impairing the obligation of contracts.²⁹ While the State can not barter away its power and obligation to control the public health and morals, nor its power and duty with respect to the regulation of property dedicated to a public use, it may validly bind itself in the exercise of its power to levy and collect taxes upon corporate property,³⁰ unless there

²⁸ *Baltimore Union Pass. Ry. Co. v. City of Baltimore* (Md. 1890), 18 *Atlan. Rep.* 917, construing *Balt. Rev. City Code* of 1885, p. 323.

^{28a} *Louisville, etc. R. Co. v. Palmer*, 109 U. S. 244; *Jack v. Weinnett*, 115 Ill. 105, 56 *Am. Rep.* 129; *Nashville, etc. Co. v. Wilson County*, 89 *Tenn.* 597; *Hibernian, etc. Soc. v. Kelly*, 28 *Or.* 173, 52 *Am. St. Rep.* 769; *Hogg v. Mackay*, 23 *Or.* 339, 37 *Am. St. Rep.* 682; *Little Rock, etc. Co. v. Worthen*, 46 *Ark.* 312.

^{28b} *People v. Reilly* (N. Y. 1904), 70 *N. E.* 1107.

^{28c} *Cooper Hospital v. City of Camden* (N. J. Sup. 1904), 57 *Atl.* 269.

²⁹ *Mobile & Ohio R. R. v. Tenn.*, 153 U. S. 486; *Wilmington, etc. Co. v. Alsbrook*, 146 U. S. 279; *Northwestern Univ. v. Ill.*, 99 U. S. 309; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362; *Home of the Friendless v. Rowse*, 8 *Wall.* (U. S.) 430; *Wilmington, etc. Co. v. Reid*, 13 *Wall.* (U. S.) 264; *Whiting v. Town of West Point*, 88 *Va.* 905, 29 *Am. St. Rep.* 750; *Milwaukee, etc. Co. v. City of Mil.*, 95 *Wis.* 39, 36 *L. R. A.* 45.

³⁰ A law pledging the faith of

be some provision in the constitution of the State forbidding the exemption of corporations from taxation; in which case the legislature can not create a corporation capable of acquiring and holding property free from liability to taxation.³¹ The principle that the legislature may make an irrevocable contract of exemption from taxation does not derive its origin from the Dartmouth College case. It found its earliest assertion in the case of *New Jersey v. Wilson*,³² decided in 1812; and the succeeding cases which affirm the rule, profess to rest upon that case.³³ But a statutory provision for ascertaining a tax in a certain manner is not a contract that no statute shall thereafter provide a different method.³⁴ And exemptions from taxation which are mere boun-

the State not to impose any further tax or burden upon banks, if they would perform certain conditions, has been held to be an exemption of more than the franchise, and to protect the stockholders from any tax upon them as individuals by reason of their stock. *Gordon v. Appeal Tax Court*, 3 How. 133. A statute of Illinois, passed in 1855, declares that all the property of the Northwestern University shall be forever free from taxation. A statute of 1872 limited this exemption to land and other property in immediate use by the institution; and it was held, that the latter statute impaired the obligation of the contract of exemption found in the statute of 1855. *Northwestern University v. People*, 99 U. S. 309. In *St. Anna's Asylum v. New Orleans*, 105 U. S. 362, it was held that section 118 of the Louisiana constitution of 1868, requiring uniformity of taxation throughout the State, and the act in pursuance thereof, under which a tax was imposed on the property of an asylum contrary to the express terms of its charter, are in violation of § 10, art. 1 of the federal constitution.

³¹ *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244. A provision in a new State constitution, that no property should be exempt

from taxation except public school property, applies as well to the renewal of an exemption as to its original creation. *Trask v. Maguire*, 18 Wall. 391.

³² *New Jersey v. Wilson*, 7 Cranch, 164. The contract in this case was an act of New Jersey declaring that certain lands should be purchased for the Indians and that such lands should not be thereafter subject to taxation.

³³ *Gordon v. Appeal Tax Court*, 3 How. 133; *Piqua Bank v. Knoop*, 16 How. 369; *Ohio Life Ins. & Trust Co. v. De Bolt*, 16 How. 416; *Dodge v. Woolsey*, 18 How. 331; *Mechanics' & Traders' Bank v. Thomas*, 18 How. 384; *McGee v. Mathis*, 4 Wall. 143; *Jefferson Branch Bank v. Skelly* (1861), 1 Black, 436, 446, where it is held, however, that the abandonment of the power to tax "ought not to be presumed in a case in which the deliberate purpose of a State to abandon it does not appear;" *Home of the Friendless v. Rouse*, 8 Wall. 438; *Wilmington R. Co. v. Reid*, 13 Wall. 264; *Farrington v. Tennessee*, 95 U. S. 679; *Murray v. Charleston*, 96 U. S. 432.

³⁴ *Bailey v. Maguire*, 22 Wall. 215. The legislature of Ohio, in 1834, incorporated the Ohio Life Insurance & Trust Company, a section in its charter providing that

ties, or privileges granted without consideration, may be withdrawn or repealed by the legislature.³⁵ When a State, in chartering a charitable corporation, exempts its property from taxation, a subsequent law, taxing its property, is void.³⁶ The contract is as fully protected against impairment by adoption of constitutional provision, as against impairment by statute.³⁷ Where the corporation is exempt from taxation, no tax can be imposed upon shares of its stock in the hands of stockholders, for this is in effect a tax upon the corporation.³⁸ The exemption of capital stock of a corporation from taxation is construed to exempt its shares in the hands of shareholders.³⁹ An exemption from taxation, constituting a contract on the part of the State not to tax, is held never to arise by implication.⁴⁰ A provision in an act, consolidating two railroad companies, requiring the consolidated company to pay a tax of one-quarter per cent. on its stock, does not prevent the legislature from imposing further and different taxes.⁴¹ Where the charter of a street railway company provided that the company should pay license of \$30 for each car run by the company, and the legislature afterward increased the license to \$50, it was held that there was no contract to require only

no higher taxes should be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions in the State. In 1851 an act was passed providing that the stock of this company, among others, should be taxed the same as other property. This act was held constitutional, notwithstanding the fact that, under the Ohio Banking Law of 1845, certain banks are subject only to a tax therein specified, less than this. *Ohio Life Ins. & Trust Co. v. De Bolt*, 16 How. 416.

³⁵ *Rector, etc. v. Philadelphia*, 24 How. 301; *Tucker v. Ferguson*, 22 Wall. 527; *West Wisconsin Ry. Co. v. Board of Supervisors of Trempealeau County*, 93 U. S. 595.

³⁶ *Humphrey v. Pegues*, 16 Wall. 244; *Duluth, etc. Co. v. St. Louis County*, 179 U. S. 302; *Dodge v. Woolsey*, 18 How. U. S. 331; *State*

v. Berry, 52 N. J. L. 308, 19 Atl. 665. A charter exempting property of a railroad company, and the shares therein, from taxation, exempts not only the rolling stock and real estate, but also the franchise of the corporation, and a subsequent law taxing the franchise impairs the obligation of a contract, and is void. *Wilmington, etc. Co. v. Reid*, 13 Wall. 264; *Raleigh, etc. Co. v. Reid*, 13 Wall. 269.

³⁷ *Dodge v. Woolsey*, 18 How. U. S. 331.

³⁸ *New Orleans v. Houston*, 119 U. S. 265.

³⁹ *Tenn. v. Whitworth*, 117 U. S. 129.

⁴⁰ *Wilmington, etc. Co. v. Alsbrook*, 146 U. S. 279.

⁴¹ *Lincoln St. Ry. Co. v. Lincoln*, 61 Neb. 109, 77 Fed. 658; *People v. Commrs. etc.*, 82 N. Y. 459; *Delaware R. R. Tax*, 18 Wall. U. S. 206.

§30.⁴² Immunity from taxation is not transferable, unless subsequent owners succeed to the property and franchises of the corporation, under special authority from the State securing to them all the rights and privileges of the corporation.⁴³ *Vide infra* § 517

§ 513. (b) **Exemption to be clearly expressed.**—It is essential that a charter contract, exempting a corporation from taxation, should be expressed in clear and unmistakable terms.⁴⁴ Where two railroad corporations, subjected to special tax, and immunity from other tax, are so consolidated into a new corporation as to render the special tax impossible, the new corporation is not exempt from general taxation.⁴⁵ A consolidated company acquires no greater immunity from taxation than the constituent companies had, and holds those immunities distributively. The new company succeeds to the privileges enjoyed by the old companies to the extent of the road occupied by each, at the time of consolidation.⁴⁶ When by the act authorizing a new company by consolidation, it is to have the powers, privileges and immunities possessed by each of the constituent corporations, the new corporation will have the privileges, powers and immunities that they had, and those which some had, and some did not have. This construction was put on a consolidating act in regard to exemption from taxation; the former charters, moreover, were subject to alteration and appeal.⁴⁷ Where a new railroad corporation was formed by the union of

⁴² *Railway Co. v. Philadelphia*, 101 U. S. 528; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Wilmington, etc. R. Co. v. Alsbrook*, 146 U. S. 279; *People v. Commrs. etc.*, 82 N. Y. 459; *Lincoln Street Ry. Co. v. Lincoln*, 61 Neb. 109, 77 Fed. 658; *Yazoo R. Co. v. Thomas*, 132 U. S. 174; *New Orleans, etc. Co. v. New Orleans*, 143 U. S. 192; *Central R. Co. v. Wright*, 164 U. S. 327; *Ford v. Land Co.* 164 U. S. 662.

⁴³ *Railway Co. v. Gill*, 156 U. S. 649; *Tenn. v. Whitworth*, 117 U. S. 139; *State Board, etc. v. Morris, etc. Co.*, 49 N. J. L. 193; *Memphis, etc. Ry. Co. v. Ark. Ry. Commrs.*, 112 U. S. 609; *Railway v. Pendleton*, 156 U. S. 677; *Mercantile Bk. v. Tenn.*, 161 U. S. 161.

⁴⁴ *Memphis Gas L. Co. v. Shelby County Taxing Dist.*, 109 U. S.

398; *Providence Bank v. Billings*, 4 Pet. 514; *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559. A clause in the charter of a company imposing a tax and providing that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this State, or any law thereof," excludes the right of the State to revoke it at pleasure. *New Jersey v. Yard* (1881), 95 U. S. 104.

⁴⁵ *Railway Co. v. Maine*, 96 U. S. 499.

⁴⁶ *Tomlinson v. Branch*, 15 Wall. 460; *Central R. R. Co. v. Georgia*, 92 U. S. 665; *State v. Commrs.*, 37 N. J. L. 240; *Tennessee v. Whitworth*, 117 U. S. 139.

⁴⁷ *State v. Maine Central R. R. Co.* 66 Me. 488.

several, chartered by different States, the charter of one of the original corporations contained exemption from taxation, the charter of another company, granted in a different State, contained no exemption. *Held*, that the new company's property in the latter State could be taxed by that State, notwithstanding the charter exemption granted to one of the constituent companies by another State.⁴⁸ Whether the exemption passes from one corporation to another, succeeding to its property and franchises, depends upon the legislative intent. The principle: that a special privilege or exemption claimed under corporate charter, is to be strictly construed against the corporation, and in favor of the public, is applied with special force to a claim of exemption from taxation, and the legislative intention must be expressed in unmistakable terms, or must appear by necessary implication.⁵⁰ Thus a statute imposing a tax of eight per cent. on each yearly dividend of the banks which it incorporates, will be interpreted to mean that they shall pay at least that amount, and not that the rate shall not be increased by future legislation.⁵¹ So, where the purposes for which a corporation may hold property are specified in connection with its exemption from taxation, only property acquired for those purposes is considered within the exemption.⁵² Upon the same principle the privilege of exemption from taxation is construed to be the especial privilege of the corporation to which it is granted; and it does not pass to its successor unless the law granting the exemption expresses a clear intent to that effect.⁵³ If the grant is without restriction, it includes all property held by the corporation, and which may be

⁴⁸ Delaware Ry. Tax, 18 Wall. 206; Chesapeake, etc. v. Virginia, 94 U. S. 718.

⁵⁰ Providence Bk. v. Billings, 4 Pet. 514; Morgan v. Louisiana, 93 U. S. 217; Hoge v. Railway Co. 99 U. S. 348; Annapolis, etc. Co. v. Anne Arundel County Commrs., 102 U. S. 1; Wilmington, etc. Co. v. Alsbrook, 146 U. S. 279; *In re* Swigert, 119 Ill. 83; People v. Chicago, etc., 174 Ill. 171; Philadelphia v. Penn Hospital, 134 Pa. St. 171; State v. Anderson, 90 Wis. 550.

⁵¹ Bank v. Commonwealth, 10 Pa. St. 442, 449; Bank of Pennsylvania v. Commonwealth, 19

Pa. St. 144, 155; Hare's American Constitutional Law, 666.

⁵² Bank of Commerce v. Tennessee, 104 U. S. 493.

⁵³ Morgan v. Louisiana, 93 U. S. 217; Wilson v. Gaines, 103 U. S. 417; Louisville & N. R. Co. v. Palmes, 109 U. S. 214; Memphis R. Co. v. Commissioners, 112 U. S. 609. Thus a grant to one company of the powers, rights and privileges of another, for the purpose of making and using a railroad, carries with it only such rights and privileges as were essential to the operation of the other, and does not include an exemption from taxation, which was one of

essential for carrying on its business.⁵⁵ A general exemption from taxation exempts the franchises as well as its real estate, rolling stock, and other tangible property.⁵⁶ But whether the exemption passes to a corporation succeeding to its property, franchises, and privileges, depends upon the legislative intention, and that must affirmatively appear, that the new corporation was to succeed to the exemption of taxation belonging to the old corporation.

§ 514. (c) **Loss of the exemption by long acquiescence in tax.**—The words “powers, privileges, and franchises and immunities,” do not include the exemption from taxation.⁵⁷ But if it appears from anything else or from circumstances in connection with the statute, that the legislature intended the exemption to pass to the new corporation, such words are sufficient to pass it. The exemption from taxation is a personal privilege, and unless otherwise expressly provided by the legislature, the exemption is not assignable. A corporation purchasing under foreclosure of mortgage of all the property and franchises of another corporation, under authority of the legislature, or at any other judicial sale, does not acquire an exemption from taxation belonging to such other corporation.⁵⁸ An exemption of the property or capital stock of a corporation, does not pass to a corporation purchasing, under foreclosure of a mortgage of the rights, privileges and franchises by the former, executed under a statute, authority to mortgage its charter and works.⁵⁹ Upon sale, under decree to enforce a statutory lien, retained by the State upon the property, stock and franchises of a corporation, exempt from taxation, the property becomes subject to taxation in the hands of the purchaser. The sale transfers no immunity from taxation.⁶⁰

the privileges of that company. *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697; *Annapolis, etc. R. Co. v. Anne Arundel County*, 103 U. S. 1. But see *Humphrey v. Pegues*, 16 Wall. 244; *Tennessee v. Whitworth*, 117 U. S. 139.

⁵⁵ *Mo. Pac. Ry. Co. v. Carland*, 5 Mont. 146.

⁵⁶ *Wilmington, etc. Co. v. Reid*, 13 Wall. (U. S.) 264; *Raleigh, etc. Co. v. Reid*, 13 Wall. (U. S.) 269; *Worth v. Wilmington, etc. Co.*, 89 N. C. 291, 45 Am. Rep. 679.

⁵⁷ *Vicksburg etc. Ry. Co. v. Dennis*, 116 U. S. 665.

⁵⁸ *Memphis, etc. Ry. Co. v. Ark. Ry. Commrs.*, 112 U. S. 609; *St. Louis, etc. Ry. Co. v. Berry*, 113 U. S. 465; *Ches. & Ohio Ry. Co. v. Miller*, 114 U. S. 176; *Picard v. East Tenn. etc. Co.*, 130 U. S. 637; *Mercantile Bank v. Tenn.*, 161 U. S. 161.

⁵⁹ *Memphis, etc. Ry. Co. v. Ark. Ry. Commrs.*, 112 U. S. 609.

⁶⁰ *East Tenn. etc. Co. v. County of Hamblen*, 102 U. S. 273; *Wilson*

When, however, the intention to confer an immunity from taxation is distinctly expressed, or is a necessary inference from the words employed, the court will not resort to a strained interpretation for the sake of withholding a privilege which may have been the chief inducement to the acceptance of the grant or charter.⁶¹ The exemption may be lost by acquiescence in the imposition of taxes.⁶² "If an exemption from taxation can be lost in any case by long acquiescence under the imposition of taxes, it would seem that an acquiescence of sixty years, and, indeed, a much shorter period would be amply sufficient for this purpose, by raising a conclusive presumption of a surrender of the privilege. An easement may be lost by non-user in 20 years, and even in a less time if affected by positive acts of invasion. A franchise may be lost in the same way, non-user being one of the common grounds assigned as a cause of forfeiture. . . . Exemption from taxation being a special privilege, granted by the government to an individual, either in gross, or as appurtenant to his freehold, is a franchise. Non-user for sixty, or even thirty years, may well be regarded as presumptive proof of its abandonment or surrender."⁶³ The exemption may be lost by acceptance of amendment of the charter.⁶⁴

§ 515. (d) **Exemption from municipal taxes.**—Railway companies are frequently exempted from the payment of "county taxes," but there has been some litigation as to what taxes are properly included in the exemptions.⁶⁵ A tax levied to pay the

v. Gaines, 103 U. S. 417. *Vide infra*, § 517.

⁶¹ *Farrington v. Tennessee*, 95 U. S. 679; *Commonwealth v. Pennsylvania Canal Co.*, 66 Pa. 46, 65; *New York & E. R. Co. v. Sabin*, 26 Pa. St. 242.

⁶² In *Given v. Wright*, 117 U. S. 648, it was held that the long acquiescence of the land owners under the imposition of taxes, raised a presumption that the exemption which once existed had been surrendered, as it was a franchise or privilege which could be lost by acquiescence. The court expressed the opinion that if the question in *New Jersey v. Wilson*, 7 Cranch, 164, were a new one, it might be differently decided.

⁶³ *Given v. Wright*, 117 U. S. 648. Per Mr. Justice Bradley.

⁶⁴ *Memphis City Bk. v. Tenn.*, 161 U. S. 186; *Macon, etc. Ry. Co. v. Goldsmith*, 62 Ga. 463.

⁶⁵ Mo. Act 1868, p. 151, repealing former acts relating to taxes for maintenance of public roads, provides in section 7 that county courts may borrow money on the credit of the county for the purpose of opening and repairing public roads, and levy a tax to meet the interest thereon. Section 27 provides that, for the purpose of opening, repairing and improving roads, and in order to raise the necessary funds, the county courts shall levy a special tax, which shall be known as the "road tax,"

bonds of the county, given by it for stock in a railroad company, is a county tax; and this, although the bonds can only be paid out of the tax levied for that special purpose.⁶⁶ But in the case above cited, a local tax levied only on property within the limits of a particular township to pay township funding bonds, has been held not to be a county tax within the meaning of the defendant's charter.⁶⁷

§ 516. (e) **Exemption of charitable or other institutions.**—Ben-
evolent, religious, scientific and educational associations and corporations are frequently exempted by the constitutions and general laws from payment of taxes.⁶⁸ These provisions generally contain a proviso that the property must be used exclusively for the purposes designated, in order to receive the benefit of exemption from taxation. If used for other purposes, it then becomes liable to taxation, although the proceeds are to be applied for the promotion of the institution.⁶⁹ The English tax upon

this levy to be made as the county revenue is levied; and that all property subject to pay a county tax shall be made subject to pay a road tax. Subsequent acts classify all taxes into State, county, township, school and municipal taxes. It is held that the road tax is a county tax, within the meaning of the special charter of the defendant company (Mo. Act 1847, p. 157, § 4), exempting it from payment of county taxes. *State v. Hannibal & St. J. R. Co.* (Mo. 1890), 13 S. W. Rep. 406. Mo. Acts 1847, p. 157, gives to defendant company all the privileges and immunities which were granted to the Louisiana & Columbia Railroad Company by Acts 1836-37, p. 252, which provide, *inter alia*, that "the stock of said company shall be exempt from all State and county taxes." Act Sept. 20, 1852, granting lands to defendant, and accepted by it, provides that it shall "pay into the treasury of the State a sum of money equal to the amount of State tax on other real and personal property of like value for that year, upon the actual value

of the road-bed and other property of the company." But it is held that this act in no way affects defendant's charter exemption from taxation for county purposes. *State v. Hannibal & St. J. R. Co.* (Mo. 1890), 13 S. W. Rep. 505; 138 Mo. 332, 36 L. R. A. 457.

⁶⁶ *State v. Hannibal & St. J. R. Co.* (Mo. 1890), 13 S. W. Rep. 505.

⁶⁷ *State v. Hannibal & St. J. R. Co.* (Mo. 1890), 13 S. W. Rep. 505.

⁶⁸ *E. g.* Mo. Const. art. x, § 21.

⁶⁹ *Trustees v. Exeter*, 58 N. H. 306; *Old South Society v. Boston*, 127 Mass. 378; *Orr v. Baker*, 4 Ind. 86; *Trustees v. Ellis*, 38 Ind. 3; *Connecticut, etc. Assn. v. East Lyme*, 54 Conn. 152; *State v. Board*, 34 La. Ann. 668; *State v. Board*, 34 La. Ann. 574; *Blackman v. Houston*, 39 La. Ann. 592; *Washburne College v. Shawnee County*, 8 Kan. 344; *Cincinnati College v. State*, 19 Ohio, 110; *St. Mary's College v. Crawl*, 10 Kan. 442; *Morris v. Lone Star Chapter*, 68 Tex. 698; *First M. E. Church v. Chicago*, 26 Ill. 482; *Wyman v. City of St. Louis*, 17 Mo. 335. *Of. Massachusetts Gen. Hospital v. Sommerville*, 101 Mass. 319; *Mon-*

associations and companies exempts, *inter alia*, property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science or the fine arts; property belonging to, or constituting the capital of a body corporate or unincorporate established for any trade or business; property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding; and property on which legacy or succession duty has been paid.⁷⁰ There is a statute in New York exempting every "incorporated company" not liable to taxation on its capital stock.⁷¹ The difficulty under these statutes is in determining whether particular associations or corporations are within the exemption; whether, looking at the facts of the case, the objects of the body claiming exemption and the manner in which those objects have been carried out, it is entitled to immunity.⁷² Masonic lodges are generally

ticello Seminary v. People, 106 Ill. 398; "Non-Taxable Institutions," by D. H. Pingrey (1890), 31 Cent. L. J. 25. Accordingly, statutes exempting houses for religious worship, owned by religious societies, do not include a parsonage erected upon the church grounds, or the lands on which it is situated, although the parsonage is occupied by the pastor of the church, rent free. Third Congregational Soc. v. Springfield, 147 Mass. 396; State v. Lyon, 32 N. J. 360; State v. Krallman, 38 N. J. 117; State v. Axtell, 41 N. J. 117; Church v. Board, 12 Minn. 395; Hennepin v. Grace, 27 Minn. 503; Church v. Providence, 12 R. I. 19; Gerke v. Purcell, 25 Ohio St. 229; Trustees v. Ellis, 38 Ind. 3. Cf. "Taxation of Christian Associations," by B. V. Abbott, 12 Chicago L. N. 15; "Taxation of Churches, Colleges & Charitable Institutions," by Lyman H. Atwater, 46 Princeton Rev. 340.

⁷⁰ Customs and Inland Rev. Act of 1855.

⁷¹ N. Y. Rev. Stat. 388, § 4, sub. 7.

⁷² Commissioners of Inland Rev. v. Forrest, 59 L. T. Rep. N. S. 282; s. c. 29 Q. B. Div. 621. In this case, the institution in question was that of civil engineers. It was incorporated in 1828 by Royal Charter for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer. The secretary's affidavit stated that the whole property of the institution was, and always had been, exclusively devoted to the furtherance of these objects. The Divisional Court, consisting of Lord Coleridge and Mr. Justice Field, held that this institution did not come within the exemption. On appeal, Lord Justice Lopes agreed with the Divisional Court, but Lord Esher and Lord Justice Fry being of the contrary opinion the judgment of that court was reversed. "The question in this case," said the Master of the Rolls, "is not one as to the construction of the section, but whether, looking at the facts as

considered as institutions of purely public charity, and so long as their property is used exclusively for the purposes set forth in the law, it is exempt from taxation. But when their real estate is rented for other purposes, then it becomes subject to taxation.⁷³ In New York it has been held that a religious corporation is not exempt under the exemption of incorporated companies not liable to taxation on their capital stock.⁷⁴ An association for the encouragement of debating, reading, and literature, and the enjoyment of rational and social amusements, and the playing of ten-pins, chess, and checkers, and other lawful games of the kind, but which excludes all drinks, and has no connection with business purposes, nor politics, nor has in view any pecuniary profit, was held to be exempt from the payment of an incorporation tax under the Missouri exception of associations incorporated for benevolent, religious, scientific, fraternal, beneficial, and educational purposes, and of any association which tends to the public advantage in relation to education, literature, history, or skill among the learned professions.⁷⁵ Exemptions from taxation

to this institution, its main object is the promotion of science, and whether that object has been carried out." "Science," said Lord Justice Fry, "is not the less science because it is also able, in the language of one of its most distinguished professors, 'to be a rich storehouse for the relief of man's estate.' Finally, it is not necessary that it should be science for all; there is nothing to prevent the exception applying to the promotion of science among a particular class." The House of Lords have agreed with a majority of the Court of Appeal, but the Lord Chancellor dissented. From this case it follows that all institutions which have for their main object the promotion of science will be exempt from this tax, although the members may find the institution an assistance to them in the way of their profession.

⁷³ *College v. Mercer Co.*, 101 Pa. St. 530; *Institute v. Delaware Co.*, 94 Pa. 163; *Asylum v. School District*, 90 Pa. St. 21; *Donahugh's*

Appeal, 86 Pa. St. 306; *Swift v. Easton*, 73 Pa. St. 362; *Gerke v. Purcell*, 25 Ohio St. 229; *Humphries v. Little Sisters*, 29 Ohio St. 201; *Association v. Pelton*, 36 Ohio St. 258; *Morris v. Lone Star Chapter*, 68 Tex. 698; *State v. Board*, 34 La. Ann. 574; *Massenbury v. Grand Lodge*, 81 Ga. 212; *Mayor v. Lodge*, 53 Ga. 93; "Non-Taxable Institutions," by D. A. Pingrey (1890), 31 Cent. L. J. 25; "Exemption of Friendly and Other Societies," 16 Sol. J. & Rep. 3. Whether fraternities are charities to the extent of having their property free from taxation, see *Hirschl's Law of Fraternities & Societies* (1883), 8-12.

⁷⁴ *Catlin v. Trustees of Trinity College*, 113 N. Y. 133, construing N. Y. Rev. Stat. 388, § 4, sub. 7.

⁷⁵ *State v. Lesueur* (1890), 145 Mo. 322, 13 S. W. Rep. 237, construing Mo. Rev. Stat. of 1889, §§ 2821, 2825, and holding that so much of Mo. Rev. Stat. of 1889, § 2834, as undertakes to allow corporations to be created for other

granted to the property of colleges, universities, and to municipal corporations, is extended only to property employed in a public use.^{76a}

§ 517. (f) **The exemption is not transferable.**—A sale in foreclosure of the corporate property and franchises does not carry with it an exemption from taxation. The exemption is not a franchise but a personal privilege and not transferable.⁷⁶ Consolidation dissolves the old corporation and destroys its exemption from taxation.⁷⁷ If on consolidation an exemption from taxation passes to the new company, it passes as a repealable gratuity.⁷⁸ Shareholders are exempt from tax on their shares where the charter requires the corporation to pay an annual tax "on each share of tax in lieu of all other taxes."⁷⁹ But the corporation is nevertheless liable to tax also upon its capital stock.⁸⁰ An exemption has no extra territorial effect. A non-resident shareholder taxable in the state of his residence, cannot avail himself of an exemption in the State where the corporation has its domicile.⁸¹ Immunity from taxation is a privilege personal to the corporation to which it is granted,⁸² and does not pass to its successor unless the charter or statute express a clear intent to that effect.⁸³ Thus, immunity from taxation does not pass merely by a

than benevolent, religious, scientific or educational purposes, without payment of the tax, violates Mo. Const. art. x, § 21, requiring that corporations other than those mentioned shall provide for a capital stock, and pay a tax.

^{75a} *Styles v. Village of Newport* (Vt. 1904), 56 Atl. 662.

⁷⁶ *Baltimore, etc. Ry. v. Ocean City* (1899), 89 Md. 89; *Chesapeake & Ohio Ry. Co. v. Miller* (1885), 114 U. S. 176.

⁷⁷ *Keokuk, etc. R. R. v. Missouri* (1894), 152 U. S. 301; *Yazoo, etc. Co. v. Adams* (1901), 180 U. S. 1, 187 U. S. 258.

⁷⁸ *Wilmington, etc. Co. v. Alsbrook* (1892), 110 N. C. 137.

⁷⁹ *Bank of Commerce v. Tennessee* (1896), 161 U. S. 134 and 163 U. S. 416.

⁸⁰ *Shelby County v. Union, etc. Bank* (1896), 161 U. S. 149.

⁸¹ *Railroad Co. v. Pennsylvania* (1872), 15 Wall. 300.

⁸² *Vide supra*, § 63. A consolidation of two railroad companies under the Missouri consolidation act of March 2, 1869, operates as the creation of a new corporation, wholly distinct from the constituent corporations out of which it is formed, which new corporation derives its powers and franchises from the consolidation act; and since Mo. Const. 1865, art. xi, § 16, prohibiting legislative exemption from taxation, was adopted before the passage of the act, the consolidated corporation does not acquire the immunity from taxation granted in 1857 to one of its constituent corporations. *Keokuk & W. R. Co. v. County Court* (1890), 41 Fed. Rep. 305, following *State v. Railroad Co.* (1889), 99 Mo. 80.

⁸³ *Vide supra*, § 63. *Wilson v. Gaines*, 103 U. S. 417; *Morgan v. Louisiana*, 93 U. S. 217; *Lord v. Litchfield*, 36 Conn. 116; *New*

conveyance of the "property and franchises" of a railroad company under a judicial sale, in a suit brought by the State to enforce a statutory lien, although the company's property was held by it exempt from taxation.⁸⁴ So, lands embraced in a railroad land grant and exempt from ordinary taxation while held by the corporation for whose benefit the grant was made, become subject to taxation, upon the entire beneficial interest of the corporation being conveyed by a trust deed, to secure a specified charge upon the lands exceeding their value, the *cestuis que trustent* being empowered, at their mere election, to take and appropriate the entire property in satisfaction of their claims upon it, so as to leave nothing to revert to the grantor.⁸⁵ But where an act of consolidation grants to the new company the rights and privileges of the original corporations, it is held to confer upon the former an exemption from taxation enjoyed by the latter.⁸⁶ At a time when the Tennessee constitution of 1834 was in force, an insurance and trust company was incorporated, a provision in its charter declaring that it should "pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes." The name of the company was afterwards changed, and authority conferred on it to do a banking instead of an insurance business, all the "present rights, privileges, and immunities, excepting only that of insurance" appertaining to the old company being transferred to the new; and it was held that the exemption passed to the new company, and that an increase of capital stock beyond the amount originally fixed was exempt in like manner as the original amount.⁸⁷ But only to the extent that property of the original company was exempt from taxation, does the reorganized company enjoy the immunity.⁸⁸ And even though the consolidating act may provide that the new company shall have all the privileges and immunities

Haven v. Sheffield, 30 Conn. 160; State v. Whitworth, 8 Lea, 594; People v. Bearsley, 52 Barb. 205; St. Louis, etc. Ry. Co. v. Berry, 113 U. S. 465; Louisville, etc. R. Co. v. Palmes, 109 U. S. 244. Cf. Memphis, etc. R. Co. v. Railroad Commissioners, 112 U. S. 609.

⁸⁴ Pickard v. East Tennessee, V. & G. R. Co. (1889), 130 U. S. 637; s. c. 6 Ry. & Corp. L. J. 131, reversing s. c. 24 Fed. Rep. 614.

⁸⁵ *In re* St. Paul S. & T. F. R. Co. (Minn. 1890), 7 Ry. & Corp. L. J. 235.

⁸⁶ Tennessee v. Whitworth, 11 U. S. 145, and cases cited in opinion of Chief Justice Waite.

⁸⁷ State v. Butler, 13 Lea, 400.

⁸⁸ Chesapeake, etc. R. Co. v. Virginia, 94 U. S. 718; Minot v. Philadelphia, W. & B. R. Co. (1873), 18 Wall. 206; Charleston v. Branch, 15 Wall. 470; Branch v.

of the original companies, yet if their exemption from taxation was qualified by their duties and dependent upon them, and they incapacitated themselves from the performance of those duties by their consolidation, the new company thus formed can not claim the benefit of the exemption.⁸⁹

§ 518. (g) **Repeal and forfeiture of exemption.**—Exemptions from taxation in the nature of bounties, having been granted without consideration, may be repealed by the legislature.⁹⁰ Where, however, one legislature has entered, as it were, into a contract exempting certain property or persons from taxation in consideration of certain advantages accruing to the public, no subsequent legislature can repeal the statute or charter making the exemption.⁹¹ Neither can the judicial department of the State forfeit an exemption inherent in property owned by a corporation, upon grounds which are sufficient cause of forfeiture of its franchises.

§ 519. (h) **Exemption is a property right.**—The immunity of the property from taxation is not a corporate franchise, but is a property right, and although the corporation be dissolved by forfeiture of its charter, the exemption continues for the benefit of those who may have a just claim upon its assets.⁹² But it has been

Charleston, 92 U. S. 677; *State v. Philadelphia, etc. R. Co.*, 45 Md. 361; *Southwestern R. Co. v. Georgia*, 92 U. S. 676; *Central R. etc. Co. v. Georgia*, 92 U. S. 665; *Philadelphia, etc. R. Co. v. Maryland*, 10 How. 376; *Tomlinson v. Branch*, 15 Wall. 460.

⁸⁹ *Beach on Railways*, § 555, citing *Railroad Co. v. Maine*, 96 U. S. 499, affirming *s. c. sub nom. State v. Maine Central R. Co.*, 66 Me. 488.

⁹⁰ *Rector, etc. v. Philadelphia*, 24 How. 301; *Tucker v. Ferguson*, 22 Wall. 527; *West Wisconsin Ry. Co. v. Supervisors*, 93 U. S. 595, cited *supra*, § 34; "Perpetual Exemption of Corporations from Taxation," by A. Martin, a monographic note, 7 Am. L. Reg. N. S. 390; "Authority of the State to Exempt from Taxation," by Isaac F. Redfield, 10 Am. L. Reg. N. S. 493; "Power of the Legislature to Grant Perpetual Immunity from

Taxation," monographic note, 72 Am. Dec. 682, 684.

⁹¹ *New Jersey v. Wilson* (1812), 7 Cranch, 164, and cases cited *supra*, § 512, as resting on that case; "Power of the Legislature to make a Contract whereby the Taxes of the State are put beyond the Control of all future Legislatures," address by J. W. Judd, 1 Tenn. Bar Assn. 73.

⁹² *International & G. N. Ry. Co. v. State* (1890), 75 Tex. 356; *s. c.* 7 Ry. & Corp. L. J. 305, where the court said: "The exemption is not given to a company named alone, but to its assigns and successors as well; thus evidencing an intention that the exemption from taxation should adhere to the property exempted, and follow it into the hands of whomsoever may become its owner. No such state of facts is shown in the following cases, to which counsel for the State refers, and on which it

held that the exemption from taxation of property employed in manufactures declared by the constitution of Louisiana, is forfeited during the continuance of a lease made for the purpose of closing the factory to limit production and prevent competition.⁹³ It is not lost, however, by temporary interruptions in operation; but continues as long as the factory exists and the property is set apart for the purpose required.⁹⁴ And under a constitutional and statutory provision reserving the right to alter, suspend, or repeal corporate charters, an act is valid which requires a street-

relies: *Morgan v. Louisiana*, 93 U. S. 217; *Railroad Co. v. Georgia*, 98 U. S. 359; *Railway Co. v. Berry*, 113 U. S. 465; *Railway Co. v. Miller*, 114 U. S. 176; *Pickard v. Railway Co.*, 130 U. S. 637. These cases hold that exemption from taxation given to a named corporation will not inure to the benefit of another that may buy the property, or to a corporation formed from the consolidation of the one holding the exemption and another, in the absence of something showing an intention to fix the exemption on the property into the hands of whomsoever it may go. These decisions, however, are fatal to the proposition that exemption from taxation in such cases is, within the meaning of the law, a corporate franchise, though it may be a franchise owned by a corporation. The act in question, and its acceptance by the company, constitutes, as declared by the legislature, 'an irrevocable contract and agreement between the State and the said company, its successors and assigns,' based on consideration deemed by the legislature sufficient; and under it, the right to the exemption would continue, in favor of persons or corporations who may become the owners of the property to which the exemption applies, even though the appellant corporation should be dissolved by a decree declaring the forfeiture of its charter. The existence of this right enhances the

value of the property to which it applies. Shareholders and creditors must be presumed to have dealt with the corporation on the faith of the contract which gave the exemption, and it can not be taken away by legislation, by dissolution of the corporation or in any other manner not sufficient to pass title to any other property from one person to another. The right to exemption from taxation is secured by the same guaranty which secured titles to those owning lands granted under the act and though the corporation may be dissolved, will continue to exist in favor of persons owning the property to which the immunity applies. Lawful dissolution of a corporation will destroy all its corporate franchises or privileges vested by the act of incorporation; but if it holds rights, privileges and franchises having the nature of property, secured by contract based on valuable consideration, these will survive the dissolution of the corporation, for the benefit of those who may have right to or just claim upon its assets."

⁹³ *Waterbury v. Atlas Cordage Co.* (La. 1890), 7 So. Rep. 783; *Hernsheim v. Atlas Steam Cordage Co.*, 7 So. Rep. 784, construing La. Const. art. 207.

⁹⁴ *Waterbury v. Atlas Cordage Co.* (La. 1890), 7 So. Rep. 783; *Hernsheim v. Atlas Steam Cordage Co.* (La. 1890), 7 So. Rep. 784.

railroad company to pay annually into the city treasury one per cent. of its gross earnings in lieu of a fee of a certain amount for each car used by it, as required by its charter. The subsequent act must be deemed an amendment of the charter in that respect.⁹⁵

§ 520. (i) **Exemption of patent rights.**—Where the capital stock is invested in patent rights, it cannot be taxed by the State.⁹⁶ Although its capital is invested in patent rights and therefore cannot be taxed by the State, it may nevertheless tax the corporate franchises.^{96a} Patent rights are protected by act of Congress against taxation by any State, and thus corporate capital stock, invested in patents is not taxable by the State.^{96b}

§ 521. **Taxation of corporate business earnings.**—The fourth method of taxing corporations is based upon either the business transacted, or their gross earnings, or net earnings, or dividends. The tax upon the business transacted is imposed in several States upon savings banks, their deposits being reckoned as showing the amount of business;⁹⁷ on insurance companies in Connecticut and Massachusetts, the amount insured being taken as representing the amount of business in the former two States; on foreign life insurance companies in New York, the criterion being the amount of their premiums;⁹⁸ on telephone companies in Connecticut, according to the number of telephones and mileage of wire;⁹⁹ and in Georgia upon the number of telephone stations.¹ In Mississippi the number of subscribers is the criterion of the business done by telephone companies.² Sleeping car companies are taxed upon the number and mileage of their cars in Georgia and Iowa;³ railway companies in Delaware, according to the

⁹⁵ City of New York v. Twenty-Third St. Ry. Co., 118 N. Y. 389.

⁹⁶ People, etc. v. Knight (1901), 67 N. Y. App. Div. 333; Holt v. Indiana Manuf. Co. (1897), 80 Fed. 1.

^{96a} Marsden Co. v. State, etc., 61 N. J. L. 461; Commonwealth v. Philadelphia (1893), 157 Pa. St. 527, 27 Atl. 378.

^{96b} Commonwealth v. Westinghouse, etc. Co. (1892), 151 Pa. St. 265.

⁹⁷ Me. Rev. Stat. tit. 1, §§ 64-67; N. H. Gen. Laws, ch. 65, § 8; Vt.

Rev. Laws, § 3595; Mass. Pub. Stat. ch. 13, §§ 20-24; R. I. Pub. Stat. ch. 27, § 3; Conn. Gen. Stat. § 3918; Md. Pub. Gen. Laws, art. 81, § 86.

⁹⁸ N. Y. Laws of 1887, ch. 699. *Vide infra*, § 522.

⁹⁹ E. g. Conn. Laws of 1889, ch. 178.

¹ Ga. Laws of 1888, ch. 123, § 7, subd. 2.

² Miss. Laws of 1880, p. 17.

³ Ga. Laws of 1888, ch. 123, § 8, subd. 3; Iowa Rev. Stat. §§ 2023-2025. See, also, *infra*, § 533.

number of locomotives and passengers;⁴ in Missouri according to mileage;⁵ express companies in Tennessee according to mileage and number of packages;⁶ mining, smelting and refining companies in Michigan upon tonnage of product.⁷

§ 522. (a) **Taxation of gross receipts—or net earnings.**—The tax upon gross receipts or earnings is imposed by many States on insurance companies, the gross amount of their premiums being regarded as their earnings.⁸ But if a statute taxing the gross

⁴ Del. Code, 874, p. 29.

⁵ Under Rev. Stat. Mo. 1879, §§ 6871, 6873, which make it the duty of the State board of equalization, after assessing a railroad in its entire length, to apportion the aggregate value to each county according to the ratio which the number of miles in each county bears to the whole number of miles in the State, an assessment of a railroad by a county court for State, county, township and school taxes, need not describe the property other than as so many miles of road of a given value; and a petition in a suit to recover these delinquent taxes, which sets forth the number of miles of road owned by the defendant in a designated county, is sufficient, as it need not be more specific than the assessment, although the form for a petition prescribed by § 6889 contemplates a description of the road. *State v. Hannibal & St. J. R. Co.* (1890), 138 Mo. 332, 36 L. R. A. 457, 13 S. W. Rep. 505.

⁶ The legislature of Tennessee, by an act approved March 29, 1887, provided that the following taxes should be paid by express companies: "In lieu of all other taxes, except *ad valorem* tax, if the lines are less than one hundred miles long, per annum, \$1,000. If the lines are over one hundred miles long, per annum, \$3,000." The same authority, by an act approved April 8, 1889, provided that express companies should pay a tax "in lieu of all other taxes except *ad valorem* tax, if the lines

are less than one hundred miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum, \$1,000. If the lines are more than one hundred miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum, \$3,000." By this act, it is made a misdemeanor, punishable by a fine and imprisonment, to conduct the express business without prepayment of the tax.

⁷ Mich. Gen. Stat. §§ 1187, 1226, 1229; "Taxation on Corporations," by Prof. E. R. A. Seligman (1890), 5 *Polit. Science Quart.* 269, 307.

⁸ *E. g.* Ala. Civil Code, §454. The New Act of 1886, ch. 679, entitled "An act to provide for the taxation of fire and marine insurance companies," providing that all insurance companies doing business in the State shall pay a certain tax on the amount of their premiums; that their real estate shall continue to be assessed and taxed for State, city, town, county, village, school, or other local purposes, but their personal property, franchise and business shall be exempt from all assessment or taxation, "except as in this act prescribed," provided that the fire department shall not be affected, and this is held to apply as well to local as to State taxation and assessment. *People v. Coleman* (1890), 121 N. Y. 542.

receipts of foreign insurance companies, provides no method of ascertaining the amount of the gross receipts, they can not be taxed.⁹ The taxation of gross receipts is the method applied to transportation companies in many instances.¹⁰ Telegraph companies are taxed on their gross receipts in many States.¹¹ Electric light companies in Georgia,¹² and gas companies in Massachusetts, are similarly taxed.¹³

Net earnings.—The net earnings of railway companies are taxed in Georgia, Virginia and Delaware;¹⁴ of insurance companies, in Alabama, Illinois, Maine, Missouri, Nevada and Indiana;¹⁵ of savings banks without capital stock, in Pennsylvania;¹⁶ and of gas-works, water-works, electric-light companies, ferries, toll-bridges, public mills and gins, and cotton compresses, in Alabama.¹⁷ And in England the Customs and Inland Revenue Act of 1855 imposes a duty on the property of bodies corporate and unincorporate. This is a duty of five per cent. upon the annual value, income or profits of the real or personal property of these bodies, after deducting all necessary outgoings, costs, charges and expenses properly incurred in the management of their property.¹⁸

§ 523. (b) *Taxation of dividends.*—Stock dividends are not taxable. A tax upon a dividend must be paid, where it is not

⁹ *British Foreign Marine Ins. Co. v. Assessors* (1890), 42 Fed. Rep. 90, construing La. Acts of 1886, ch. 76.

¹⁰ *E. g.* Express companies in Georgia: Ga. Laws of 1887, pp. 22, 24. Sleeping-car companies in Alabama: Ala. Civil Code, § 454. Express companies in Arkansas are taxed on gross receipts, less amount paid for transportation to domestic railways. Ark. Rev. Stat. § 5640. In Maine, where horse railways are taxed on gross receipts according to a graduated scale of one-tenth of one per cent. for every thousand dollars. Me. Rev. Stat. tit. 1, § 47. For other examples, *vide infra*, §§ 525, 533.

¹¹ Ark. Rev. Stat. § 5640; Ala. Civ. Code, § 454; Ga. Laws of 1887, pp. 22, 24, and cases cited *infra*, § 536.

¹² Ga. Laws of 1887, pp. 22, 24.

¹³ Mass. Acts of 1882, ch. 106, § 4; Mass. Acts of 1885, ch. 314.

¹⁴ Ga. Code, § 818. And fifty cents on every hundred dollars in value of property in Virginia. Va. Acts of 1874, p. 353. In Delaware railway and canal companies. Del. Code, p. 41.

¹⁵ Ala. Act of Dec. 11, 1886, § 3; Ill. Rev. Stat. ch. 73, § 30, foreign companies only; Me. Rev. Stat. tit. 1, § 59, foreign companies only; Mo. Rev. Stat. § 6057, foreign companies only; Neb. Comp. Stat. ch. 77, § 38; Ind. Rev. Stat. § 6351, home companies only.

¹⁶ Pa. Act of June 1, 1889, §§ 25, 27.

¹⁷ "Taxation of Corporations," by Prof. E. R. A. Seligman (1890), 5 Polit. Science Quart. 269, 296, citing Ala. Code, § 454, subd. 5.

¹⁸ Customs and Inland Rev. Act of 1855, § 11.

a distribution of the capital stock.¹⁹ Distribution of its treasury stock in another corporation among the shareholders, is a dividend.²⁰ Consolidation of corporations by increase of the capital stock and its issue *pro rata* to shareholders of the old stock, is not a dividend.²¹ That part of the dividends earned in other years is not taxable.²² Profits expended in improvements of the corporate property are not a dividend.²³ A tax upon railroad receipts is not a tax on dividends.²⁴ In Alabama the general corporation tax is upon dividends declared or earned, and not divided, and upon the capital stock.²⁵ Gas and electric light companies are taxed upon their dividends in New Jersey, and turn-pike, street-railways and gas companies in Kentucky.²⁶ In New York and Pennsylvania the tax, while upon the capital stock, depends upon the contingency of the company being a dividend-paying concern.²⁷

§ 524. Tenure of corporate property as affecting liability to tax.—Generally speaking, a company does not have such an ownership in property leased by it as to be liable for taxes imposed thereon.²⁸ Thus the Missouri statute,²⁹ declaring all other property "owned" by any railway company to be subject to taxation, does not apply to Pullman cars operated by a company under a lease.³⁰ A railroad company which has acquired from a city the right to perpetual possession of certain land, and is in the actual occupancy thereof, is liable for the taxes thereon,

¹⁹ Commonwealth v. Western, etc. Co. (1893), 156 Pa. St. 455.

²⁰ Allegheny v. Pittsburg, etc. Ry. Co. (1897), 179 Pa. St. 414.

²¹ Allegheny v. Federal, etc. Ry. (1897), 179 Pa. St. 424.

²² Commonwealth v. Brush, etc. Co. (1891), 145 Pa. St. 147.

²³ State v. Comptroller (1891), 54 N. J. L. 135.

²⁴ Commrs. etc. v. Buckner, 43 Fed. 533 (1891).

²⁵ Ala. Civil Code, § 453.

²⁶ Ky. Rev. Stat. ch. 90, art. 4, §§ 1 and 3.

²⁷ *Vide supra*, § 500. Under the Pennsylvania act of June 30, 1885, which repeals all laws laying taxes upon certain manufacturing corporations, "reserving and excepting unto the Commonwealth the right to collect any taxes ac-

crued under the laws repealed," it has been held that a corporation which was chartered February 18, 1885, and declared dividends during the year amounting to twelve per cent., viz., one of six per cent., May 12th, and another of like amount, August 6th, was subject to taxation upon its capital stock, measured by the amount of its dividends, for the proportion of the tax year from February 18th, when it was incorporated, to June 30th, the date of the repeal. MacKellar, etc. Co. v. Commonwealth (Pa. 1887), 10 Atl. Rep. 780, not reported.

²⁸ State v. St. Louis County (1886), 84 Mo. 234.

²⁹ Mo. Act of March 10, 1871.

³⁰ State v. St. Louis County Court (1886), 13 Mo. App. 53.

although it does not own the title to the fee.³¹ Where in a grant of land to a railway company, there is a provision that a conveyance of the land to the company shall not be executed, until payment be made to the federal government for the cost of surveying, selecting, and conveying it, no taxes can be levied upon it by any State until that payment has been made.³²

§ 525. Taxation of railroads, and interstate railways.—

The State may tax a railroad upon its gross receipts or, if but partly in the State, on a proportion of the gross receipts in such mode as the statute may provide,³³ or may tax the railroad on its business that passes out of the State into another, and back into it again.³⁴ A state tax on interstate railroad earnings, is unconstitutional.³⁵ Although used in interstate traffic, the rolling stock of a foreign railroad corporation may be taxed by the State, proportioned, as the number of miles in the State bears to the whole number of miles of the road.³⁶ The tax upon railways is usually either upon their property or upon their gross receipts. In *Alabama* it is a property tax.³⁷ So, the local taxation in *New York* is upon the railway property.³⁸ In *California* it is upon the franchise and property, the assessment being made by the State and apportioned among the municipalities for taxation by them.³⁹ So, in *Colorado* the tax is upon the property, the realty being taxed where it lies and the other property assessed by the State and notice given to the municipalities of its value.⁴⁰ So again, in *Kansas*, railway property is taxed, the assessment being made by the State and apportioned as in *California*.⁴¹ In *Iowa*, while the assessment is of the property, the gross earnings per mile are taken into consideration in fixing its value. This is done by the

³¹ *City of Muscatine v. Chicago, R. I. & P. Ry. Co.* (Iowa, 1890), 44 N. W. Rep. 909.

³² *Northern Pacific R. Co. v. Traill County* (1886), 115 U. S. 600.

³³ *Maine v. Grand Trunk, etc. Ry.* (1891), 142 U. S. 217.

³⁴ *Lehigh Valley R. R. v. Penn.* (1892), 145 U. S. 192.

³⁵ *Fargo v. Michigan* (1887), 121 U. S. 230.

³⁶ *Board of Assessors v. Pullman, etc. Co.* (1894), 60 Fed. 37.

³⁷ *Ala. Civ. Code*, § 453, subd. 11.

³⁸ "Taxation of the Elevated

Railroads in the City of New York" (New York, 1883), by Roger Foster. Whether a railroad is constructed on or beneath the surface, or on pillars, is immaterial, as regards its liability to taxation, the law regarding as land the structures adapted to support it, or to facilitate and protect its use. *People v. New York Tax Commissioners* (1886), 101 N. Y. 322.

³⁹ *Cal. Const.* art. xiii, § 10.

⁴⁰ *Colo. Gen. Stat.* § 2847.

⁴¹ *Kan. Comp. L.* p. 95.

State and, as above, the municipal corporations tax. Railroads and street railways are in many States taxed upon their gross receipts;⁴² or, in the case of interstate roads, upon such part of the gross receipts as their mileage within the State is to the mileage of the whole line.⁴³ A tax on the undivided profits of a railway "which have accrued, been earned and added to any surplus, contingent, or other fund" during the year, is not to be assessed upon undivided profits used for new construction.⁴⁴ In *Minnesota* the State was declared to be deprived of the right to assess in specie the land of a railway company, by a statute requiring the company to pay into the State treasury on or before a certain day in each year three per cent. of its gross earnings, and declaring that sum to be in lieu of all taxes and assessments.⁴⁵ But a statute which provides that a company shall at all times, and as fixed by statute for similar reports from other railway companies, make a report of its gross earnings for the preceding year, and shall each year pay into the State treasury, at the times fixed by the revised statutes for payment by railway companies of their license fees, a sum equal to five per cent. of its gross earnings for the preceding year, which should be in lieu of all other license fees exacted from the company, merely prescribes a way for ascertaining the amount of the license fee for the year in which it is to be paid, and does not impose a tax on the gross earnings of the road.⁴⁶ The *Maryland* Code provides that "Whenever the road of any railroad company, organized under the laws of this State, shall extend beyond the limits of this State, into any other State or States, and the return of the treasurer or other financial officer of said company, made to the comptroller, shall not show certainly and accurately the precise amount of gross receipts within this State, the comptroller may ascertain said amount by making the gross receipts in this State bear the same proportion to the whole gross receipts of said company

⁴² *E. g.* Me. Rev. Stat. p. 136, and cases cited *infra*. But in Virginia and Delaware the tax is on the net earnings of railways. "Taxation of Railroads & Railroad Securities" (New York, 1880), being a report by C. F. Adams, W. B. Williams and J. H. Oberly, a committee appointed at a convention of State Railroad Commissioners.

⁴³ *Vide infra*, § 533.

⁴⁴ *Marquette H. & O. R. Co. v. United States* (1888), 132 U. S. 722, construing Act Cong. July 14, 1870.

⁴⁵ *Hennepin County v. St. Paul M. Ry. Co.* (1886), 33 Minn. 534, construing Minn. Special Laws of 1857, ch. 1, § 18.

⁴⁶ *State v. Harshaw* (Wis. 1890), 45 N. W. Rep. 308.

as the number of miles of said road in this State does to the whole number of miles in the length of said road.”⁴⁷ This method of ascertaining the gross receipts within the State is declared to be fair and reasonable. It is true the gross receipts on one part of the road may be greater than on another, but perfect equality in the assessment and apportionment of taxes is unattainable, and hence this rule is adopted.⁴⁸ And in a case in Maryland it is held that where a portion of a line of a street railway company, which is required to pay to the city in which it is located a certain percentage of the gross receipts from passenger travel within the city limits, runs beyond the city limits, and the company keeps no separate account of the receipts from this portion of the road, it is proper, in arriving at the amount of its receipts, to take the amount which bears the same proportion to the receipts of the whole line as the number of miles of road beyond the city limits bears to the total number of miles operated.⁴⁹ Under the provision of the *Wisconsin* statute, requiring railway companies annually to make and return a “statement of the gross earnings of their respective roads for the preceding calendar year, of the number of miles operated, and the gross earnings per mile, per annum, during such year,” requiring also the payment of a license fee, and dividing railways into classes, with respect to the gross earnings “per mile per annum of operated road,” it was held immaterial, in determining the class to which a road belongs, that it was operated for only a short while during the year.⁵⁰ And under this act it is also held that spur tracks are to be included in the mileage; that payments for rent of a leased road must not be deducted from the gross earnings, and that the excess of the amount received for the use of cars over the

⁴⁷ Md. Code, II, art. 81, § 153, p. 1264.

⁴⁸ Delaware Railroad Tax Case, 18 Wall. 208, 231, where this rule was approved by the Supreme Court of the United States. It was also approved in State Railroad Tax Cases, 92 U. S. 608-611, and Western Union Telegraph Co.’s Case, 125 U. S. 530-552; and in State v. Railroad Co., 45 Md. 384.

⁴⁹ Baltimore Union Passenger Ry. Co. v. City of Baltimore (Md. 1890), 18 Atlan. Rep. 917; s. c.

7 Ry. & Corp. L. J. 202; holding, also, that the testimony of passengers who had been riding on the line beyond the city limits several times a day, stating from casual observation their estimate of the number of passengers who rode on that portion of the line, is incompetent to show the amount of the receipts.

⁵⁰ State v. McFetridge (1886), 64 Wis. 130, construing Wis. Rev. Stat. §§ 1211 *et seq.*

amount expended for that purpose, is to be accounted as a part of the gross earnings.⁵¹ An assessment of taxes due the State on the gross receipts of a railway company should properly be made in the name of the company alone, even though it has passed into the hands of a receiver appointed by a United States court.⁵² *In New York* there is a statute providing that all taxes, except for schools and roads, assessed upon any railroad in a town which has issued bonds in aid thereof, shall be held as a sinking fund for the redemption of the municipal bonds.⁵³ Where a town has collected from a railroad company money to pay the interest on bonds issued in its aid, and it appears that the bonds were void, the railroad will be entitled to recover the money, and no limitation will bar it of that right.⁵⁴ So far as railway and other carrying companies do business entirely within the limits of a single State, questions arising under its tax laws are to be determined by the construction put upon them by the courts of the State.⁵⁵ Public corporations, which are agencies of the govern-

⁵¹ *State v. McFetridge* (1886), 64 Wis. 130.

⁵² *Philadelphia & Reading R. Co. v. Commonwealth* (1886), 104 Pa. St. 80.

⁵³ N. Y. Laws of 1869, ch. 907, § 4, as amended by N. Y. Laws of 1871, ch. 283. And this statute is held to apply not only to railways constructed under the act of 1869, but to all towns bonded in aid of railroads constructed in or through them. *Clark v. Sheldon* (1887), 106 N. Y. 109, holding also that it is the duty of the county treasurer under this act to set aside and invest all such taxes paid him by the railways, although by doing so he will not have money enough to pay the obligations of the county to the State and to the county officials and other county creditors. *Beach on Railways*, § 227.

⁵⁴ *Aurora v. Chicago, etc. R. Co.*, 19 Ill. App. 360; *Beach on Railways*, § 227.

⁵⁵ *United States Ex. Co. v. Allen* (1889), 39 Fed. Rep. 712. *Mass. Acts of 1884*, ch. 157, § 2, authorizes a railroad to take so much

land in a certain region "as it may deem necessary or suitable for station purposes, and for tracks and yard-room to be used in connection therewith;" section 5 provides that the company, in the exercise of the powers granted, is to be subject to all the duties, liabilities, and restrictions which are provided by the general laws in like cases; and *Mass. Pub. Stat.* ch. 112, § 92, provides that "land without the limits of the route, fixed as aforesaid, and taken or purchased for depot or station purposes, shall not be exempt from taxation." Under these provisions it was held that land taken for station purposes is liable to taxation, although the limits of the road have not been fixed as provided; that it would be assumed that the whole of the taking is for station purposes, as the tracks and yard-room are merely incidental; and that although part of the taking was once within the limits, yet if it has been sold, and the whole of the taking is for station purposes, that part will not be exempt. *Norwich & W. R. Co.*

ment are not taxable, but quasi-public corporations, such as railroads, and other common carriers, and gas, water, telegraph companies, etc., owing services to the public, are, nevertheless, taxable, as are other private corporations in the absence of express exemption by the legislature.^{55a}

§ 526. **Taxation of railway bridge companies.**—Railway bridges are frequently constructed and owned by companies distinct from those owning and operating the railways which cross them. And where this is the case, the bridge is not to be taxed as part of the property of the railway company,⁵⁶ even though the stockholders of both companies are the same, and all of the bridge company stock is pledged to the railway company, which by contract has the permanent use of the bridge.⁵⁷ The liability for taxation is upon the bridge company itself. From this it follows that these structures are subject to local taxation, where, if owned by the railway company, they might be exempt. And the return of the bridge to the railroad assessors of the State as a part of the road's mileage does not exempt it from taxation as an independent structure.⁵⁸ The Iowa Code makes railway bridges across the Mississippi river taxable as real estate.⁵⁹ In a Kentucky case, a city, whose corporate limits extend to low-water mark on the opposite side of the Ohio river, is held to have authority to make an assessment for railroad and school taxes of the district, against a railroad bridge built across the river, where the city granted the land on which the approaches of the bridge are built, reserving as a consideration therefor the right

v. County Commissioners (Mass. 1890), 23 N. E. Rep. 721.

^{55a} *People v. Forest*, 97 N. Y. 97; *Thomson v. U. P. Ry. Co.*, 9 Wall. (U. S.) 579; *Louisville Water Co. v. Hamilton*, 81 Ky. 517; *Commonwealth v. Lowell Gaslight Co.*, 12 Allen (Mass.) 775.

⁵⁶ *St. Louis & S. F. Ry. Co. v. Williams* (1890), 53 Ark. 58, 13 S. W. 796.

⁵⁷ *St. Louis & S. F. Ry. Co. v. Williams*, 53 Ark. 58, 13 S. W. Rep. 796, distinguishing *State v. Depot Co.* (1889), 42 Minn. 142.

⁵⁸ *St. Joseph & G. I. R. Co. v. Devereaux* (1890), 41 Fed. Rep. 14.

⁵⁹ Accordingly, the assessment of a tax against a bridge company,

owning a bridge across the Mississippi river from Iowa to Illinois, by the county auditor (after the assessment lists for that year have passed from the assessor), under Code Iowa, § 841, giving the county auditor power to correct the assessment or tax books, where the assessment is made as on personal property, when the only property owned by the company is part of its bridge and the approach thereto, is void, since Code Iowa, § 808, makes railroad bridges across the Mississippi river taxable as realty. *Keithsburg Bridge Co. v. McKay* (1890), 42 Fed. Rep. 427.

to tax the bridge itself, and all its appurtenances within the corporate limits of the city.⁶⁰

§ 526a. Taxation of National banks, and moneyed capital.—

By the federal statute it is provided that shares of national bank stock may be taxed as part of the personalty of the owner, and that each State may tax them in its own manner, except that the taxation shall not be at a greater rate than is imposed on other "moneyed capital" owned by citizens of the State, and that the shares of non-residents shall only be taxed in the city wherein the bank is located.⁶¹ "Moneyed capital" may be taxed for years past.⁶² "Moneyed capital" refers to capital which comes in competition with the business of national banks.⁶³ Other "moneyed capital" means that employed in banking or loaning and not in business.⁶⁴ "Moneyed capital" competing with national bank capital need not be at the same rate, for example: capital invested in railroads, mortgages, manufacturing, or mining, for that is not "moneyed capital."⁶⁵ A statute limiting tax to thirty cents per hundred dollars on general stocks, does not include national bank stock.⁶⁶ A considerable number of cases involving the construction of this section of the United States Revised Statutes have gone to the Supreme Court, in which the complaint has been of discrimination against national banks and their shareholders, in favor of owners of other moneyed capital, in the assessment of taxes by the States. In most of them the court has upheld the tax, in others it has pronounced against it. From the nature of the subject, each case has presented its own

⁶⁰ *Henderson Bridge Co. v. City of Henderson* (Ky. 1890), 14 S. W. Rep. 85; *Anderson v. Chicago*, etc. R. R. (1886), 117 Ill. 26.

⁶¹ U. S. Rev. Stat., § 5219. See generally on taxation of national banks: "National Banks & State Taxation" (New York, 1887), by Chauncey P. Williams; "Taxation of National Banks," monographic note by Robert Desty, 13 Fed. Rep. 433; "Power of States to Tax Property of National Banks," monographic note, 96 Am. Dec. 290, 297; "Taxation of National Bank Shares by or under State Authorities," by John W. Daniel, 5 Va. L. J. 535; "Taxation of Shares in National Banks," monographic note by John F. Dillon,

6 Am. L. Reg. N. S. 475; "The Question of Taxation—State and National Banks" (Albany, 1864); "Taxation of National Bank Shares," by Isaac F. Redfield, 5 Am. L. Reg. N. S. 526; 6 Am. L. Reg. 475; 8 Am. L. Reg. 272; "State Taxation of National Corporations," by Russell H. Curtis (1885), 21 Cent. L. J. 428.

⁶² *State v. Simmons* (1893), 70 Miss. 485.

⁶³ *First Nat. Bank v. Chapman* (1899), 173 U. S. 205.

⁶⁴ *Talbott v. Silver Bow Co.* (1891), 139 U. S. 438.

⁶⁵ *Aberdeen Bank v. Chehalis County* (1897), 166 U. S. 440.

⁶⁶ *National Bank v. Mayor, etc.* (1900), 100 Fed. Rep. 24.

special facts, and has differed in these facts from every other case. The Supreme Court has dealt fairly with the tax laws of the States which have been brought under its review. It has held that the shares of national banks may be taxed by the States, although no provision be made in assessing it for deducting from computation the always large amount of United States bonds held by the banks.⁶⁷ It is held both by the Supreme and Circuit Courts that the tax upon the shares of these banks may be assessed upon, and collected from, the banks themselves.⁶⁸ The Supreme Court has held that neither of these circumstances in itself vitiates a tax. Even in cases where it has appeared that the system of taxation enforced by a State has operated unequally, as between shareholders of national banks and owners of other moneyed capital, the court has not looked upon the system with unfriendly scrutiny and illiberal spirit, but in cases where the discrimination was trivial or technical, or such as must always result from the greater or less imperfection of all human legislation, it has declined to interpose in behalf of the taxpayer. Further than thus indicated, there does not appear in the many decisions in which that court has given construction to the prohibition in the federal statute, to be any general principle laid down applicable to all cases that have arisen. The court has decided each case upon its own special facts. The question has continually been, does the tax materially and injuriously discriminate against the shareholders of national banks? And in every case the question has been rather one of fact than of law.⁶⁹ The stock of national banks may be taxed in Delaware,⁷⁰ and in Pennsylvania,⁷¹ and in Kentucky,⁷² in Iowa,⁷³ in Indiana,⁷⁴ in Wash-

⁶⁷ Hughes, J., in *First Nat. Bank v. City of Richmond* (1889), 39 Fed. Rep. 309; s. c. 6 Ry. & Corp. L. J. 331; s. c. (1890), 42 Fed. Rep. 877.

⁶⁸ La. Act of 1888, § 27, providing that shares in banks shall be assessed to the shareholders, but requiring the bank to pay taxes so assessed, and authorizing it to collect them from the shareholders, imposes a tax, not upon the bank, but upon its shares, as permitted by act of congress, providing that a State may determine the manner of taxing the shares of national banks located in the

State. *Whitney Nat. Bank v. Parker* (1890), 41 Fed. Rep. 402, and cases there cited.

⁶⁹ Hughes, J., in *First Nat. Bank v. City of Richmond* (1889), 39 Fed. Rep. 309.

⁷⁰ *First Nat. Bank v. Herbert* (1890), 44 Fed. 158.

⁷¹ *Merchants Bk. v. Pa.* (1897), 167 U. S. 461.

⁷² *First Nat. Bank v. Stone* (1898), 88 Fed. 409.

⁷³ *First Nat. Bank v. Albia* (1892), 52 N. W. 334.

⁷⁴ *First Nat. Bank v. Turner* (1900), 154 Ind. 456.

ington,⁷⁵ in Nevada,⁷⁶ and West Virginia.⁷⁷ Under the New York statute, a non-resident is not personally liable for such tax.⁷⁸ In Kansas, when assessed against the stockholders, the tax may be collected from the bank.⁷⁹ In deciding that shareholders of national banks may be taxed at a rate in fixing which no account has been taken of the non-taxable United States bonds required by law to be held by those banks, the court has not made so absolute a ruling that if it should be shown in any particular case that such an omission operates as a material and injurious discrimination against national bank shareholders, in favor of other moneyed capitalists, the tax thus operating may not be pronounced illegal. The paramount question in every case is, whether or not the tax, or system of taxation, complained of, materially and injuriously discriminates against national bank shareholders, in favor of other moneyed capitalists, in a degree tending to discourage investments in the shares of the national banks. Upon this question of fact, the decisions of the Supreme Court have turned, and all decisions on this subject must turn.⁸⁰ But it is doubtful whether congress, in authorizing the States to tax the shares of national banks, under legislation of their own, prescribing the manner and place of doing so, intended thereby to authorize cities, counties, and towns to exercise the same power. The mere fact that municipal corporations may tax national banks at their pleasure would tend strongly to discourage investments in their shares, and no instance of such a tax has yet gone to the Supreme Court of the United States.⁸¹ Congress requires the tax to be assessed as part of the personal property of the owners of the shares of the bank. It does not authorize the taxation of the stock of a bank *in solido* by the city in which it does business; but only the shares of individual owners residing in the city are taxable, and they must be taxed separately, in order that the owner may deduct from their value the amount of his personal indebtedness, where the State laws or municipal ordinances permit such deductions, and require equality

⁷⁵ Bank v. Hungate (1894), 62 Fed. 548.

⁷⁶ First Nat. Bank v. Kreig (1893), 21 Nev. 404, 32 Pac. 641.

⁷⁷ Bank of Bramwell v. Mercer County (1892), 36 W. Va. 341.

⁷⁸ City of New York v. McLean (1902), 170 N. Y. 374.

⁷⁹ Leoti Nat. Bank v. Fisher (1891), 45 Kan. 726, 76 Pac. 482.

⁸⁰ Hughes, J., in First Nat. Bank v. City of Richmond (1889), 39 Fed. Rep. 309.

⁸¹ Hughes, J., in First Nat. Bank v. City of Richmond (1889), 39 Fed. Rep. 309.

of taxation.⁸² By an act of its legislature in 1890, Virginia attempted to legalize the taxes levied upon the assessments, but the Federal court declared the act void and the assessments made under it.⁸³ Assessment of tax on national bank stock is illegal where it is assessed at two-thirds its actual value, while other personal property is assessed at only half its value.⁸⁴ Where it pays the tax, the bank itself may bring suit in equity to restrain illegal tax upon its shareholders.⁸⁵ Only the real estate of national banks is taxable by the State. Its stock is not taxable under the federal law, but it is liable to pay a tax on its stock voluntarily rendered for taxation.^{85a} A State may levy a tax on the shares of stock held by stockholders of a national bank, and require the bank to pay the tax. The shares of any non-resident owner are taxable in the city or town where the bank is located.^{85b}

⁸² *First National Bank v. City of Richmond* (1889), 39 Fed. Rep. 309, where Hughes, J., continued: "To assess the tax as if against the bank *in solido*, on a value made up of the whole amount of the bank's capital and surplus fund, without deduction for non-taxable securities, constituting nearly half the bank's capital; to require this tax to fall upon the whole body of the bank's shareholders, wherever resident, whether in Richmond or Virginia, and to give no shareholder the privilege of deducting the amount of his debts from that of securities due him in determining the net value of his estate—these features of the tax complained of by the bill under consideration all seem to me to condemn it as contrary alike to national, State and municipal law, and as discriminating against the owners of national bank shares in favor of other moneyed capitalists, in a manner obnoxious to the policy of congress in regard to the national banks, and seriously discouraging to investments in national bank shares. I will sign a decree of perpetual injunction, this ruling being founded on the decisions of the supreme court of the United States in the cases of *Hills v. Bank*, 105

U. S. 319, and *Whitbeck v. Bank*, 127 U. S. 193. In dealing with the subject I have also considered the decisions of the same court in *Van Allen v. Assessors*, 3 Wall. 573; *People v. Commissioners*, 4 Wall. 244; *Bank v. Commissioners*, 9 Wall. 353; *Bank v. New York*, 121 U. S. 138; *Lionberger v. Rouse*, 9 Wall. 475; *Waite v. Dowley*, 94 U. S. 533; *Supervisors v. Stanley*, 105 U. S. 311; *Bank v. Kimball*, 103 U. S. 733; *Pelton v. Bank*, 101 U. S. 143; *Cummings v. Bank*, 101 U. S. 153; *Bank v. Davenport*, 123 U. S. 83, and *People v. Weaver*, 100 U. S. 539. The jurisdiction of this court, as a court of chancery, to entertain this bill, I have thought too plain to need discussion."

⁸³ *National Bank v. City of Richmond* (1890), 42 Fed. Rep. 877, construing Va. Act of Jan. 27, 1890.

⁸⁴ *First Nat. Bank v. Lindsay* (1891), 45 Fed. 619.

⁸⁵ *Whitney Nat. Bank v. Parker* (1890), 41 Fed. 402; *Bank v. Columbia County* (1900), 23 Wash. 441; *Lindsay v. First Nat. Bank* (1895), 156 U. S. 485.

^{85a} *First Nat. Bank v. City of Lampasas* (Tex. Civ. App. 1903), 78 S. W. 42; U. S. Rev. St., § 5219.

^{85b} Rev. St. U. S., § 5210; Com-

§ 526b. Taxation of banks and savings banks. Who are bankers.—One whose business is buying and selling stocks for his customers, and who employs capital in his business, and has a regular place for transacting it, is a “banker,” within the meaning of the federal statute which provides that every person having a place of business where money is advanced or lent on stock, bonds, etc., or where stocks, bonds, etc., are received for discount or for sale, shall be regarded as a banker.⁸⁶ But it has been decided that corporations whose business is to invest their own capital, and not that of others, in bonds secured by mortgage upon real estate, and to negotiate, sell, and guaranty those bonds, are not banks or bankers, within the meaning of this act; and that congress did not intend that a person or corporation selling its own property, not that received from other owners for sale,

monwealth v. Citizens' Nat. Bank (Ky. 1904), 80 S. W. 158.

⁸⁶ *Richmond v. Blake* (1890), 132 U. S. 592; s. c. 7 Ry. & Corp. L. J. 194, construing U. S. Rev. Stat. §§ 3407 and 3408, and saying: “This language embraces the present case. The plaintiff was not a broker who, without employing capital of his own, simply negotiated purchases and sales of stocks for others, receiving only the usual commissions for services of that character. In his business of buying and selling stocks for others, he regularly employed capital, by the use of which interest was earned upon moneys advanced by him for his customers substantially as it would be earned by a bank upon money loaned to its customers. In the parlance of the stock exchange he might be called a ‘stock-broker;’ yet here were all the conditions which under the statute made the case of a banker whose capital employed in his business was liable to a tax of one twenty-fourth of one per centum each month.” Field & Miller, JJ., dissenting. In *Warren v. Shook*, 91 U. S. 704, the question was whether a firm, holding a special license as bankers,

was liable to the tax imposed by U. S. Act of June 30, 1864, § 99. That statute imposed a tax of one-twentieth of one per centum upon the par value of stock and bonds sold by “brokers and bankers doing business as brokers.” It was held that congress intended to impose the duty prescribed by section 99 upon bankers doing business as brokers, although a person, firm or company, having a license as a banker, might be exempted by subdivision 9 of section 79 of the Act of 1864, as amended by the Act of March 3, 1865, from paying the special tax imposed upon brokers. See generally on taxation of banks: *Taxation of State Banks* (Boston, 1865), by W. B. Stevens; “Bank Taxation,” by Samuel T. Spear, 21 Alb. L. J. 427; “Report of the Committee of Bank Officers of the City of New York in relation to Bank Taxation” (New York, 1875); “Reports of the American Bankers' Association upon Bank Taxation” (New York, 1875-1889); “Taxation of Bank Stock” (Albany, 1822), being a speech by S. M. Hopkins; “Taxation of Banks by the State of New York” (New York, 1880), Thomas J. Hallhouse.

should be classed as a banker or bank for the purposes of taxation.⁸⁷

Savings banks.—The reserved profits of a savings bank, whose charter empowers the directors by majority vote to "divide the whole property among the depositors in proportion to their respective interests therein," belong to the depositors, and can not be taxed as the property of the bank.⁸⁸ Under the Michigan tax law, providing that, except as to real estate, all taxation of State banks shall be against the shareholders, a savings bank is not liable to taxation, as a corporation, upon its bank fixtures and surplus of property beyond its nominal capital stock, where its shareholders have been taxed upon their shares.⁸⁹ Under the Massachusetts act, providing for a tax upon savings banks of a percentage to be paid semi-annually, on the average amount of deposits for the six months preceding, the tax is to be computed on the amount deposited, together with the interest and dividend accruing and payable to depositors, and does not include the guaranty fund of the bank, nor the undivided profits.⁹⁰

⁸⁷ *Selden v. Trust Co.*, 94 U. S. 419. The court in this case referred to U. S. Rev. Stat. § 3407, as describing three distinct classes of artificial and natural persons, distinguished by the nature of their business: *First*, those who have a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check, or order; *second*, those having a place of business where money is advanced or lent on stocks, bonds, bullion, bills of exchange, or promissory notes; *third*, those having a place of business where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale. In respect to the third class it was said: "The language of the statute is, 'where' such property is 'received' 'for discount or for sale.' The use of the word 'received' is significant. In no proper sense can it be understood that one receives his own stocks and bonds or bills or notes for discount or for sale. He receives the bonds, bills or notes belonging

to him as evidences of debt, though he may sell them afterwards. Nobody would understand that to be banking business. But when a corporation or natural person receives from another person, for discount, bills of exchange or promissory notes belonging to that other, he is acting as a banker; and when a customer brings bonds, bullion, or stocks for sale, and they are received for the purpose for which they are brought, that is, to be sold, the case is presented which we think was contemplated by the statute. In common understanding, he who receives goods for sale is one who receives them as agent for a principal, who is the owner. He is not one who buys and sells on his own account."

⁸⁸ *Mechanics' Sav. Bank v. Granger* (R. I. 1890), 20 Atl. Rep. 202; "Objections to the Taxation of Savings Banks" (N. Y. 1880), by W. G. Abbott.

⁸⁹ *Lenawee Co. Sav. Bank v. City of Adrian* (1887), 66 Mich. 273.

⁹⁰ *Suffolk Sav. Bank v. Commonwealth* (1889), 151 Mass. 103,

§ 527. **Income tax.**—An income tax though leviable by the State, cannot be levied by the federal government.⁹¹

§ 528. **Inheritance tax.**—A new and fruitful source of revenue to the States is tax upon inheritance.⁹² Upon the New York law there have been the most numerous decisions. The tax there applies to stock in domestic corporations, though held abroad by non-residents, but not to bonds so held by non-residents.⁹³ A non-resident's certificate of stock in foreign corporations, though in New York, are not subject to tax there.⁹⁴ Stock sold in payment for an annuity is not subject to inheritance tax.⁹⁵ Collateral inheritance tax is a lien upon stock owned by a citizen of any other State, in a New York corporation.⁹⁶

§ 529. **Taxation of foreign corporations. The power to tax.**—When a foreign corporation goes into a State and engages in business there, undoubtedly it does so subject to the general policy and the course of legislation in the State.⁹⁷ It can exercise its franchises there only so far as it may be permitted by the local sovereign. The right rests wholly upon the comity of States.⁹⁸ A State may tax foreign corporations on the same basis as domestic corporations, to the extent they do business within its

construing Mass. Pub. Stat., ch. 13, § 20.

⁹¹ Pollock v. Farmers', etc. Co. (1895), 158 U. S. 601, 157 U. S. 429.

⁹² *In re Cox's Estate* (1899), 193 Pa. St. 100, 44 Atl. 256; *Magoun v. Illinois, etc. Bank* (1898), 170 U. S. 283.

⁹³ *In re Bronson* (1896), 150 N. Y. 1, 34 L. R. A. 238, 55 Am. St. Rep. 632; *Matter of Fitch* (1899), 160 N. Y. 87, 54 N. E. 701.

⁹⁴ *In re Whiting* (1896), 150 N. Y. 27; *In re James* (1894), 144 N. Y. 6.

⁹⁵ *Matter of Edgerton* (1898), 35 N. Y. App. Div. 125.

⁹⁶ *Matter of Fitch* (1899), 39 N. Y. App. Div. 609.

⁹⁷ *Runyan v. Coster*, 14 Pet. 122, cited in New York, L. E. & W. R. Co. v. Commonwealth (1889), 129 Pa. St. 463; s. c. 7 Ry. & Corp. L. J. 14. See generally: "Argument for a Change in the Law in

Regard to Taxing Foreign Corporations" (Boston, 1877), by Edward Atkinson; "Taxation of Bonds or Stock of Foreign States, Municipalities and Corporation," 18 Am. L. Reg. (N. S.) 1; "Taxation of Shares of Stock in Foreign Corporations," monographic note by A. J. Marvin, 19 Am. L. Reg. (N. S.) 774.

⁹⁸ *Paul v. Virginia*, 8 Wall. 181. Unless the validity of N. J. Act of April 18, 1884, for taxing corporations, is successfully assailed on constitutional grounds, a tax imposed under color of it, and not stayed in its collection by pending proceedings in *certiorari*, presents a proper case for the granting of an injunction against the corporation doing business until the tax is paid as provided by the act. *Standard Under-Ground Cable Co. v. Attorney-General* (N. J. 1890), 19 Atl. Rep. 733.

limits,⁹⁹ except upon sales by sample.¹ It is not entitled to deduction for its debts.² The payment of license tax, required by the New York statute, of foreign corporations, as condition to doing business in that State, is constitutional.³ A State may exclude foreign corporations, or may impose any condition upon their doing business in the State, unless they are engaged in interstate or foreign commerce, or are employed by the government.⁴ A corporation of one State can not do business in another without the latter's consent, express or implied; and the consent may be accompanied with such conditions as the latter may think proper to impose.⁵ These conditions will be valid and effectual, provided they are not repugnant to the constitution or laws of the United States, inconsistent with the jurisdictional authority of the State, or in conflict with the rule which forbids condemnation without opportunity for defense.⁶ A foreign corporation can not invoke the *provision of the federal constitution* that "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," against legislation requiring it to pay a license for the privilege of keeping an office within the State, corporations not being "citizens" within the meaning of that clause.⁷

Neither can it invoke the *fourteenth amendment*, providing that "no State shall deny to any person within its jurisdiction the equal protection of its laws,"—against legislation requiring the payment of a license for the privilege of keeping an office therein.⁸ And a tax upon the franchise of all corporations doing business within the State, can not be evaded by a foreign corporation on the ground that, as applied to foreign corporations, the tax is an unconstitutional interference with interstate commerce.⁹

⁹⁹ *Horn Silver, etc. Co. v. New York* (1892), 143 U. S. 305.

¹ *People v. Wemple* (1892), 133 N. Y. 323.

² *People v. Barker*, 141 N. Y. 118, 35 N. E. 1073.

³ *New York State v. Roberts* (1898), 171 U. S. 658.

⁴ *Pembina Min. Co. v. Pennsylvania* (1888), 125 U. S. 181.

⁵ *St. Clair v. Cox*, 106 U. S. 350.

⁶ *Insurance Co. v. French*, 18 How. 404; *Doyle v. Insurance Co.*, 94 U. S. 535; *Milling Co. v. Penn-*

sylvania, 125 U. S. 181; *New York L. E. & W. R. Co. v. Commonwealth* (1889), 129 Pa. St. 463; s. c. 7 Ry. & Corp. L. J. 14.

⁷ *Pembina Consolidated Silver Min. & Milling Co. v. Pennsylvania* (1888), 125 U. S. 181.

⁸ *Pembina Consolidated Silver Min. & Milling Co. v. Pennsylvania* (1888), 125 U. S. 181.

⁹ *People v. Wemple* (1890), 117 N. Y. 136, construing N. Y. Laws of 1880, ch. 542, § 3, as amended by Laws of 1881, ch. 361.

A tax upon the gross receipts of foreign companies is void only as to that part of their receipts derived from interstate commerce.¹⁰ The legislature, in levying a tax upon the gross receipts of the business conducted in the State by a foreign corporation, may require it to be paid by the resident agent, and this liability, on default by him, may be enforced by action.¹¹ A company incorporated by an act of congress is not a foreign corporation within the meaning of the Pennsylvania revenue act; and, although it does business in that State, is not, therefore, obliged to take out the license and to pay the tax provided for by the act.¹² The *proviso* in that act, that, if a majority of the stock of a foreign corporation doing business in that State be owned or controlled by a corporation of the State, it shall not be obliged to take out a license and pay a privilege tax, is construed as referring to a majority of the stock actually issued by the foreign corporation, and not to a majority of the total amount of stock which it is by the terms of its charter authorized to issue.¹³ Under the statutes regulating taxation in Michigan,¹⁴ taxes can not be imposed on a foreign railway company, made by the consolidation of lines partly within and partly without the State, as though it derived its powers from the laws of the State.¹⁵ A legacy to a foreign college is subject to the New York collateral inheritance tax, providing that all property which shall pass by will from any person who may die seized or possessed thereof, while a resident of that State, to any body, politic or corporate, other than to the societies, corporations, or institutions now exempted by law from taxation, shall be subject to a tax of five dollars on every hundred.¹⁶

¹⁰ *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411. *Vide infra*, § 536.

¹¹ *State v. Sloss* (1888), 87 Ala. 119.

¹² *Commonwealth v. Texas & Pacific R. Co.*, 98 Pa. St. 90, construing Pa. Act of June 7, 1879.

¹³ *Commonwealth v. Texas & Pacific R. Co.*, 98 Pa. St. 90.

¹⁴ Mich. Tax Law of 1882.

¹⁵ *Chicago & N. Ry. Co. v. Auditor-General* (1886), 53 Mich. 79.

¹⁶ *In re McCoskey's Estate* (1888), 1 N. Y. Supp. 782, construing N. Y. Laws of 1887, ch. 713,

§ 4. In another case, construing the same act, a testator died, leaving legacies to a church, a missionary society incorporated in New York, and a foreign corporation. In a controversy to determine the rights of the three corporations to take the legacies free from the collateral tax, it was held that, since a church is exempt only as to its buildings, lots, and furniture, under 2 N. Y. Rev. Stat., § 4, and both the church and the missionary society fall outside of the exemptions of subd. 6 of "all stock

Securities deposited in the State by a foreign corporation as security for performance of its obligations within the State are subject to taxation under the statute making subject to assessment all property whether owned by persons or corporations.^{16a}

Taxation of a *foreign insurance company* doing business in the State, based upon its premium receipts in the State, is a tax on its franchise as distinguished from tax on its property, and does not affect its right to tax any property of the corporation, having a *situs* in the State for taxation purposes.^{16b}

Taxation of *personal property* of a foreign corporation in the State of its domicile does not preclude its taxation in another State, which has acquired jurisdiction over it for purposes of taxation.^{16c}

Where the statute makes taxable all property real and personal within the State, the *municipal bonds*, deposited by a corporation with the State superintendent of insurance for the protection of domestic policy holders, are taxable.^{16d}

§ 530. (a) "Doing business" by corporation, construed.—Under statutes imposing a tax upon foreign corporations doing business within the State, questions have arisen as to what constitutes doing business.¹⁷ A pipe line company organized in another State, whose line extends across a part of New Jersey, is held to be within the act imposing a license tax upon all corporations doing business in that State.¹⁸ A New York railway company which, to avoid certain engineering difficulties, constructed a small portion of its road through Pennsylvania, is held to be sub-

owned by the state, or by literary or charitable institutions," and subd. 7, of "the personal estate of every incorporated company not made liable to taxation on its capital," they are subject to the tax on their bequests; that the foreign corporation, although exempt from taxation by its charter, is not exempted by the statute, and is subject to its provisions. *Catlin v. St. Paul's Church* (1888), 1 N. Y. Supp. 808.

^{16a} *State v. Fidelity, etc. Co.* (Tex. Civ. App. 1904), 80 S. W. 544.

^{16b} *Western, etc. Co. v. Halliday* (Ohio, 1903), 127 Fed. 830 (U. S., C. C. A.)

^{16c} *State v. Fidelity, etc. Co.* (Tex. Civ. App. 1904), 80 S. W. 544.

^{16d} *Western Assur. Co. v. Halliday* (Ohio, 1903), 126 Fed. 257 (U. S., C. C. A.).

¹⁷ Pa. Act of June 30, 1885, § 4; N. Y. Laws of 1880, ch. 542, § 3; Revision of N. J. Supp., p. 1016, par. 156.

¹⁸ *State v. Berry* (1890), 52 N. J. Law, 393, 19 Atl. Rep. 665, construing Revision of N. J. Supp., p. 1016, par. 156, and holding further that the company is also subject to be taxed for real estate owned by it in the state in the township where it is located, under the general tax law.

ject to taxation there like other companies doing business within the State; and this, although it pays a privilege tax also for the right to construct its road through her territory.¹⁹ It has been held that although an occasional business transaction in New York, maintaining an office where meetings of the directors are held, transfer-books kept, dividends declared and paid, and other business merely incidental to the regular business of a corporation is done, may not bring the corporation within the statute of that State imposing a tax upon corporations organized under the laws of other States and doing business in New York; yet that, when all these things are done, and, besides, its president, secretary and treasurer have their offices there, its silver bullion is all sold there, and the proceeds there received, some of the proceeds lent and some used in the State, such a substantial portion of the business is done as brings the corporation within the act.²⁰

§ 531. (b) Taxation of movable property of foreign corporation.—Movable property of a corporation in use in other States is taxable only in the State of the company's domicile.²¹ Thus, rolling-stock used by a railway company in operating a leased road in another State is taxable not in the latter State but in the State in which the company is domiciled.²² And that portion of the stock of a Pennsylvania corporation represented by

¹⁹ New York, *L. E. & W. R. Co. v. Commonwealth* (1889), 129 Pa. St. 463; s. c. 7 Ry. & Corp. L. J. 14.

²⁰ *People v. Horn Silver Min. Co.* (1887), 105 N. Y. 76, construing N. Y. Laws of 1880, ch. 542, § 3.

²¹ Mich. Sess. Laws 1885, No. 153, § 2, provides that shares in certain foreign corporations owned by inhabitants of that state shall be taxed. "Shares in corporations, the property of which is taxable to itself, shall not be assessed to the shareholders." Section 4 enacts that all corporate property, except when otherwise provided, shall be assessed to the corporation as to a natural person, where its principal office in this state is. By subdivision 2, of section 13, each person is required to set forth, as property liable to taxation, "all shares in for-

eign corporations (except national banks), and their value." Section 2 provides that, for the purpose of taxation, personal property "shall include all goods and chattels within the state; all ships, boats and vessels belonging to inhabitants of this state;" and that the personal property of a non-resident cannot be taxed unless it has an actual *situs* in the state. Plaintiff was taxed on stock in a foreign corporation, whose boats lying in the same state were taxed there. And it was decided that, as the boats were improperly taxed, the stock was taxable against plaintiff. *Graham v. Township of St. Joseph* (1888), 67 Mich. 652.

²² *Baltimore & O. R. Co. v. Allen* (1886), 22 Fed. Rep. 376.

dredges, tug-boat, and scows, not permanently located anywhere, and not registered, but carried from State to State for dredging purposes, is taxable in Pennsylvania, although the boats were built outside the State, and have never been in it.²³

§ 532. (c) **Tax discriminations.**—The property of railroads may be assessed at eighty per cent. of its value, where other property in the State is assessed at sixty per cent.²⁴ Domestic corporations, having their principal office out of the State, may be taxed higher than other corporations having principal office and place of business in the State.²⁵ A distinction is drawn between sums required to be paid by foreign corporations for the privilege of acting in a corporate capacity within the State, and taxes discriminating against them by reason of their foreign origin.²⁶ If there be a condition imposed by the State that corporations shall pay a fixed sum for the privilege before they shall be allowed to do business at all, this is "a condition and not a tax; so, perhaps, if the license were required to be renewed at stated periods."²⁷ And it has been held that when the corporation is required to pay a percentage upon its receipts, and the payment is required to be secured by a bond before the corporation is allowed to do business in the State, this special requirement distinguishes it from ordinary taxation and stamps its character as a license-fee.²⁸ But having paid the license-fee and thus having acquired the privilege of doing business in the State, foreign corporations are entitled to the protection of its laws as fully as citizens thereof.²⁹ They are likewise subject to the same burdens imposed on other corporations. For the payment of a license fee does not exempt a foreign corporation from taxes levied upon all corporations doing business in the Commonwealth.³⁰ If, however, the statutes of a State permit foreign corporations to do

²³ *Commonwealth v. American Dredging Co.* (1888), 122 Pa. St. 386.

²⁴ *Chamberlain v. Walter*, 60 Fed. 788 (1894).

²⁵ *Blue Jacket v. Scherr* (W. Va. 1901), 40 S. E. 514.

²⁶ *San Francisco v. Liverpool, etc. Ins. Co.* (1887), 74 Cal. 113; s. c. 5 Am. St. Rep. 425.

²⁷ *San Francisco v. Liverpool, etc. Ins. Co.* (1887), 74 Cal. 113; s. c. 5 Am. St. Rep. 425.

²⁸ *Trustees Exempt Firemen's Fund v. Roome*, 93 N. Y. 325; s. c. 45 Am. Rep. 217.

²⁹ *San Francisco v. Liverpool, etc. Ins. Co.* (1887), 74 Cal. 113; s. c. 5 Am. St. Rep. 425.

³⁰ *New York, L. E. & W. R. Co. v. Commonwealth* (1889), 129 Pa. St. 463; s. c. 7 Ry. & Corp. L. J. 14. In this case the New York, Lake Erie & Western Railroad Company, a foreign corporation, was permitted by Pa. Acts of Feb.

business therein, but impose on them conditions which could not be imposed on citizens, the permit is held to be valid while the condition is void.³¹ Accordingly, a State can not levy a tax on foreign corporations licensed to do business therein, if its constitution prohibits it from levying a like tax on its own inhabitants.³² But the two classes of cases, one of which is plainly taxation, and the other a sum paid for a permit, may be approximated until it is difficult or impossible to say to which class a given case may belong. These difficulties in discriminating the principles underlying different cases constantly included in different classes, and to which the same rule of decision can not be applied, constitute the perpetual debating grounds of the law, and occasion much of the confusion of the decisions.³³

§ 533. (d) Tax not to interfere with interstate railroads and other transportation companies.—No State may interfere, by taxation or otherwise, with any of the rights or powers of the national government over interstate commerce.³⁴ The State may tax the tangible property in the State, of a corporation engaged in interstate commerce and earnings of its business, in the proportion that its property in the State bears to its whole property. Levying such a tax is not interference with interstate commerce.³⁵ A railroad corporation consolidated with others in other States,

16, 1841, Priv. Laws, 28, and of March 26, 1846, Priv. Laws, 179, to build a portion of its road in the state on payment of ten thousand dollars annually to the state after its completion. And it was held that the Act of June 30, 1885, § 4, taxing the indebtedness of corporations doing business in the state, and compelling them to collect that tax, applied to this company, and did not impair the obligation of the contract between the state and the corporation, as set forth above in the private statutes. The court said in conclusion; "Thus it will be seen that the defendant exercises powers and franchises which it has received directly from the legislation of Pennsylvania; that a part of its property is actually within the limits of this state, and received the protection of our laws;

and there is no good reason why the company should not be held subject to the same regulations as corporations of our own state."

³¹ *San Francisco v. Liverpool, etc. Ins. Co.* (1887), 74 Cal. 113; s. c. 5 Am. St. Rep. 425.

³² *San Francisco v. Liverpool, etc. Ins. Co.* (1887), 74 Cal. 113; s. c. 5 Am. St. Rep. 425. See further as to the power of a state to discriminate against foreign corporations, the exhaustive note to *Ducat v. Chicago*, 95 Am. Dec. 536.

³³ *Temple, J., in San Francisco v. Liverpool, etc. Ins. Co.* (1887), 74 Cal. 113; s. c. 5 Am. St. Rep. 425, 429.

³⁴ *Western Union Tel. Co. v. Taggart* (1896), 163 U. S. 1.

³⁵ *Adams Express Co. v. Ohio State Auditor* (1897), 166 U. S. 185.

and forming an interstate railroad, may be taxed on all the consolidated stock, by a State through which the road runs.³⁶ The license fee imposed by Pennsylvania upon foreign corporations for keeping an office in the State, is unconstitutional as to any such corporation owning a railroad in the State, forming part of an interstate railway system.³⁷ When these companies become instrumentalities of interstate commerce, the federal courts have jurisdiction without regard to the citizenship of the parties.³⁸ And many questions have arisen in respect of attempts on the part of the States to impose taxes which are in effect a regulation of interstate commerce,—thus whether a State may impose a tax upon freight carried into or out of its territory;³⁹ whether it may tax *in transitu* through its jurisdiction, goods transported from one State to another;⁴⁰ whether it may impose a license or privilege tax upon foreign companies doing interstate business;⁴¹

³⁶ *Ashley v. Ryan* (1894), 153 U. S. 436.

³⁷ *Norfolk, etc. R. R. v. Pennsylvania* (1890), 136 U. S. 114.

³⁸ *United States Ex. Co. v. Allen* (1889), 39 Fed. Rep. 712; but holding that under Act of Congress, March 3, 1887, providing that no civil suit shall be brought in either the district or circuit court against any person by any original process in any other district than that whereof he is an inhabitant, except when jurisdiction is founded only on the fact that the action is between citizens of different states, a suit to enjoin collection of a tax on the ground that it violates the federal constitution, must be dismissed as to such defendants as are non-residents of the district in which it is brought.

³⁹ *State Freight Tax Case*, 15 Wall. 232; *Philadelphia, etc. S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Fargo v. Michigan*, 121 U. S. 230; *Telegraph Co. v. Texas*, 105 U. S. 460; *Erie Ry. Co. v. New Jersey*, 2 Vroom, 531.

⁴⁰ *Fargo v. Michigan*, 121 U. S. 230; *Coe v. Errol*, 116 U. S. 517.

⁴¹ *United States Ex. Co. v. Allen*

(1889), 39 Fed. Rep. 712; s. c. 7 Ry. & Corp. L. J. 45, holding that Tenn. Act of March 29, 1887, imposing a license tax upon express companies, is unconstitutional, as invading the exclusive power of congress to regulate interstate commerce, as against an express company engaged in interstate transportation; and that Tenn. Act of April 8, 1889, providing that a tax shall be paid for transporting one or more packages between points within the state, the amount being regulated by the length of the company's lines, is, in effect, a tax on interstate business, and is unconstitutional; citing and quoting *Leloup v. Mobile*, 127 U. S. 645; "Ordinary occupations are taxed in various ways, and in most cases legitimately taxed; but we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and the tax on the occupation of doing a business is surely a tax on the business."

whether it may tax the gross receipts of foreign companies derived in part from interstate traffic;⁴² and each of these questions has been decided in the negative. In short, no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to congress.⁴³ But a distinction is made between taxing the gross receipts of foreign companies, and domestic; and it is held that the State may impose a tax of that kind upon its own railways, even though the receipts be partly derived from interstate traffic.⁴⁴ And the same rule is applied to a franchise tax proportioned to the capital stock and dividends of companies organized under the laws of the State imposing it, even though they be engaged in interstate commerce.⁴⁵ A foreign interstate railroad is liable under statute for franchise tax upon its capital stock, in the proposition that its mileage operated, or leased or owned in the State, bears to the total mileage of its entire system.^{45a} An elevator, controlled by a railroad, at the water's edge, for delivery of its extensive traffic in grain for water transportation, and without any purpose of conducting a storage business, or realizing profit from the operation of the elevator, was held to be necessarily used in the operation of the railroad and entitled to the exemption from

⁴² *Cf.* *Telegraph Co. v. Texas*, 105 U. S. 460.

⁴³ *Leloup v. Port of Mobile*, 127 U. S. 640, 648.

⁴⁴ *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456; *Minot v. Philadelphia, W. & B. R. Co.* (1873), 18 Wall. 206; *State Freight Tax Case*, 15 Wall. 232. *Cf.* *Railroad Co. v. Maryland*, 21 Wall. 456, where a charter stipulation that the railway should pay a part of its earnings as a bonus to the state, was considered different in principle from a tax and not unconstitutional.

⁴⁵ *People v. Wemple* (1889), 117 N. Y. 136; s. c. 7 Ry. & Corp. L. J. 127, where Danforth, J., said: "We are also of opinion that the tax

sought to be enforced is neither in form nor substance obnoxious to any provision of the federal constitution. It interferes in no respect with commerce with foreign nations or among the several states. It is confined to capital employed in this state by an entity existing under its laws, and the manner in which its value shall be assessed and the rate of taxation are matters of legislative discretion. In no aspect does it profess 'to regulate commerce,' nor in any proper sense has the legislation in question that effect."

^{45a} *Jefferson County v. Board of Valuation, etc.* (Ky. 1903), 78 S. W. 443.

taxation provided by statute for property necessarily used in the operation of the railroad.^{45b}

§ 534. (e) **Tax of sleeping and parlor car companies.**—The capital stock of a foreign sleeping car company running its cars through the State, is subject to a tax in such proportion of capital stock as number of miles run in the State, bear to the whole number of miles run by the sleeping cars in all the States.⁴⁶ Sleeping cars operated only within the State, may be taxed as a privilege.⁴⁷ Sleeping and parlor cars, being usually owned by corporations distinct from the railway companies over whose lines they are run, and these corporations having extensive business in many States, the question of their taxation becomes one of the taxing of interstate commerce. Thus, an attempt on the part of the State of Texas to impose a privilege tax upon every sleeping car not owned by the railway companies, run over their lines in the State, has been declared to be a regulation of interstate commerce and unconstitutional.⁴⁸ But where sleeping cars are run wholly within a State, the business may be taxed as a privilege.⁴⁹ For every State, exercising the sovereign power of taxation, may tax all articles of property found within its borders, and all business carried on there, whether owned and done by its own citizens or foreigners. The protection given while within the State, is the consideration received for the contribution by taxation to the exchequer of the power that protects, and the fact that the same property or business may be taxed by the home power of the foreigner,—because of its authority over him and his property

^{45b} *Chicago, etc. v. Douglas County* (Wis. 1904), 90 N. W. 1030.

⁴⁶ *Pullman Car Co. v. Pennsylvania* (1891), 141 U. S. 18.

⁴⁷ *Gibson County v. Pullman, etc. Co.* (1890), 42 Fed. 572.

⁴⁸ *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34.

⁴⁹ *Gibson County v. Pullman Southern Car Co.* (1890), 42 Fed. Rep. 572; s. c. 8 Ry. & Corp. L. J. 263, where the court said: "It must be conceded that the state of Tennessee had the right to tax the two sleeping-cars engaged in business between Nashville and Memphis, wholly within the state, and

that so far as the federal authority is concerned, that power of taxation is plenary. The authorities need not be cited here, since it is not necessary to support the concession made to the plaintiff on that point, and the cases in the supreme court upon the subject of taxation, in its relation to interstate commerce, are far too numerous and well known to require any especial application of them to this case. The very latest of them cites the others, and fully establishes this ruling. *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472."

wherever situated,—does not impose any restriction on the taxing power of the State where the property is situated or the business carried on by him. That fact, however, and other considerations of amity and comity among nations, induce each to withhold, generally, any taxation of articles which are merely in transit through the territory, or business temporary in character; but this exemption is purely voluntary and gracious, except so far as mutual benefits derived from civilized international intercourse may influence it. The only restrictions upon this plenary power of the State, must be found in its constitution and those obligations which it assumed by entering into the federal compact. Where there is no discrimination in the statutes against the property or business of the citizens of other States, and the business of running cars to furnish sleeping and other comfortable accommodations to passengers between points wholly within the State, being domestic, and not interstate commerce, there can not be said to be any violation of the federal constitution in exercising the taxing power over them.⁵⁰ Whether counties may levy a similar tax depends upon whether the statutes of the State authorize them to do so.⁵¹ The authorization must be express and is not

⁵⁰ *Gibson County v. Pullman Southern Car Co.* (1890), 42 Fed. Rep. 572; s. c. 8 Ry. & Corp. L. J. 263.

⁵¹ *Gibson County v. Pullman Southern Car Co.* (1890), 42 Fed. Rep. 572; s. c. 8 Ry. & Corp. L. J. 263, where Hammond, J., criticises our American system of tax legislation as follows: "It is undoubtedly generally true that whenever the state levies a tax, the counties are authorized to levy a similar tax, not exceeding the state tax or that specially fixed by the act, and this is always so, I think, in a general revenue law. There is no nicely adjusted system of revenue laws, and of all subjects of legislation these are the most characterized by want of uniformity and system, and are irregular and slipshod in habit, not to say slovenly; yet it will be seen that there is a habit about it that precludes that which the county assumes in this

case, which is that once in a while a general revenue statute, or a pair or several of them, will be attempted, wherein taxes are authorized for state and county purposes, the county being always specially mentioned, and all other acts are repealed. Then commences the process of patching and tinkering, often unskillfully done and creating more confusion, but the general law remains the foundation of the amendatory legislation until the confusion becomes so great that a new start is made by another general law, to be put through the same process of amendment as before. These amendatory acts do not always couple the county with the state, but sometimes do, and the authority of the county depends upon the original act, as often the state levy does also, notwithstanding the amendatory act. But this is an entirely different habit from that urged here in behalf of the county,

to be lightly implied from loose and ill-considered statutes. For a sleeping car company can hardly be said to be doing business in a county through which its cars are carried in the course of a few minutes.⁵²

that the code confers a general power, and nothing excludes it but special exclusion of the county in the particular act. So far as these revenue laws are concerned, the codes are as transitory as the other tax laws are found to be, and only embody the general foundation act in existence at the time the code happens to be enacted. There is not an intention by a fixed code statute to give the counties general power of taxation to operate somewhat like a constitutional power would act, and only to be withdrawn by special exclusion of the counties, but they must, like the state, take their chances in the constantly changing revenue enactments, and depend upon them for whatever authority they give when construed together. It might be a very useful and beneficial power for the counties to be comparatively exempt from changing authority, and thus have a right to tax, absolutely, whenever the state taxes, unless forbidden, but such is not our law nor our habit of legislation, as any one will see upon careful investigation historically and critically made." See, also, *Carlisle v. Pullman Palace Car Co.* (1886), 8 Colo. 320; s. c. 54 Am. Rep. 553.

⁵² *Gibson County v. Pullman Southern Car Co.* (1890), 42 Fed. Rep. 572, where the court criticizing the Tennessee act said: "The original sleeping car tax was a special and fixed tax, not found in a general revenue law, nor intended as an amendment extending the county tax to that subject of taxation. It was a loose and evidently ill-considered bit of legislation in not making the intention more manifest, but in the

very nature of the case, in view of the business taxed, it probably never occurred to the draughtsman or the legislature that running a sleeping-car across a county a few minutes each day was such a doing of business in that county as would justify its taxation, as a privilege, by counties. It was so incongruous in its relation to county taxation that it did not occur to the legislature that such a construction could be claimed for it. And, really, no business is carried on in Gibson county when the car rolls through it, possibly in sixty minutes or less, and taxable county privileges are those where the business is located and done in the county. To use the illustrations of the counsel for the plaintiff, the peddler, although in one sense transitory, really is, for the time being, located in Gibson county, and sells quite exclusively to its population while there, and so the circus shows almost exclusively to them for the time being; but the sleeping-car, while it may take up a Gibson county man now and then, or sell a ticket at its stations to him who enters the cars, can hardly be said to be doing business in that county in such a sense as would justify taxing it as a privilege by counties, while as to the whole state it might be fair and well enough to tax the privilege, as has been done by these acts. It is in the light of such considerations as these that we arrive at the legislative intention, certainly when we are asked to imply it, in the absence of all express declaration to that end which is contrary to all sense of justice."

§ 535. (f) **Tax upon express companies.**—Interstate express companies may be taxed on the business they do within the state.⁵³ A State cannot, without interference with interstate commerce, require license from the agents of a foreign express company, as a condition to their doing business in the State.⁵⁴ A tax upon its gross receipts, though it pays a part to a railroad, which is again taxed upon it, is not double taxation.⁵⁵ It may be required to pay a license fee whenever it does business.⁵⁶

§ 536. (g) **Tax upon telegraph and telephone companies.**—The State may tax such real and personal property of telegraph companies as is located within its borders.⁵⁷ But neither the State nor a municipality can impose a license tax upon lines used in the transmission of interstate messages.⁵⁸ Neither can the State or municipal governments impose a tax upon the gross receipts of telegraph companies a part of whose earnings is from interstate messages.⁵⁹ A tax on interstate telegrams is uncon-

⁵³ *Pacific Ex. Co. v. Seibert*, 44 Fed. 310 (1890).

⁵⁴ *Crutcher v. Kentucky* (1891), 141 U. S. 47.

⁵⁵ *Commonwealth v. U. S. Ex. Co.* (1893), 157 Pa. St. 579.

⁵⁶ *Osbourne v. State* (1894), 33 Fla. 162, 25 L. R. A. 120, 14 So. 588.

⁵⁷ *City of St. Louis v. Western U. Tel. Co.* (1889), 39 Fed. Rep. 59; s. c. 6 Ry. & Corp. L. J. 293, citing *Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Leloup v. Port of Mobile*, 127 U. S. 640.

⁵⁸ *City of St. Louis v. Western U. Tel. Co.* (1889), 39 Fed. Rep. 59, citing *Almy v. California*, 24 How. 169; *Crandall v. Nevada*, 6 Wall. 35; *State Freight Tax*, 15 Wall. 232; *Car Co. v. Nolan*, 22 Fed. Rep. 276; *Leloup v. Port of Mobile*, 127 U. S. 640, and holding that a tax of five dollars a year upon every pole in the city is a "license tax" and not within the city's charter power to "regulate" telegraph companies. "By virtue of such power," said Thayer, J., "the city authorities may undoubtedly make reasonable regulations touching the location of telegraph poles, their height and

size, and very likely, as was recently held by Judge Wallace in the southern district of New York (*Telegraph Co. v. Mayor*, 38 Fed. Rep. 552), may require them to be carried underground rather than overhead. The section of the ordinance on which this suit is based is not, however, a regulation of that character, nor is it in any proper sense a regulation, within the meaning of the city charter. The object of the enactment was evidently to secure revenue for the municipality; hence the burden imposed is a tax, and it is imposed in such form that it can only be regarded as a privilege or license tax which the city has no authority to impose."

⁵⁹ *Western Union Tel. Co. v. Seay* (1889), 132 U. S. 472. In this case the supreme court, referring to similar cases decided in that court, said but little remained except to show that this case comes within the same principle. "That principle is, in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866, sections 5263 to 5268 of the Revised Statutes of the United States, that

stitutional.⁶⁰ The basis of taxation by a State of the capital stock of a foreign telegraph company engaged in interstate telegraph

they shall not be taxed by the authorities of a state for any messages, or receipts arising from messages from points within the state to points without, or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states, and not subject to legislative control of the states, while the latter class are elements of internal commerce, solely within the limits and jurisdiction of the state, and therefore subject to its taxing power. The following cases in this court have fully developed and established this proposition: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Ratterman v. Telegraph Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640; *Fargo v. Michigan*, 121 U. S. 230; *Steamship Co. v. Pennsylvania*, 122 U. S. 326. . . . In the earliest of these cases, *Telegraph Co. v. Telegraph Co.*, the statute of Florida had attempted to confer upon a corporation of its own state, the *Pensacola Telegraph Company*, an exclusive right of doing the telegraph business within that state. This court held, affirming the judgment of the circuit court of the United States for that district, that this statute was a regulation of commerce among the states forbidden by the constitution of the United States to the state of Florida. In the next case, that of *Telegraph Co. v. Texas*, 105 U. S. 460, in which the state had imposed a tax of one cent for every full-rate message

sent, and one-half cent for every message less than full-rate, on the business of the *Western Union Telegraph Company*, many of the messages were by the officers of the government, on public business, and a large portion of them were to places outside of the state. The company contested the constitutionality of this law, and the case came to this court, where it was said that a telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad does as a carrier of goods. . . . The case of *Telegraph Co. v. Massachusetts*, 125 U. S. 530, was a question growing out of the taxation of the telegraph company by the state of Massachusetts, and the same principle we have already considered was asserted in that case, after a general review of the authorities upon the subject." In *Leloup v. Port of Mobile*, 127 U. S. 640, the question arose upon a conviction, under the statute of Alabama, on an indictment for failing to take out a license tax by the telegraph company, imposed by the city of Mobile on all telegraph companies. Edward Leloup, the agent of the company, was convicted under this proceeding, his conviction affirmed by the supreme court of Alabama, and its judgment brought to this court on writ of error. This court held that, his company having complied with the act of congress of July 24, 1866, the state could not require it to take out a license for the transaction of business in the city, and that a general license tax on the telegraph company affected its entire business, interstate as well as domestic and internal, and was unconstitutional."

⁶⁰ *Western Union T. Co. v. Alabama* (1889), 132 U. S. 472.

business, may be such proportion of the aggregate value of all the stock as the length of the telegraph lines running through the State bears to the whole length of the line in all the States,⁶¹ or, instead,—a tax, directly upon the property. A franchise tax may be levied upon the value of the company's property in the State, measured by miles;⁶² or measured by the proportion that the value of that part of the system in the State bears to the value of the entire system.⁶³ A municipal corporation, by legislative authority may impose a tax upon an interstate telegraph company in the form of an annual license fee for doing business within its municipal limits. Such tax is not a restriction upon the privilege of doing business in the State.⁶⁴ A tax of gross receipts is not wholly invalid, however; but is invalid only in proportion to the extent that the gross receipts are derived from interstate commerce.⁶⁵ Neither is the capital stock of a foreign telephone company, having no officer or agent in the State, and doing business there only in renting instruments to other corporations, which own the wires and operate the telephones, under contracts made outside the State,—taxable in the State, although the instruments remain the property of the company, and it reserves the right in certain events to take possession of and operate them.⁶⁶

⁶¹ *Massachusetts v. Western Union T. Co.* (1890), 141 U. S. 40.

⁶² *Postal Tel. Cable Co. v. Adams* (1895), 155 U. S. 688.

⁶³ *State v. Western Union T. Co.* (1901), 165 Mo. 502, 65 S. W. 775.

⁶⁴ *Postal Tel. Cable Co. v. Charleston* (1894), 153 U. S. 692.

⁶⁵ *Ratterman v. Telegraph Co.*, 127 U. S. 411.

⁶⁶ *Commonwealth v. American Bell Tel. Co.* (1889), 129 Pa. St. 217; s. c. 7 Ry. & Corp. L. J. 99. The court, per Paxon, C. J., in affirming the judgment below, said: "The company is a corporation created by the laws of the state of Massachusetts. Its principal office or place of business is in the city of Boston. It has no office, agent or place of business in this state. All the contracts for rent and royalty of telephones were made in Boston, and the payments therefor were made there. It leases to certain Pennsylvania corporations

the use of the telephone and furnishes the instruments, which remain the property of the company, and are to be paid for, whether used or not. The Pennsylvania corporations carry on the business here. They construct and own the necessary lines of wire, switches, switch-boards and other apparatus necessary to carry on the business. They maintain their own offices, and employ and pay the officers and agents needed to carry it on. The telephone company transacts no business here. It has no part of its capital or property here, except the instruments in question, which, as before observed, are leased to Pennsylvania corporations with a license to use the same. Under such a state of facts it would seem clear that the telephone company could not be taxed as doing business within this state. It was contended, however, on the

There is a decision in New York, however, to the contrary, in which the same company was held liable to taxation on such part of its capital as is employed in that State, on dividends realized thereon and on its gross earnings within the State, upon the ground that the local companies were merely its agents, and that it was, accordingly, "doing business within the State."⁶⁷

part of the commonwealth, that because the company has in its contract with the Pennsylvania corporations reserved a certain power of control over telephones leased to them, and might, upon certain breaches of said contracts, enter upon, take possession of, and operate said telephones, the said company was doing business here, and became liable to the tax. There is a wide distinction, however, between the right to do business and actually doing it. It may be that should said company proceed to enforce their rights under these contracts, and after taking possession of the telephones operate them, it would be doing business here. But that contingency has not arrived. It is to be observed that this was not a tax upon the instruments owned by the company, and operated here under license. The instruments as such are perhaps within the taxing power of the commonwealth, for the reason that they are here, and within her jurisdiction. It matters not to the state to whom they belong. But the state has not laid such a tax. On the contrary, it is a tax upon capital stock; and, as the company transacts no business within the state, no portion of its capital is here in point of fact or by construction of law. Authorities are scarcely needed for so plain a proposition. It is sufficient to refer to *Commonwealth v. Oil Co.*, 101 Pa. St. 119." *Commonwealth v. American Bell Telephone Co.* (1889), 129 Pa. St. 217.

⁶⁷ The American Bell Telephone

Company, of Massachusetts, licenses corporations to do business in New York under the "exchange system," by which a central office is established, and communication carried on through it. The instruments are supplied by the company, and remain its property, and a royalty is paid to it on each, though they are leased by the local corporations to their subscribers. The other apparatus belongs to the local corporations. The latter make the leases, and collect the rents, but each lease stipulates that the company owns the instruments, and the company reserves the right to intervene and collect its portion of the rents. Another form of contract with the local corporations provides for connecting lines on similar terms, reserving to the company the right to use the telephones thereon, and to connect the lines with the lines of the local corporations in order to forward through messages, and provides for a division of the tolls, and that the leases shall express the title of the company to the instruments, and the company may enforce, or require the local corporation to enforce, all its rights against the subscriber. Leases for private lines are made directly with the company, and countersigned by the local corporations, which collect the rents, and transmit them to the company. The company also has lines connecting with the offices of the Western Union Telegraph Company, under an arrangement by which it receives a certain

Missouri.—Express, telegraph, and telephone companies in Missouri, in lieu of all other taxes, are taxable upon their gross receipts for business done in the State, not including receipts for interstate business.⁶⁸ And *insurance companies* are taxable upon gross receipts, and upon all real estate, and other property, in like manner, as individuals. Such gross receipts, except unearned premiums, are returned to the insured upon cancellation of policy.⁶⁹

§ 536a. **Water companies, gas companies, steamships**.—Gas pipes and mains of a corporation laid in the streets, and assessed for taxation by the State, are not taxable by local authorities.⁷⁰ The franchise of a turnpike company is not taxable by a town in which is located a part of the road.⁷¹ Steamships owned by a foreign corporation enrolled outside the State, and whose principal business is to convey passengers and freight from points in the State to the company's ocean vessels going abroad, are subject to taxation within the State.⁷² Under statute the franchise of a waterworks company, and all tangible property, personal and real estate, are taxable as personalty.⁷³

§ 537. **Injunction to restrain enforcement of tax**.—Where a company, under the law, is not liable at all to taxation on its personal property, and the levy is made in such a way as to directly interfere with its business, equity will interfere, by injunction, to restrain the enforcement of the tax.⁷⁴ But a petition to enjoin the levy of taxes on property which is only in part exempts from taxation, must show to what extent the property is ex-

proportion of the income derived from that business. And as stated in the text, it was held that the local corporations are merely the agents of the company, which thus does business within the state, within the intendment of N. Y. Laws of 1881, ch. 361, §§ 3, 6, said act being an amendment of Laws of 1880, ch. 542, and is liable to pay the percentage, at least on its capital employed in the state, and on the dividends realized on that capital, as prescribed by section 3 of the act of 1881, and also the tax of five-tenths per cent. on its gross earnings in the state. *People v. American Bell Tel. Co.* (1889), 50

Hun, 114, Van Brunt, P. J., dissenting.

⁶⁸ *State v. Fleming* (Mo. 1904), 97 N. W. 1063.

⁶⁹ *State v. Fleming* (Mo. 1904), 97 N. W. 1063.

⁷⁰ *People v. Wells* (N. Y. Sup. 1904), 87 N. Y. Supp. 595.

⁷¹ *In re President, etc.* (N. Y. Sup. 1904), 87 N. Y. Sup. 1104.

⁷² *Old Dominion, etc. v. Commonwealth* (Va. 1904), 46 S. E. 783.

⁷³ *Town of Washburn v. Washburn, etc.* (Wis. 1904), 98 N. W. 539.

⁷⁴ *Lenawee Co. Sav. Bank v. City of Adrian* (1887), 66 Mich. 273.

empt.⁷⁵ Upon the general principle that where officers refuse or neglect to defend the corporate interests, the shareholders themselves may act in behalf of the company; they may defend a suit brought to collect an unauthorized tax or may bring suit to enjoin its payment.⁷⁶ The collection of a tax, as excessive, can not be enjoined without tender of the portion admitted to be due.⁷⁷ In Indiana, an injunction is not the proper remedy in case of illegal tax on the capital stock.⁷⁸ For non-payment of taxes a corporation may be enjoined from doing business.⁷⁹ The actual value of capital stock for taxation is not the market value under influence of speculation.⁸⁰ The value of all the assets should be considered in measuring the value of the corporate stock for purpose of taxation.⁸¹ Stock quotations are unstable and unreliable *indicia* of the value of the capital stock.⁸²

§ 537a. **Constitutionality of tax. Discriminating tax.**—A franchise tax upon a corporation, although its business, if carried on by an individual, would not be subject to tax or license, is not an unlawful discrimination within the prohibition of the fourteenth amendment of the United States Constitution.⁸³

⁷⁵ *City of Louisville v. Louisville Board of Trade* (Ky. 1890), 14 S. W. Rep. 408.

⁷⁶ *Greenwood v. Union Freight Co.* (1881), 105 U. S. 13; *Dodge v. Woolsey*, 18 How. 331; *State Bank of Ohio v. Knoop*, 16 How. 369; *Delaware Railroad Tax Cases* (1873), 18 Wall. 206; *Wilmington R. Co. v. Reed* (1871), 13 Wall. 264; *Paine v. Wright*, 6 McLean, 395; *Foote v. Linck*, 5 McLean, 616.

⁷⁷ *Smith v. Rude, etc. Co.* (1892), 131 Ind. 150, 30 N. E. 947.

⁷⁸ *Jones v. Rushville, etc. Co.* (1893), 135 Ind. 595.

⁷⁹ *Re Electro, etc. Co.* (1893), 51 N. J. Eq. 71, 26 Atl. 463.

⁸⁰ *Commonwealth v. Philadelphia, etc. R. R.* (1891), 145 Pa. St. 74, 22 Atl. 235.

⁸¹ *Commonwealth v. N. Y., etc. R. R.* (1898), 188 Pa. St. 169, 41 Atl. 594.

⁸² *Chicago, etc. Co. v. State Board, etc.* (1901), 112 Fed. 607.

⁸³ *Bank of Cal. v. San Francisco* (1904), 142 Cal. 276, 64 L. R. A. 918.

CHAPTER XX.

MEMBERS AND STOCKHOLDERS.

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A.

MEMBERSHIP IN NON-STOCK CORPORATIONS.

§ 538. **The contract of membership.**—No general rule can be laid down as to what constitutes membership in companies or associations not having capital stock. The requisites of membership are usually prescribed in the charters or by-laws of such organizations.¹ The evidence of membership in non-stock corporations is generally a certificate which, when accepted, constitutes the contract of membership. It may, or may not, be transferable.² Signing the constitution and by-laws,³ or payment and acceptance of fees, is evidence of the acceptance of the contract.⁴ By whatever acts, there must be an accepted contract of membership.⁵ There must be compliance with the by-laws or other prescribed mode of acquiring membership.⁶ Misstatements by the applicant,

¹ The constitution of a charitable corporation provided that any person could apply for admission by paying an admittance fee, and, when declared elected, could, after signing the constitution, vote at all meetings and be eligible to office; and that each member should pay a certain amount yearly to the corporation, and it was held that the signing of the constitution was not a prerequisite to membership, and that an action would lie by the corporation against a member who had not signed for his yearly dues. *United Hebrew Benevolent Assn. v. Benshimol*, 130 Mass. 325. Where active members of a certain corporation were exempt from

jury duty, mere ownership of a certificate of membership to which only active members were entitled was held not to be conclusive. *State v. Primm*, 50 Mo. 87.

² *American, etc. Co. v. Chicago, etc. Exchange*, 143 Ill. 210; *Burlington, etc. Dept. v. White*, 41 Neb. 547, 43 Am. St. Rep. 701.

³ *Palmetto Lodge v. Hubbell*, 2 Strob. (S. C.) 457, 49 Am. Dec. 604.

⁴ *Palmetto Lodge v. Hubbell*, 2 Strob. (S. C.) 457, 49 Am. Dec. 604.

⁵ *Ellenberger v. Protective, etc. Ins. Co.*, 89 Pa. St. 464.

⁶ *Matkin v. Supreme Lodge*, 82 Tex. 301, 27 Am. St. Rep. 886; *American, etc. Co. v. Chicago Live*

not amounting to fraud, are not ground for rescission of the contract.⁷ Admission of the original or so-called "charter members," is provided for in the charter or statute authorizing the incorporation. Subsequent members are usually admitted upon their application, and upon the vote of the "charter members."⁸ A non-stock corporation, as one of its incidental powers, may arbitrarily, or otherwise, except as provided by charter, admit to or exclude from membership any person, and may do so beyond power of interference by the courts.⁹ In partnerships every member is the agent of the firm, whereas under incorporation the members or stockholders are neither agents of the corporation, nor agents of the other members.^{9a}

§ 539. Admission to membership.—The power of electing new members, is an incident to corporate existence. It is not necessary that it should be expressly conferred by the charter. Unless otherwise expressly provided in the constitution or by-laws, it is to be exercised by the whole body of incorporators.¹⁰ Ordinarily, in companies having capital stock, however, the power of admitting new members is not vested in the corporation at large; but is committed to the discretion of the commissioners or officers, or agents authorized to receive subscriptions to the stock; since the usual requisite of membership is simply the ability to enter into a legal contract; and the desirability of an applicant for membership is usually a mere question of ability to pay for the shares allotted him.¹¹ But in societies and associations not organized primarily for purposes of gain, an election is generally necessary to the admission of new members.¹² Yet even in the case of corporations having capital stock, the mere ownership of shares may not, under the charter or by-laws, constitute member-

Stock Exchange, 143 Ill. 210, 36 Am. St. Rep. 385.

⁷ Cobb v. Covenant, etc. Assn., 153 Mass. 176, 25 Am. St. Rep. 619; Clapp v. Mass. Ben. Assn., 146 Mass. 419.

⁸ State v. Sibley, 25 Minn. 387.

⁹ Ellerbe v. Faust, 119 Mo. 653; McCoy v. Roman Catholic, etc. Co., 152 Mass. 272; American Live Stock, etc. Co. v. Chicago, etc. Exchange, 143 Ill. 210, 36 Am. St. Rep. 385; Diligent Fire Co. v. Commonwealth, 75 Pa. St. 291.

^{9a} Van Aerns v. Bleiston, 102 N. Y. 360.

¹⁰ Commonwealth v. Gill (1838), 3 Whart. 228, 247.

¹¹ *Vide supra*, § 203; and see 46 L. R. A. 618.

¹² For examples see the statements of facts to the cases cited in section 59, *supra*. As to injunction to restrain admission to membership, see Thompson v. Society of Tammany (1879), 17 Hun, 305.

ship therein;¹³ and when in addition to the ownership of stock, an election to membership is requisite, reference must be had to the spirit and provisions of the charter, to determine by whom the power of admission is to be exercised.¹⁴ If there is no contrary charter or by-law provision, a minor may be admitted to membership in a non-stock corporation.¹⁵ The corporation may act arbitrarily and exclude any person in its discretion, and beyond the power of the courts to interfere.¹⁶ But it may not exclude from membership any person in violation of its charter or enabling act; or in pursuance of by-laws which are contrary to public policy.¹⁷

§ 540. Withdrawal from membership.—The legal questions involved in cases of voluntary withdrawal from corporate bodies relate to its effect upon the member's interest in the property and upon his liability to creditors. Whether the consent of the society or company has been given, is not usually in issue in cases of withdrawal from voluntary associations; but from companies having capital stock, the member or shareholder can not sever his connection so as to relieve himself from liability to the corporation or its creditors by a mere abandonment of his shares, without the consent of the corporation;¹⁸ and under certain cir-

¹³ *State v. Primm*, 50 Mo. 87; *Commonwealth v. Gill* (1838), 3 Whart. 228.

¹⁴ "The power of electing both officers and members is an incident to every corporation. It is not necessary that it should be expressly conferred by the charter. If the power is not expressly lodged in other hands, it is to be exercised by the company at large. *State v. Sibley*, 25 Minn. 387; *Ellerbe v. Faust*, 119 Mo. 653; *Vanck v. Medical Soc., etc.*, 38 N. J. Law, 337. But this power of election may, by the charter, be taken from the body at large, and reposed in a body of directors, or any other select committee. Whether this has been done, either expressly or by necessary implication, is a question which is to be determined by reference to the provisions and spirit of the charter." *Commonwealth v. Gill* (1838), 3 Whart. 228, 247. See.

also, *Diligent Fire Ins. Co. v. Commonwealth* (1874), 75 Pa. St. 291, 296; *Waterman on Corporations*, 160.

¹⁵ *Chicago Mutual Life, etc. Assn. v. Hunt*, 127 Ill. 257; *McCoy v. Roman Catholic, etc. Co.*, 152 Mass. 272; *Morrison v. Wisconsin, etc. Co.*, 59 Wis. 162.

¹⁶ *Blien v. Rand*, 77 Minn. 110; *Ellerbe v. Faust*, 119 Mo. 653; *American, etc. Co. v. Chicago, etc. Exchange*, 143 Ill. 210, 36 Am. St. Rep. 385; *McKane v. Adams*, 123 N. Y. 609, 20 Am. St. Rep. 785.

¹⁷ *Diligent Fire Ins. Co. v. Commonwealth*, 75 Pa. St. 291; *People v. Young Men's Assn.*, 41 Mich. 67; *St. Paul, etc. Co. v. Minn., etc. Co.*, 47 Minn. 154.

¹⁸ *Laurel Run Building Assn. v. Sperring*, 106 Pa. St. 334; *Rockville, etc. Turnpike Co. v. Maxwell*, 2 Cranch, C. C. 451; *Mills v. Stewart*, 41 N. Y. 384; *Selma, etc. R. Co. v. Tipton*, 5 Ala. 787; s. c.

cumstances the consent of the creditors also is requisite.¹⁹ For the company has a lien against his shares for debts due it from him; ²⁰ the other shareholders have a right to require him to meet his proportion of the common liabilities,²¹ and the corporate creditors have an interest in the unpaid balance due upon his subscription.²²

§ 541. **Expulsion from membership.**—Where a non-stock corporation has statutory authority to provide by by-laws for expulsion of members, and appoints a committee to hear and determine the controversy, the accused is entitled to due notice of the time and place of hearing.²³ The by-laws are supreme author-

39 Am. Dec. 344; *United Society v. Eagle Bank*, 7 Conn. 456; *Bishop's Fund v. Eagle Bank*, 7 Conn. 476; *Klein v. Alton, etc. R. Co.*, 13 Ill. 514; *Ryder v. Alton, etc. R. Co.*, 13 Ill. 516; *Muskingum Valley Turnpike Co. v. Ward* (1844), 13 Ohio, 120, 127; s. c. 42 Am. Dec. 191, saying, "for an individual cannot release himself from the obligation of a contract against the consent of the obligee; and the defendant's subscription to the capital stock of the plaintiff is a contract." *Johnson v. Wabash, etc. Plank Road Co.*, 16 Ind. 389; *Hughes v. Antietam Manuf. Co.*, 34 Md. 316. *Cf. Payne v. Bullard*, 23 Miss. 88; s. c. 55 Am. Dec. 74; *Morawetz on Private Corporations*, § 109. "If the contract to pay for and take the stock was a valid contract, made upon a sufficient consideration, then his subscription was not open to revocation. Until the incorporation of the company was perfected, the other subscribers had an interest in its execution and performance of which they could not be deprived by the act of the defendant; and after the articles were filed and recorded in the secretary's office, and the corporation had a legal existence, it acquired a vested interest in the defendant's agreement." *Lake Ontario, etc. R. Co. v. Mason*, 16 N. Y. 451, 463. "But what are the acts of 'rescission' or 'repudiation' (for

both terms are used, though they are far from convertible) which the shareholder must do. He can file his bill, or he can give notice of a motion for rectification of the share-register under section 35, of the Companies Act of 1862; of which two proceedings the second is the simplest, while the first will be preferred where the bare rectification of the register does not meet all the party's requirements, as, for instance, where an injunction against calls is wanted." "What is 'Repudiation' of Shares," 16 Sol. J. & Rep. 365.

¹⁹ *Vide supra*, §§ 244, 245.

²⁰ *Laurel Run Building Assn. v. Sperring*, 106 Pa. St. 334. Under Ind. Rev. Stat., § 3410, providing that "no stockholder shall be entitled to withdraw whose stock is held in pledge for security," it was held that a stockholder who had borrowed from the corporation and pledged his stock as security, could not withdraw until he had redeemed his stock by payment of the loan, or an unconditional tender. *Anderson Building Loan Fund, etc. Assn. v. Thompson*, 88 Ind. 405.

²¹ *Twin Creek & C. Turnpike R. Co. v. Lancaster* (1883), 79 Ky. 552, and other cases cited *supra*, § 240.

²² *Vide supra*, §§ 244, 245.

²³ *People v. East Buffalo, etc. Assn.* (1903), 84 N. E. 795.

ity for trial of charges against a member. Unless they are unreasonable, a court of equity will not interfere.²⁴ A court may pass upon the jurisdiction of the board to expel a member of an incorporated stock exchange.²⁵ A stock exchange may expel a member for non-fulfilment of his contracts made as a member of the exchange, and within it,²⁶ but not for bringing a suit in court, instead of submitting his complaint to arbitration.²⁷ There is no power of expulsion from a corporation having capital stock, unless the power is expressly conferred by charter or statute. Herein is a difference between the powers of a stock and of a non-stock corporation.²⁸ In companies having capital stock, there is no power of expulsion independently of statutory or charter provisions.²⁹ Such a company has no power to pass by-laws respecting the expulsion of members.³⁰ Incorporated stock companies, without express charter authority, have no power to expel a member, and it is even questioned whether such a corporation has the power to fine a member for violation of its laws.³¹ But unincorporated companies may forfeit membership for nonpayment of dues.³² Membership, generally speaking, consisting merely in owning a share in the capital stock,³³ a shareholder can not be deprived of his right to participate in the corporate affairs, save by forfeiture of his stock for failure to pay calls and assessments. But even this power of forfeiture does not exist independently of charter or statutory authority, and can not be created by a by-law,³⁴ the remedy of the corporation at common law being

²⁴ *Wood v. Chamber of Com.*, etc. (Wis. 1903), 96 N. W. 835.

²⁵ *People v. N. Y. Produce Exchange* (1896), 149 N. Y. 401.

²⁶ *Lewis v. Wilson* (1890), 121 N. Y. 234.

²⁷ *People v. N. Y. Cotton Exchange* (1876), 8 Hun, 216.

²⁸ *State v. Milwaukee*, etc. (1879), 47 Wis. 670; *Monroe*, etc. *Assn. v. Webb* (1899), 40 N. Y. App. Div. 49.

²⁹ *In re Long Island R. Co.*, 19 Wend. 37, 32 Am. Dec. 429; *Evans v. Philadelphia Club* (1865), 50 Pa. St. 107; *State v. Chamber of Commerce* (1879), 47 Wis. 670; *Dickenson v. Chamber of Commerce* (1871), 29 Wis. 45, in which it is held that there may be a lawful expulsion under a valid by-

law. Cf. upon the "Power of Expulsion" contributed article by A. G. McKean, in 17 L. J. (Eng.) 205; "Remedies for Improper Expulsion and Suspension from Societies and Fraternities," by Eugene McQuillin (1890), 30 Cent. L. J. 327.

³⁰ *People v. Saint Francisco's Benevolent Soc.* (1862), 24 How. Pr. 216; *Roehler v. Mechanics' Aid Soc.*, 22 Mich. 86; *Green v. African Methodist Epis. Soc.*, 1 Serg. & R. 254.

³¹ *Monroe*, etc. *Assn. v. Webb* (1899), 40 N. Y. App. Div. 49.

³² *Denver Chamber of Commerce v. Green* (1896), 8 Colo. App. 420.

³³ *Vide supra*, § 202.

³⁴ *Perrin v. Granger*, 30 Vt. 595; *Williams v. Lowe*, 4 Neb. 382;

by an action against the shareholder to recover the amount due upon the stock.³⁵ A clear distinction is recognized between the powers of corporations, and that of non-incorporated societies to expel members. Where a corporation expels a member, whether by virtue of express power under its charter, in pursuance of its by-laws, or through the inherent power attaching to it, the courts will, at the instance of the expelled member, investigate the action of the corporation, determine whether it acted in accordance with its power, whether the by-laws were legal and reasonable, whether the expulsion was fair and just, and whether the cause of expulsion was such as would produce an injury to the corporation.³⁶

§ 542. (a) **Powers of stock and non-stock companies to expel, distinguished.**—A joint stock, or other corporation having capital stock, has no power, unless it be expressly conferred by its charter, or the general law in force at the time of its creation, to declare a forfeiture, and to disfranchise, or expel a member;³⁷ but the converse rule applies to non-stock corporations, not organized for pecuniary profit, such as chambers of commerce, boards of trade, mutual benefit societies, social or political clubs, literary, educational, and religious societies or associations. Such a corporation has had, from the earliest period, the incidental power to expel a member for cause, subject only to such restrictions, if any, as may be provided in its charter.³⁸ Members being bound by the constitution and by-laws of the organization, their rights are to be measured in accordance therewith;³⁹ and a

In re Long Island R. Co., 19 Wend. 37, 32 Am. Dec. 429; *Cartan v. Father Matthew, etc. Soc.*, 3 Daly, 20; *Hill v. Nisbet*, 100 Ind. 341; *Westcott v. Minnesota, etc. Co.*, 23 Mich. 145; *Adley v. Reives*, 2 Maule & S. 53; *Dixon v. Evans*, L. R. 5 H. L. 606; *Clarke v. Hart*, 6 H. L. Cas. 633; *Campbell's Case*, L. R. 9 Ch. 1; *Kirk v. Norwill*, 1 Term. Rep. 118. See, however, *Lesseps v. Architects' Co.*, 4 La. Ann. 316, where it was held that the acceptance of certificates at the foot of which was printed a by-law providing for forfeiture was "a tacit acquiescence in and submission to the by-law." *Cf. Knight's Case*, L. R. 2 Ch. 321; *Perrin v. Granger*, 30 Vt. 595;

Kennebec, etc. R. Co. v. Kendall, 31 Me. 470.

³⁵ This subject is treated in detail in CALLS AND ASSESSMENTS, *supra*, §§ 302-337a.

³⁶ *Hiss v. Bartlett*, 3 Gray, 468, 63 Am. Dec. 768, and the annotations, 772-778.

³⁷ *Edgerton, etc. Co. v. Croft*, 69 Wis. 256; *Westcott v. Minn. Mining Co.*, 23 Mich. 145; *In re St. Lawrence Steam Boat Co.*, 44 N. J. Law, 529.

³⁸ *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Dickenson v. Chamber of Commerce, etc.*, 29 Wis. 45, 9 Am. Rep. 544; *Otto v. Journeymen, etc. Union*, 75 Cal. 308, 7 Am. St. Rep. 156.

³⁹ *Hyde v. Woods*, 2 Saw. 655,

member may be bound by amendments to, and changes of, the rules subsequently made in accordance with existing rules.⁴⁰ So that a member can not complain of an expulsion fairly conducted under the rules of the association, unless they be against natural justice.⁴¹ It is necessary, however, that a member should have

658; affirmed in 94 U. S. 523; Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495; Maxey's Appeal, 9 Week. N. Cas. 441; White v. Brownell, 2 Daly, 329, 359, 4 Abb. Pr. (N. S.) 162, 193; Fischer v. Raab, 57 How. Pr. 87, 95; Fitz v. Muck, 62 How. Pr. 69, 74; Elsas v. Alford, 1 City Ct. Rep. 123; Leech v. Harris, 2 Brewst. 571; Maxey's Appeal, 9 Week. N. Cas. 441. "The first case," says Mr. Leach (Leach's Club Cases, 17), "where the power of expulsion from a club was discussed in a court of law was in Hopkinson v. Marquis of Exeter, 17 L. T. (N. S.) 368, L. R. 5 Eq. 63, which was a suit against the committee of a club, from which H. had been expelled by the vote of a general meeting, praying a declaration that so long as he should conform to the rules of the club (which he offered to do) he was entitled to participate in the use and enjoyment of the property and effects of the club, and in its rights, privileges and benefits, and also that the defendants might be restrained from excluding the plaintiff from such rights and benefits, and from removing his name from the list of members. The expulsion clause provided that it was the duty of the committee, in case any circumstances should occur likely to endanger the welfare and good order of the club, to call a general meeting, and in the event of its being voted at that meeting by two-thirds of the persons present that the name of any member should be removed, he should cease to belong to the club. The general principles were strongly asserted that the rules

were the governing contract of the association, and that a judicial or *quasi-judicial* office was vested by the rules in the committee and the general meeting, from which in ordinary cases there was no appeal. The only limitation on the power of the committee or meeting, being, that it must be *bona fide*, and not arbitrarily exercised."

⁴⁰ Note to Austin v. Searing, 69 Am. Dec. 674; Poultney v. Bachman, 31 Hun, 49.

⁴¹ Hopkinson v. Exeter, L. R. 5 Eq. 63, 37 L. J. Ch. 73, 16 Week. Rep. 266; Dawkins v. Antrobus, 17 Ch. Div. 615, 44 L. T. 557, 29 Week. Rep. 511; Richardson-Gardner v. Freemantle, 24 L. T. 81, 19 Week. Rep. 256; Lyttleton v. Blackburn, 33 L. T. 641; White v. Brownell, 2 Daly, 329, 4 Abb. Pr. (N. S.) 162; Olery v. Brown, 51 How. Pr. 92; Fitz v. Muck, 62 How. Pr. 69; Sperry's Appeal, 116 Pa. St. 391; Leech v. Harris, 2 Brewst. 571. "A man who becomes a member of a club, binds himself by a written contract, which is to be found in the rules of the club. Those rules are the laws from and by which his rights and duties as a member are to be ascertained and governed. If those rules give (as all club rules do give) an unlimited power of expulsion to the committee or to the general body of the club, the exercise of that power is not a matter for the interference of the law courts, provided that the power be exercised (i) in accordance with the letter and spirit of the rules; (ii) in a *bona fide* manner and not capriciously or oppressively; (iii) in a fair and impartial man-

assented to the rules of the association before he will be bound thereby;⁴² and while ordinarily a member in joining an association is presumed to know and to assent to its rules,⁴³ yet it has been held that where the ceremony of expulsion involved a battery, it could not be lawfully performed against the will of the member to be expelled.⁴⁴ The power to expel from membership in a non-stock corporation, like the power to admit to membership, is inherent in the corporation.⁴⁵ Without any express provision, the power exists to adopt rules or by-laws of the corporation for expulsion from membership,⁴⁶ if they are not contrary to law.⁴⁷ The by-laws providing for expulsion must be reasonable and not contrary to public policy.⁴⁸ Thus, where under statutory power to make by-laws, relative to expulsion of members, a medical society expelled a member for violation of its by-law fixing minimum tariff of fees for medical service, the court held the regulation to be void, because unreasonable, and contrary to law, and to public policy.⁴⁹ And a by-law, providing for expulsion, is void if contrary to the charter or general law,⁵⁰ or if contrary to the settled principles of law upon the subject.⁵¹ A member

ner in accordance with the ordinary principles of justice." Leach's Club Cases, 45, 46. See, also, Lambert v. Addison, 46 L. T. 20; Robinson v. Yates City Lodge, 86 Ill. 598, 599; Anacosta Tribe v. Murbach, 13 Md. 91, 71 Am. Dec. 625; Osceola Tribe v. Schmidt, 57 Md. 98; Karcher v. Supreme Lodge Knights of Honor, 137 Mass. 368, 372; Burt v. Grand Lodge F. & A. M. 44 Mich. 208; People *ex rel.* Corrigan v. Young Men's Father Matthew Ben. Soc., 65 Barb. 357.

⁴² Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665, and note, 673; Leech v. Harris (1869), 2 Brewst. 571.

⁴³ Note to Austin v. Searing, 69 Am. Dec. 665, 16 N. Y. 112; White v. Brownell, 2 Daly, 329, 4 Abb. Pr. (N. S.) 162.

⁴⁴ State v. Williams, 75 N. C. 134.

⁴⁵ State v. Georgia, etc. Soc., 38 Ga. 608, 95 Am. Dec. 408; Commonwealth v. St. Patrick, etc.

Soc., 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

⁴⁶ Child v. Hudson Bay Co., 2 P. Wms. 207; Bailey v. Association, etc., 103 Tenn. 99, 46 L. R. A. 501.

⁴⁷ Commonwealth v. Union League, etc., 135 Pa. St. 301, 20 Am. St. Rep. 870; Taylor v. Edson, 4 Cush. (Mass.) 522; Dickenson v. Chamber of Commerce, etc., 29 Wis. 45, 9 Am. Rep. 544.

⁴⁸ Allnutt v. Subsidiary, etc. Court, 62 Mich. 110; People v. Medical Soc., 24 Barb. (N. Y.) 570; State v. Georgia Med. Soc., 38 Ga. 608, 95 Am. Dec. 408; Otto v. Journeymen, etc., 75 Cal. 308, 7 Am. St. Rep. 156; People v. New York, etc., 149 N. Y. 401.

⁴⁹ People v. Medical Soc., etc., 24 Barb. (N. Y.) 570.

⁵⁰ New York, etc. Assn. v. McGrath, 23 N. Y. 209.

⁵¹ Commonwealth v. St. Patrick Soc., 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

may be expelled for an offense which is "in direct contravention of the purposes for which the charter was obtained."⁵² A social club may expel a member "for a wilful infraction of its rule, or for conduct disorderly or injurious to the interests, or hostile to the objects of the association."⁵³

Good faith.—If a member is nominally expelled upon alleged grounds of an offense which would authorize his expulsion, but is in reality expelled for an offense which, by the rules or by-laws, is punishable only by a fine, he will be reinstated by the courts.⁵⁴ "In the matter of expulsion, the society acts in a *quasi*-judicial character; and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land, or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal."⁵⁵ The power of expelling a member from a corporation belongs only to the society at large, unless the charter, or some by-law founded on it, transfers this power to a select few.⁵⁶ A religious society, incorporated by voluntary association, is a temporal body, and distinct from the church organized from it, and the society is not liable for damages sustained by one's expulsion from the church.⁵⁷ The member of a church corporation cannot be expelled for refusal to take a sacrament, in accordance with the forms and practice of a particular church or sect.⁵⁸ Where charges are preferred against a member, who is apparently of unsound mind, his failure to appear and answer, is not excused by his insanity, and the association may regularly proceed, according to its laws, to convict and punish him by expulsion.⁵⁹ An unjust resolution of expulsion,

⁵² *People v. New York, etc. Assn.*, 18 Abb. Pr. (N. Y.) 271.

⁵³ *Commonwealth v. Union League, etc.*, 135 Pa. St. 301, 20 Am. St. Rep. 870.

⁵⁴ *Otto v. Journeymen, etc. Union*, 75 Cal. 308, 7 Am. St. Rep. 156.

⁵⁵ *Otto v. Journeymen Tailors' Union*, 75 Cal. 308, 7 Am. St. Rep. 156; *Pitcher v. Board of Trade, etc.*, 121 Ill. 412; *High Court, etc. v. Zak*, 35 Ill. App. 613, 136 Ill. 185; *Society v. Commonwealth*, 52 Pa. St. 125, 91 Am. Dec. 139; *Commonwealth v. Union League, etc.*,

135 Pa. St. 301, 20 Am. St. Rep. 870; *Levy v. Magnolia Lodge*, 110 Cal. 297; *Supreme Council, etc. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298; *Spilman v. Supreme Council*, 157 Mass. 128.

⁵⁶ *Hassler v. Philadelphia Musical Assn.* (1884), 14 Phila. 233.

⁵⁷ *Hardin v. Detroit Baptist Church*, 51 Mich. 137, 47 Am. Rep. 555.

⁵⁸ *People v. St. Franciscus Soc.*, 24 How. Pr. (N. Y.) 216.

⁵⁹ *Pfeiffer v. Weishaupt*, 13 Daly, 161.

spread upon the corporate books, is a libel, and any member offering a resolution of that nature for adoption at a corporate meeting, is liable in damages for libel.⁶⁰

Damages.—A member wrongfully expelled is entitled, in an action against the corporation, to recover damages sustained by reason of the expulsion, and is not restricted to his remedy to compel reinstatement.⁶¹

§ 543. (b) *Grounds of expulsion.*—At common law there are two sufficient causes for the expulsion of members, to wit, the commission of an indictable offense, or a violation of the duties of membership.⁶² "It appears to be well settled that, when the charter of a corporation is silent upon the subject of expulsion, or grants the power in general terms, there are but three legal

⁶⁰ *Fawcett v. Charles* (1835), 13 Wend. 473. *Cf. Adley v. Whitstable Co.* (1815), 19 Vesey, 304; *Chase v. East Tennessee, etc. R. Co.* (1880), 5 Lea, 410.

⁶¹ *Ludowski v. Polish, etc. Soc.*, 29 Mo. App. 337; *Republican, etc. Co. v. Northwestern, etc. Press*, 10 U. S. App. 72, 51 Fed. 377; *Peyre v. Mutual Relief, etc.*, 90 Cal. 240.

⁶² *Bagg's Case* (1816), 11 Coke, 94, 99; *Rex v. Town of Liverpool* (1759), 2 Bur. 723, 732; *State v. Chamber of Commerce* (1865), 20 Wis. 63; *People v. New York Commercial Assn.* (1864), 18 Abb. Pr. 271; *People v. Chicago Board of Trade* (1867), 45 Ill. 112. *Cf. Smith v. Smith* (1813), 3 Desaus. Eq. 557; *Woolsey v. Independent Order, etc.* (Iowa, 1883), 1 Am. & Eng. Corp. Cas. 172; *Fisher v. Keane* (1878), 11 Ch. Div. 353; *Gardner v. Freemantle*, 19 W. R. 256; *People v. New York Cotton Exchange* (1876), 8 Hun, 216; *Dean v. Bennett*, L. R. 6 Ch. 489. The right of expulsion from associations of this character may be based and upheld upon two grounds: 1. A violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such violation. 2. For such conduct as

clearly violates the fundamental objects of the association and if persisted in and allowed would thwart those objects, or bring the association into disrepute. *Otto v. Journeyman Tailors' P. & B. U.* (1888), 75 Cal. 308, 7 Am. St. Rep. 156, 159. As the words of the usual expulsion clause—"conduct either in or out of the club"—imply, the conduct for which the member of a club is expelled, need not have any direct connection with the club. It may, indeed, be a circumstance suggesting malice, if the conduct which forms the ground of expulsion is not of such a nature as to give "reasonable and probable" cause for the interference of the committee or club. But this is a question for the jury or judge sitting as a jury, in each case; and in the absence of proved malice, the fact that the action complained of, neither took its origin in the club, nor had any connection or reference to a club, is not a reason against the exercise of the discretionary power vested in the committee by an expulsion clause. *Labouchere v. Wharnccliffe*, 13 Ch. Div. 346, 28 W. R. 367, 41 L. T. 638; see review of this case in *Canada L. Jour.*, Oct. 15, 1881, 381.

causes of disfranchisement: (1) Offenses of an infamous character indictable at common law. (2) Offenses against the corporator's duty to the corporation, as a corporation, as a member of it; and (3) offenses compounded of the two."⁶³ Charter power, given in general terms, to suspend or expel a member, does not empower the corporation to expel a member for any offense not indictable, or which does not affect the corporate government, or tend to defeat its objects.⁶⁴ If the offense of the member comes within either of these causes, it is ground for expulsion, whether or not expressly made so by the by-laws, or rules of the corporation, and although they specify certain causes for expulsion.⁶⁵ The power given by charter to expel for specific causes does not, by implication, exclude other causes as ground for expulsion.⁶⁶ When the offense is an act contrary to the member's duty to the corporation, it may try, convict and expel him.⁶⁷ In Pennsylvania it was held that a corporate member, charged with an indictable offense, could not be expelled in advance of conviction by a jury under the criminal law.⁶⁸

*Among acts which have been held to justify expulsion from membership in non-stock corporations, are: making fraudulent charge by a trustee for money he had not paid;*⁶⁹ *making fraudulent pretense of sickness in order to obtain benefits as a member of a benefit association;*⁷⁰ *refusal of a board of trade member, to promptly perform a contract, and although it was not enforceable, because not in writing as required by the statute of frauds;*⁷¹ *enlisting as a soldier in active service, contrary to the prohibition of a by-law;*⁷² *violating the by-law of a board of trade, prohibiting*

⁶³ State v. Chamber of Commerce, 20 Wis. 63; Commonwealth v. St. Patrick, etc. Soc., 2 Binn. (Pa.) 441, 4 Am. Dec. 453; People v. New York, etc. Assn., 18 Abb. Pr. (N. Y.) 271; Evans v. Philadelphia Club, 50 Pa. St. 107.

⁶⁴ State v. Chamber of Commerce, etc., 20 Wis. 63.

⁶⁵ People v. New York, etc. Underwriters, 7 Hun (N. Y.), 248.

⁶⁶ Commonwealth v. St. Patrick Benev. Soc., 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

⁶⁷ Commonwealth v. St. Patrick Benev. Soc., 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

⁶⁸ Commonwealth v. St. Patrick Benev. Soc., 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

⁶⁹ Commonwealth v. Guardians, etc., 6 Serg. & R. (Pa.) 469.

⁷⁰ Society, etc. v. Commonwealth, 52 Pa. St. 125, 91 Am. Dec. 139.

⁷¹ Dickenson v. Chamber of Commerce, etc., 29 Wis. 45, 9 Am. Rep. 544; Lewis v. Wilson, 121 N. Y. 284; People v. New York, etc., 149 N. Y. 401.

⁷² Franklin, etc. Assn. v. Commonwealth, 10 Pa. St. 357.

the gathering in any public place near its exchange, for trading in "futures," either before the opening, or after the time for closing;⁷³ fraudulently altering a physician's certificate, in order to increase "sick benefits" as member of a benefit society;⁷⁴ allowance of rebates to customers contrary to rules of a merchants' exchange;⁷⁵ charging lower rates than those fixed by the members of a board of fire underwriters;⁷⁶ failure to pay fine or assessment expressly provided by contract of membership in a benefit association;⁷⁷ resuming medical practice, contrary to agreement, in the same locality where, as member of a medical society, he had sold out his practice;⁷⁸ offer by member of a medical society to practice either as allopath or homeopath, as might be desired by the patient.⁷⁹ It has been held that original disqualification for election to membership is ground for subsequent expulsion therefrom;⁸⁰ but, under a statute in a New York case of such disqualification, and where membership was obtained under false representations, it was held no ground for expulsion by resolution of the corporation, but that it could be inquired into by the court, only by *quo warranto*.⁸¹ As examples of acts or grounds which have been held insufficient to justify expulsion, are the following: becoming surety on the official bond of a negro elected to office, and upon bonds of negroes charged with inciting a riot;⁸² because the member's political views, and acts as a politician, are distasteful to the other members of the medical society;⁸³ using offensive words in debate, not noticed or objected to until a subsequent meeting;⁸⁴ advertising a particular remedy by a member of a medical society;⁸⁵ refusing to join in a labor strike;⁸⁶ refusing to

⁷³ State v. Milwaukee, 47 Wis. 670.

⁷⁴ Commonwealth v. Philanthropic Soc., 5 Binn. (Pa.) 486.

⁷⁵ Jackson v. South Omaha, etc., 49 Neb. 687.

⁷⁶ People v. New York Board, etc., 7 Hun (N. Y.), 248.

⁷⁷ Muere v. Detroit, etc., 95 Mich. 451; State v. Stevedores, etc. Assn., 43 La. Ann. 1098; Medical, etc. Co. v. Weatherby, 75 Ala. 248; Karcher v. Supreme Lodge, etc., 137 Mass. 371; Whiteside v. Nyack, etc., 142 N. Y. 585.

⁷⁸ Barrow v. Mass. Med. Soc., 12 Cush. (Mass.) 402.

⁷⁹ *Ex parte Paine*, 1 Hill (N. Y.) 665.

⁸⁰ Beesley v. Chicago, etc. Assn., 44 Ill. App. 278; Diligent Fire Co. v. Commonwealth, 75 Pa. St. 291.

⁸¹ Fawcett v. Charles, 13 Wend. (N. Y.) 473.

⁸² State v. Georgia Med. Soc., 38 Ga. 608, 95 Am. Dec. 408.

⁸³ State v. Georgia Med. Soc., 38 Ga. 608, 95 Am. Dec. 408.

⁸⁴ People v. American Institute, etc., 44 How. Pr. (N. Y.) 468.

⁸⁵ People v. Med. Soc., etc., 32 N. Y. 187.

⁸⁶ People v. N. Y. Benev. Soc., 3 Hun (N. Y.), 361; Otto v.

take sacrament according to the forms and practice of a particular church, or sect;⁸⁷ refusing to submit a controversy to the arbitration committee of a board of trade, after instituting suit upon it;⁸⁸ selling his seat in the board, after the managers had declared against his title to it;⁸⁹ refusing to pay the award of an arbitration committee, on the ground that the association had no jurisdiction in the premises.⁹⁰ But a member does not forfeit his membership by failing to pay an assessment not made in accordance with the constitution of the order, and the fact that the assessment was made in accordance with a custom of which he is not shown to have had knowledge, is not sufficient to justify his expulsion for non-payment thereof.⁹¹

Waiver by the corporation.—If the corporation consents to, or acquiesces in, the violation of a by-law, or other act in violation of duty, and which is ground for expulsion, the corporation thereby waives the right to expel the member for that act.⁹²

§ 544. (c) *Review by the court.*—If the member was expelled wrongfully, contrary to good faith, and in violation of the charter or statute, equity will interpose to reinstate him.^{92a} Where the constitution or by-law of a voluntary association provide for expulsion, a court will not interfere unless it appears that the rules were immoral, contrary to public policy, or in contravention of the law of the land, that the rules were not observed, that there was *mala fides* or malice in arriving at the decision, or that the decision was made without notice and an opportunity to be heard;⁹³ nor

Journeyman Tailors, etc., 75 Cal. 308, 7 Am. St. Rep. 156.

⁸⁷ *People v. St. Franciscus Benev. Soc.*, 24 How. Pr. (N. Y.) 216.

⁸⁸ *State v. Chamber of Commerce*, 20 Wis. 63.

⁸⁹ *People v. New York Cotton Exchange*, 8 Hun (N. Y.), 216.

⁹⁰ *Savannah Cotton Exchange v. State*, 54 Ga. 668.

⁹¹ *Underwood v. Iowa Legion of Honor*, 66 Iowa, 134.

⁹² *Harmstead v. Washington Fire Co.*, 1 Leg. Gaz. (Pa.) 392.

^{92a} *Otto v. Journeymen, etc. Union*, 75 Cal. 308, 7 Am. St. Rep. 156; *State v. Georgia Med. Soc.*, 38 Ga. 608, 95 Am. Dec. 408; *Savannah, etc. v. State*, 54 Ga. 668.

⁹³ Note to *Hiss v. Bartlett*, 63 Am. Dec. 776; note to *Austin v. Searing*, 69 Am. Dec. 677; *Niblack on Mutual Benefit Societies*, §§ 59–62; *Hutchinson v. Exeter*, L. R. 5 Eq. 63, 37 L. J. Ch. 173, 16 Week. Rep. 266; *Dawkins v. Antrobus*, 17 Ch. Div. 615, 44 L. T. 557, 29 Week. Rep. 511; *Gardner v. Freemantle*, 24 L. T. 81, 19 Week. Rep. 256; *Karcher v. Supreme Lodge K. of H.* (1884), 137 Mass. 368, 372, where Field, J., delivering the opinion of the court, said the plaintiff's intestate "was suspended by the tribunal which he had chosen to determine the question according to the rules to which he assented in becoming a member, and he received notice

except in case of the rules being against natural justice, will the court pass upon their reasonableness.⁹⁴ In the matter of expulsion, the society acts in a *quasi*-judicial character, and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land or any inalienable right of the member, its sentence is conclusive like that of a judicial tribunal.⁹⁵ The decision of the members of a beneficial society, or of a tribunal provided for by its laws, as to the claim of a member to benefits, is, within the general rule above considered, conclusive, if made in good faith.⁹⁶ The courts will, how-

of the proceedings. The action of this tribunal, according to its rules, on a question which it had authority to decide, honestly taken, after the requisite notice to him, cannot be collaterally reviewed in this suit, on the ground that facts existed, which, if brought to the notice of the tribunal, would have warranted a different decision. *Grosvenor v. United Soc. of Believers*, 118 Mass. 78; *Dolan v. Court Good Samaritan*, 128 Mass. 437." *Lyttleton v. Blackburn*, 33 L. T. 641, 45 L. J. Ch. 219; *Lambert v. Addison*, 46 L. T. 20; *White v. Brownell*, 2 Daly, 329, 4 Abb. Pr. (N. S.) 162; *Olery v. Brown*, 51 How. Pr. 92; *People ex rel. Corrigan v. Young Men's Father Matthew Ben. Soc.*, 65 Barb. 367; *Sperry's Appeal*, 116 Pa. St. 391; *Leech v. Harris*, 2 Brewst. 571; *Burt v. Grand Lodge F. & A. M.*, 44 Mich. 208; *Karcher v. Supreme Lodge K. of H.*, 137 Mass. 368, 372.

⁹⁴ Note to *Austin v. Searing*, 69 Am. Dec. 672; *Hirschl on Fraternities*, 63; *Niblack on Mutual Benefit Societies*, § 25; *Kehlenbeck v. Logeman*, 10 Daly, 447, 448; *Elsas v. Alford*, 1 City Ct. Rep. 123.

⁹⁵ *Otto v. Journeyman Tailors' P. & B. U.* (1888), 75 Cal. 308, 7 Am. St. Rep. 156, 159, citing *Commonwealth v. Pike Benevolent Society*, 8 Watts & S. 250; *Burt v. Grand Lodge, F. & A. M.*, 44 Mich.

208; *Robinson v. Yates City Lodge*, 86 Ill. 598. "It is clear that every member has contracted to abide by that rule, which gives an absolute discretion to two-thirds of the members present to expel any member. Such discretion must not be a capricious or arbitrary discretion. But if the decision has been arrived at *bona fide without any caprice or improper motive, then it is a judicial opinion from which there is no appeal.* None but the members of the club can know the little details which are essential to the social well-being of such a society of gentlemen, and it must be a very strong case that would induce this court to interfere." *Hopkinson v. Exeter*, 17 L. T. Rep. (N. S.) 368. "Proprietary Clubs," 7 Ry. & Corp. L. J. 438. The question of whether the moral conduct for which a member is expelled was such as to justify his expulsion cannot be reviewed by the courts, unless the action of the expelling committee appears to have been capricious or corrupt. *Loubat v. Le Roy*, 15 Abb. N. Cas. 1.

⁹⁶ *Fitz v. Muck*, 62 How. Pr. 69; *Torrey v. Baker*, 1 Allen, 120; and see, where the society is incorporated, *Anacosta Tribe v. Murbach*, 13 Md. 91, 71 Am. Dec. 625; *Osceola Tribe v. Schmidt*, 57 Md. 98. The right of different persons claiming to represent a subordi-

ever, decide whether the ground for expulsion is well taken.⁹⁷ Accordingly, a member of an unincorporated association who is expelled therefrom, nominally for an offense which would warrant expulsion, but in reality for an offense which, by the rules of the association, is punishable only by fine, will be reinstated by the courts.⁹⁸ In an important case in New York, an expelled member of the Union Club of New York City brought an action to have the resolution of expulsion declared null and void. The government of the club was in charge of a committee which had power to expel members from the club by ballot. A rule declared that the proceedings of the meetings of this committee should be strictly private, and it was held, that a member of the committee could not be interrogated as to what took place within the committee, nor as to his reasons for his vote, nor as to what he deemed proper and sufficient ground for the expulsion of a member; that the minutes and reports in writing of the committee afforded the best evidence of what took place therein.⁹⁹

§ 545. (d) **Who may expel; notice; hearing.**—There can be no valid expulsion except by an authorized tribunal competent to hear, determine and sentence to loss of membership.¹ The power to expel is in the whole body of members when acting as the corporation,² or is in the board of directors when it has been delegated to them by the corporation,³ either in the absence of any restrictions in the charter, or under its express authority to so delegate the power.⁴

Procedure to expel.—It is essential to the validity of the act of expulsion of a member that, in the absence of a waiver by the member accused, he shall have a hearing or trial of the charge

nate lodge of an order are to be determined by the constitution of the grand lodge. *Chamberlain v. Lincoln*, 129 Mass. 70.

⁹⁷ *Otto v. Journeymen Tailors' P. & B. U.* (1888), 75 Cal. 308, 7 Am. St. Rep. 156, 159, citing *Hirschl on Law of Fraternities*, 55; *Savannah Cotton Exchange v. State*, 54 Ga. 668.

⁹⁸ *Otto v. Journeymen Tailors' P. & B. U.* (1888), 75 Cal. 308, 7 Am. St. Rep. 156.

⁹⁹ *Loubat v. Le Roy*, 65 How. Pr. 138, 40 Hun, 546.

¹ *Gray v. Christian Soc.*, 137

Mass. 329, 50 Am. Rep. 310; *State v. Trustees, etc.*, 5 Ind. 77.

² *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264; *Gray v. Christian Soc.*, 137 Mass. 329, 50 Am. Rep. 310; *Weber v. Zimmerman*, 22 Md. 156.

³ *People v. Women's Catholic Order, etc.*, 162 Ill. 78; *People v. Board of Trade, etc.*, 45 Ill. 112.

⁴ *Young v. Grand Lodge, etc.*, 172 Pa. St. 302; *People v. Women's Catholic Order*, 162 Ill. 78; *People v. Produce Exchange*, 149 N. Y. 401; *Medical, etc. Co. v. Weatherby*, 75 Ala. 248.

against him, and reasonable notice to him of the time and place of hearing.⁵

Notice and hearing.—The notice must be personal and inform him of the charges against him,⁶ and the notice and trial must be as provided in the charter and by-laws.⁷ A member of an unincorporated society cannot be legally expelled without notice and an opportunity of meeting the charges preferred against him.⁸ It is not necessary that he should request to be heard.⁹ But if he has been fully heard, he can not raise technical objections not affecting his rights.¹⁰ And a neglect to notify the member of the time when the committee's report will be presented and considered, will not necessarily invalidate the expulsion if the member has been fully heard.¹¹ If, however, a member admits the offense warranting his expulsion, it is then not necessary that he should have a formal hearing and trial, because he, in effect, pleads guilty.¹² It has been held that under a provision of the superior body of a benevolent association, guaranteeing fair hearing to every member before expulsion, except where such member

⁵ *Karcher v. Supreme Lodge*, etc., 137 Mass. 368; *Connelly v. Masonic, etc. Assn.*, 58 Conn. 553, 18 Am. St. Rep. 296; *Diligent, etc. Co. v. Commonwealth*, 75 Pa. St. 291; *Erd v. Bavarian, etc. Assn.*, 67 Mich. 233.

⁶ *Sibley v. Board, etc.*, 40 N. J. Law, 295; *Wachtel v. Noah, etc. Soc.*, 84 N. Y. 28, 38 Am. Rep. 478; *Spilman v. Supreme Council, etc.*, 157 Mass. 131; *Allnutt v. Subsidiary, etc. Foresters*, 62 Mich. 110.

⁷ *Young v. Grand Lodge, etc.*, 173 Pa. St. 302; *Medical, etc. Co. v. Weatherby*, 75 Ala. 248.

⁸ *Knights of Honor Supreme Lodge v. Johnson* (1882), 76 Ind. 110; *Delacy v. Neuse River Nav. Co.* (1821), 1 Hawks (N. C.), 274; *Southern Plank R. Co. v. Hixon* (1854), 5 Ind. 165; *Niblack on Mutual Benefit Societies*, § 65; *Innes v. Wylie*, 1 Car. & K. 257; *Labouchere v. Wharnccliffe*, 13 Ch. Div. 346; *Wachtel v. Noah Widows' & O. Soc.* (1881), 84 N. Y. 28, 31, where Danforth, J., said: "In the absence of any agreement

by the member or any provision in the charter or by-laws, for a different mode of service, it should be made personally, as required at common law, where the object is to deprive a party of his rights or property; or if that can be dispensed with, then in such other mode as will be most likely to effect its object;" *Fitz v. Muck*, 62 How. Pr. 69, 74; *Downing v. St. Columba's, etc. Soc.*, 10 Daly, 262; notwithstanding the rules do not expressly provide for notice.

⁹ *Loubat v. Le Roy*, 40 Hun, 546, 15 Abb. N. Cas. 1.

¹⁰ *Loubat v. Le Roy*, 40 Hun, 546, 15 Abb. N. Cas. 1. The notice may be waived; but it is held that the accused does not waive it by attending a meeting and entering on his defense. *Downing v. St. Columba's, etc. Soc.* (1884), 10 Daly, 262; a somewhat questionable ruling.

¹¹ *Loubat v. Le Roy* (1885), 46 Hun, 546, 15 Abb. N. Cas. 1, 65 How. Pr. 138.

¹² *Maxey's Appeal*, 9 Week. N. Cas. 441.

has been expelled from the subordinate lodge of which he was a member, one who is expelled from the subordinate lodge may be expelled from the superior body without notice.¹³ A member of an association having capital stock is entitled to notice of a proposed *forfeiture of his shares*, which must state the amount due thereon, the time within which payment is to be made and the place of the forfeiture sale,¹⁴ and legal tender at any time before actual sale will entitle the shareholder to stay or set aside the forfeiture.¹⁵ For, notice of forfeiture is not equivalent to actual forfeiture. There must be a due declaration thereof and sale.¹⁶ If a certain notice is prescribed by the constitution and by-laws, the forfeiture is invalid, if it be not given or waived.¹⁷ And where the rules of an association imply that notice shall be given on assessments becoming due, there can not be a forfeiture of membership for non-payment without notice.¹⁸ The notice, it

¹³ Pfeiffer v. Joerges, 13 Daly, 161.

¹⁴ Lake Ontario, etc. R. Co. v. Mason, 16 N. Y. 451; Lexington, etc. R. Co. v. Chandler, 13 Met. 311; Mississippi, etc. R. Co. v. Gaster, 40 Ark. 455; Rutland, etc. R. Co. v. Thrall (1863), 35 Vt. 536, 546, where it was held that the contents of the published notice is material upon an issue as to the validity of the forfeiture sale, the court saying: "The subscriber, by incorporating this [the statutory requirement of notice] into his subscription, secures this notice as a condition precedent, without compliance with which he is not liable to suit. Hence proof of a publication containing notice of these facts is indispensable to maintain the suit. The newspaper which contains the notice is clearly the best evidence of its publication and contents." Lexington, etc. R. Co. v. Staples, 71 Mass. 520; Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236; Hearton v. Cincinnati, etc. R. Co., 16 Ind. 275, 70 Am. Dec. 430; 8 Vic., ch. 6, § 30; Knight's Case, L. R. 2 Ch. 321; Birmingham, etc. Ry. Co. v. Locke, 1 Q. B. 256; Watson v. Eales, 23 Beav.

294; where the time of forfeiture was stated to be Monday the 9th, that date falling on a Friday, and the notice held insufficient. *Of. Bangs v. Duckinfield*, 18 N. Y. 592; *Schenectady, etc. R. Co. v. Thatcher*, 11 N. Y. 102; *Eppes v. Mississippi, etc. R. Co.*, 35 Ala. 33; *New Albany, etc. R. Co. v. McCormick*, 10 Ind. 49, 71 Am. Dec. 337. As to railway corporations, see N. Y. Laws of 1850, ch. 140, § 7, as amended by N. Y. Laws of 1875, ch. 108, § 8.

¹⁵ *Mitchell v. Vermont*, 67 N. Y. 280, holding also that tender of a check was sufficient; *Walker v. Ogden*, 1 Biss. 287; *Sweeney v. Smith*, L. R. 7 Eq. 324.

¹⁶ *Water Valley Manuf. Co. v. Seaman*, 53 Miss. 655; *Macon, etc. R. Co. v. Vason*, 57 Ga. 314; *Cockerell v. Van Dieman's Land Co.*, L. R. 26 C. P. 203; *Biggs' Case*, L. R. 1 Eq. 309. But see *Knight's Case*, L. R. 2 Ch. 321.

¹⁷ *Washington Beneficial Soc. v. Bacher*, 20 Pa. St. 425.

¹⁸ *Covenant Mut. Benefit Assn. v. Spies*, 114 Ill. 463. Thus, a by-law of a benevolent association, whose members had pecuniary interest therein, made provision for a fine, in case of a member fail-

seems, should be served personally, if the constitution or by-laws do not provide for a different mode of service.¹⁹ But where the intent appears, from the by-laws of a mutual aid association, to be that the mailing of the notice of an assessment shall fix the liability of the member, his rights may be forfeited, although through a miscarriage of the mail the notice failed to reach him.²⁰ Where a by-law of a mutual relief society provides for notice of assessments by the local secretary to members, and another by-law declares that a member, by a failure to pay after notice by the general secretary, shall forfeit his right to benefit; a member is entitled to a notice from both secretaries, and a card on which the name of the general secretary is printed, but which is filled up and addressed by the local secretary, is not sufficient to constitute a notice from the general secretary.²¹

§ 546. (e) To be at a regular meeting. Inquiry.—A member can not be lawfully expelled at an irregular meeting of which he had no notice.²² And it is requisite that a quorum of the committee be present.²³ But where the constitution of a club provides that a member may be expelled by a two-thirds vote of the govern-

ing to give notice of a change of residence. Another by-law provided that notice should be given to each member who should be six months in arrears, calling his attention to the fact that he should be stricken from the roll in case he should not pay his dues in thirty days. A member changed his residence without giving notice, and it was held that he could not be expelled without a personal service of notice upon him, there being neither agreement nor provision in the charter or by-laws for a different mode of service. *Wachtel v. Noah Widows' & O. Soc.* (1881), 84 N. Y. 28, 9 Daly, 476, 38 Am. Rep. 478.

¹⁹ *Wachtel v. Noah Widows' & O. Soc.* (1881), 84 N. Y. 28, 31, 38 Am. St. Rep. 478. As to personal service of notice, service by letter and by publication, see further: *Schenectady, etc. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Mississippi, etc. R. Co. v. Gaster*, 20 Ark. 455; *Lexington,*

etc. R. Co. v. Chandler, 13 Met. 311; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236; *Knight's Case*, 2 Ch. 321; *Birmingham, etc. R. Co. v. Locke*, 1 Q. B. 256; *South Staffordshire Ry. Co. v. Burnside*, 5 Ex. 129; *Cockerell v. Van Dieman's Land Co.*, 26 L. J. C. P. 203; *Graham v. Van Dieman's Land Co.*, 1 Hurl. & N. 541.

²⁰ *Weakly v. Northwestern Benevolent, etc. Assn.*, 19 Ill. App. 327.

²¹ *Payn v. Rochester Mut. Relief Soc.*, 17 Abb. N. Cas. 53.

²² *Medical & Surgical Soc. v. Weatherby* (1885), 75 Ala. 248, where it was held also that declaring a member to have forfeited his membership at a meeting other than the one specially designated by the constitution for the purpose, and of which he had notice, is ground for a *mandamus* to compel his restoration.

²³ *Loubat v. Le Roy* (1885), 40 Hun, 546, 15 Abb. N. Cas. 1.

ing committee, and that a majority of the members of the committee shall constitute a quorum, a two-thirds vote of a quorum of the committee as it existed at the time of the vote, is sufficient, although vacancies exist.²⁴ In proceedings for the expulsion of a member, one of the governors of the club is not disqualified from taking part because he is a relative of the member whom it is sought to expel.²⁵ An irregularity under the by-laws, in the appointment of the committee to try a member, is waived by the appearance of the accused, who, having knowledge of the irregularity, does not object thereto.²⁶

Of the nature of the inquiry before the committee.—In order to disfranchise a member of a voluntary association, the offenses charged must be stated as found after a formal investigation, and not rest on inference alone.²⁷ Nor, it has been held, has a society the right to expel a member merely because he does not appear, and without proving the charges against him; even if he does not appear, proof should be required of his offense.²⁸ But while the

²⁴ *Loubat v. Le Roy* (1885), 40 Hun, 546, 15 Abb. N. Cas. 1.

²⁵ *Loubat v. Le Roy* (1885), 40 Hun, 546, 15 Abb. N. Cas. 1.

²⁶ *Sperry's Appeal*, 116 Pa. St. 391.

²⁷ *Schweiger v. Voightlander Benevolent Assn.* (1883), 13 Phila. 113.

²⁸ *People ex rel. Corrigan v. Young Men's Father Matthew Ben. Soc.*, 65 Barb. 357. In the leading English case on this subject, *Labouchere v. Wharnccliffe*, 13 Ch. Div. 346, the Master of the Rolls, after reading the rule of the club providing for expulsion "after inquiry," said: "The committee are not to form an opinion without inquiry. They are not to take up a newspaper and see that A. B. has written a letter which they may consider scandalous, or that C. D. has been brought up in a police court for drunkenness." For it might well happen that the wrong man was charged, because it was well known that men had given the name of a friend or an enemy. Inquiry meant inquiry into the facts, and also into

whatever excuse or reason might be given by the member whose conduct is to be inquired into. They should have given notice, if they could, to the member that his conduct was about to be inquired into, and should have given him an opportunity of stating his case to them. And this is not merely a legal interpretation of the rule, but is, no doubt, what the framers of the rule meant to convey by it. "Is this what the committee did? All they did was this—they had brought before them a letter written by the plaintiff complaining of the conduct of another member to him as being injurious to the club, and they had also brought before them a newspaper, of which the plaintiff was the proprietor, containing a letter as to the terms of which I will not express an opinion. But they did not tell Mr. Labouchere that his conduct was brought before them; and though they adjourned their meeting to a future day, and wrote him a letter in the meantime, they did not say: 'Your conduct will be investigated and

committee must not act without evidence, yet in taking evidence they need not do so in legal form, nor are they obliged to take only such evidence as would be admissible in a court of justice. They may take cognizance of matters of public notoriety not directly before them, and though they may "set down naught in malice," yet they may take general repute into account in aggravation of any act then before them. In fact, they may do—what a court of justice may not—take evidence of bad character, not only for the purpose of passing sentence, but also for the purposes of trial, so long only as they are *bona fide* convinced in their own minds of the truth of the facts, and are so convinced as reasonable beings.²⁹

§ 547. (f) **Jurisdiction of courts of equity.**—It is an ancient and well established rule of English law that no person shall be dispossessed of a place of profit or honor, or be deprived of rights which he has acquired by contract or otherwise, without a fair

the next meeting, and we shall consider whether you ought to be turned out of the club,' which was what they had to consider. Nothing of the sort. They wrote him a letter, stating his letter of accusation of the 4th instant, and stating that a committee would be held to consider the matter of the letter, and that in the meantime he must undertake not to make any attack on any member of the club in his publication. There was really no inquiry. Even now I am unable to say what the exact nature of the charge against Mr. Labouchere was. Three have been suggested. There was his conduct as regarded the matter of the assault, or alleged assault; there was his conduct of writing the letter to Mr. Lawson; and there was his conduct of publishing that letter in *Truth*; but I am in the dark as to whether any one charge singly, or the three charges together, were considered sufficiently proved to the satisfaction of the meeting." Inquiry there did not appear to have been of any sort or description, either with or without notice, and it ap-

peared to him that the committee was not justified in acting under Rule 20. "I state this for the information of the committees of all clubs, that where it depends on the judgment of the committee, where there is no power of appeal given to anybody, it is most important that the materials on which that judgment was formed should be actually asserted. Of course, that could only be done by a proper inquiry, with notice to the accused, and taking, I do not say legal evidence, or that evidence not strictly legal ought not to be admissible, but taking evidence as to the question of the fact before them, and being satisfied in their own minds, at all events, of the truth of those facts. That was not done, and, in my opinion, the committee did not follow the rule at all." *Labouchere v. Wharnccliffe*, 13 Ch. Div. 346, 28 W. R. 367, 41 L. T. 638. See review of this case in *Canada L. Jour.*, Oct. 15, 1881, 381.

²⁹ *Leach's Club Cases*, 45, and *Labouchere v. Wharnccliffe*, 13 Ch. Div. 346, quoted in preceding note.

trial, and without the exercise of a *bona fide* and sound discretion on the part of those who claim the power so to dispossess or deprive him.³⁰ It has been said, on the other hand, that the source of equitable jurisdiction is in some infringement of the property rights of members; that while the court will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and when it takes jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character,³¹ yet that where no property rights are involved, there is no jurisdiction.³²

Grounds of equitable intervention.—Only courts of equity have jurisdiction of unincorporated societies, and it is with reluctance that they will exercise it.³³ A court will not interfere in case of a partnership merely because the partners do not agree, and there is certainly greater reason why it should not interfere in case of other associations concerning mere internal regulation and discipline.³⁴ In other words, the court will not interfere where the rules are reasonable, and have been strictly observed, unless it be shown that the club has acted maliciously and not in good faith. It is not for the court to say whether what was done was right, or even whether the decision was reasonable.³⁵ The only question is whether it was done *bona fide*, and the mere fact that the decision was unreasonable is not a sufficient ground for interference, unless it was so manifestly absurd and idle as to show a want of good faith.³⁶ Accordingly, a court of equity can not decree a dissolution and distribution because of an unauthorized expulsion.³⁷ But the court will interfere in reference to the

³⁰ Willis v. Child, 13 Beav. 117; Deane v. Bennett, L. R. 6 Ch. 489.

³¹ Rigby v. Connol, 14 Ch. Div. 482.

³² Otto v. Journeyman Tailors' P. & B. U. (1888), 75 Cal. 308, 7 Am. St. Rep. 156, 158; Rigby v. Connol, 14 Ch. Div. 482, 49 L. J. Ch. 328, 42 L. T. 139; Sale v. First Regular Baptist Church, 62 Iowa, 26, 49 Am. Rep. 136; Burke v. Roper, 79 Ala. 138.

³³ See note to Austin v. Searing, 69 Am. Dec. 665. The power of unincorporated societies to expel members, and the jurisdiction of courts to interfere concerning ex-

pulsions, will be found considered in the notes to Hiss v. Bartlett, 63 Am. Dec. 776; and Austin v. Searing, 69 Am. Dec. 665.

³⁴ 2 Lindley on Partnership, *466.

³⁵ Williams' Forensic Facts & Fallacies (1885), 115.

³⁶ Williams' Forensic Facts & Fallacies (1885), 115.

³⁷ Burke v. Roper, 70 Ala. 138; Lafond v. Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344; Fischer v. Raab, 57 How. Pr. 87, 94; Thomas v. Ellmaker, 1 Pars. Sel. Cas. 98. *Contra*, Gorman v. Russell, 14 Cal. 531, 18 Cal. 688.

expulsion of members from societies and social clubs, where the decision of the association can be shown to be contrary to natural justice, or that what has been done is contrary to the rules, or that there has been malice in arriving at the decision.³⁸

§ 548. (g) **Remedy for unlawful expulsion.**—The usual remedy of a member of an unincorporated association, who is, or is about to be, unlawfully expelled, is by injunction to restrain the officers of the association or other members from interfering with his enjoyment of the privileges of membership, or to restrain the threatened resolution of expulsion.³⁹ Or, if the member has been already expelled, *mandamus* may issue in a proper case for his reinstatement.⁴⁰ In some cases wrongful expulsion may be en-

³⁸ *Otto v. Journeyman Tailors' P. & B. U.* (1888), 75 Cal. 308, 7 Am. St. Rep. 156, 159, citing *Hirschl on Fraternal Societies*, 56; *Dawkins v. Antrobus*, 44 L. T. 557, L. R. 17 Ch. Div. 615; *Lambert v. Addison*, 46 L. T. 20. "We are referred to the provision of appellant's constitution which provides that 'any member having a grievance shall have the right to lay his case before the central body, who shall take action thereon, and whose decision shall be final.' No doubt, when an action is properly taken in the manner indicated, it is final and the courts will not interfere; but when under the guise of remedying the grievance of a member, the central body acts in bad faith and maliciously makes the subject of the grievance a pretext for oppression and wrong, its action may, however, to that extent, be the subject of review." *Otto v. Journeyman Tailors' P. & B. U.* (1888), 75 Cal. 308, 7 Am. St. Rep. 156, 160.

³⁹ *Niblack on Mutual Benefit Societies*, § 63; *Thomas v. Ellmaker*, 1 Pars. Sel. Cas. 98; *Fitz v. Muck* (1881), 62 How. Pr. 69, 73-75; *Leech v. Harris* (1870), 2 Brewst. (Pa.) 571. *Cf. Society of Italian Union, etc. v. Montedonico* (Ky. 1884), 4 Am. & Eng. Corp. Cas. 22.

But an injunction to restrain a medical society has been refused in Massachusetts. *Gregg v. Massachusetts Medical Soc.* (1872), 111 Mass. 185. *Cf. "Law of Clubs,"* by Louis Claude Whiton (1883), 27 Alb. L. J. 326.

⁴⁰ *Black & White Smiths' Soc. v. Vandyke* (1836), 2 Wharton (Pa.), 309; *Commonwealth v. German Soc.* (1850), 15 Pa. St. 251; *People v. Saint Francisco's Benevolent Soc.* (1862), 24 How. Pr. 216; *State v. Carteret Club*, 40 N. J. 295; *People v. Medical Soc. of Erie Co.* (1865), 32 N. Y. 187; *People v. New York Benevolent Soc.* (1875), 3 Hun, 361; *Medical, etc. Soc. v. Weatherby*, 75 Ala. 248. One who has been illegally expelled from an unincorporated voluntary benevolent association may maintain an action against its president to compel restoration to membership. If the rules of the association failed to provide for notice of the proceedings for expulsion, they were unreasonable, and the member, notwithstanding them, was entitled to notice and to an opportunity to be heard. Weekly payments which the member declared himself entitled to because of sickness, and of which he claimed that he was unjustly deprived during the period of his expulsion, cannot, however, be re-

joined by a court of equity;⁴¹ but it will not assume jurisdiction unless in exceptional cases, rendering its interference necessary inasmuch as the expelled member generally has adequate relief at law by *mandamus*.⁴²

Mandamus will lie to compel his restoration to membership, where a member has been expelled without sufficient cause,⁴³ or without reasonable notice and opportunity for hearing, or without compliance with the charter and by-laws, in such case prescribed.⁴⁴ He has no remedy, however, by a decree of dissolution.⁴⁵ And if the expulsion has been regular and authorized by the charter or under statute, *mandamus* will not issue.⁴⁶ Nor will one be reinstated by the court who for nineteen years has acquiesced in his expulsion from the membership of a corporation for non-payment of corporate dues.⁴⁷ In another case, the plaintiff who, six years before, had been expelled from a benevolent society, brought suit to be restored to membership. It appeared that he had previously sued for certain benefits, and that the suit had been determined against him on the ground that he had been expelled; and it was held that the former suit constituted an effectual bar to his proceeding for restoration to membership.⁴⁸ The legality of an expulsion is not to be collaterally questioned.⁴⁹

covered, the association, in the absence of fraud, being the sole judges of the propriety of making such payments. *Fitz v. Muck* (1881), 62 How. Pr. 69.

⁴¹ *Albers v. Merchants' Exchange, etc.*, 39 Mo., App. 583; *Hall v. Supreme Lodge, etc.*, 24 Fed. 450; *Leech v. Harris*, 2 Brewst. (Pa.) 571.

⁴² *Sturges v. Board of Trade, etc.*, 86 Ill. 441; *White v. Brownell*, 4 Abb. Pr. (N. Y.) 162; *Gregg v. Mass. Med. Soc.*, 111 Mass. 185, 15 Am. Rep. 24.

⁴³ *Otto v. Journeymen, etc.*, 75 Cal. 308, 7 Am. St. Rep. 156; *State v. Georgia Med. Soc.*, 95 Am. Dec. 408; *Sibley v. Board, etc.*, 40 N. J. Law, 295; *People v. Musical, etc. Union*, 118 N. Y. 101; *Meurer v. Detroit, etc. Assn.*, 95 Mich. 451.

⁴⁴ *Delacy v. Neuse River, etc. Co.*, 1 Hawks (N. C.), 274, 9 Am. Dec. 636; *People v. Mechanics' Aid Soc.*, 22 Mich. 86.

⁴⁵ *Burke v. Roper*, 79 Ala. 138; *Thomas v. Ellmaker*, 1 Pars. Sel. Cas. 98; *Fischer v. Raab*, 57 How. Pr. 87, 94. The case of *Gorman v. Russell*, 14 Cal. 531, 18 Cal. 688, to the contrary, is opposed to principle and authority.

⁴⁶ *Commonwealth v. Pike Beneficial Soc.* (1844), 8 Watts & S. 247; *People v. Fire Underwriters* (1876), 7 Hun, 248.

⁴⁷ *Bostwick v. Detroit Fire Department*, 49 Mich. 513.

⁴⁸ *Bachmann v. New Yorker Deutscher Arbeiter Bund*, 12 Abb. N. Cas. 54, 64 How. Pr. 442.

⁴⁹ *Black & White Smiths' Soc. v. Vandyke* (1836), 2 Wharton (Pa.), 309; *Commonwealth v. Pike Beneficial Soc.* (1844), 8 Watts & S. 247; *Society for the Visitation of the Sick v. Meyer* (1866), 52 Pa. St. 125, 131. Cf. *Commonwealth v. Oliver* (1849), 2 Parson's Sel. Cases, 420, 426.

In a collateral proceeding the courts will not inquire into the regularity of the proceeding in the expulsion of a member of an incorporated benefit society, where notice, trial and expulsion were voted in compliance with the provisions of the charter and by-laws.⁵⁰

The remedy within the association to be exhausted before application to the court.—So long as the government is fairly and honestly administered, those who have grievances should be required in the first instance to resort to the remedies for redress provided by the rules and regulations.⁵¹ Thus, a broker having been suspended as a member of the stock exchange, on his confession of insolvency, can not be reinstated, or maintain any claim against the association, except in accordance with its rules, and where they provide an ample remedy, equity will not relieve.⁵² For, if the constitution or by-laws provide a remedy within the association for a suspended or expelled member, then he must avail himself of that remedy before he can ask the courts to interfere.⁵³ And, at all events, he will be obliged to exhaust the remedies provided for by the constitution and by-laws of the association, before he can appeal to the courts.⁵⁴ He must first, within the organization itself, exhaust all his remedies by appeal or otherwise, and although the appellate body is a corporation of another State;⁵⁵ but a resort to that remedy is excused if it

⁵⁰ Black, etc. Soc. v. Vandyke, 2 Whart. (Pa.) 309, 30 Am. Dec. 263.

⁵¹ Lafond v. Deems, 81 N. Y. 507, 514, 8 Abb. N. Cas. 344, 349; per Miller, J.

⁵² Moxey v. Philadelphia Stock Exchange, 14 Phila. 185.

⁵³ Screwmen's Benef. Assn. v. Benson (Tex. 1890), 13 S. W. Rep. 379, holding that where the constitution of a charitable corporation reserves to a member expelled by the board of trustees the right to appeal to the members of the corporation at a corporate meeting *mandamus* will not issue in favor of an expelled member who has taken no appeal from the action of the board, though the order of expulsion may be contrary to law and void; White v. Brownell, 2 Daly, 329,

365, 4 Abb. Pr. (N. S.) 162, 199; Lafond v. Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344; Niblack on Mutual Benefit Societies, §§ 130, 131; Chamberlain v. Lincoln, 129 Mass. 70; Karcher v. Supreme Lodge K. of H., 137 Mass. 368, 372; Oliver v. Hopkins, 144 Mass. 175; Poultney v. Bachman, 31 Hun, 49; McAlees v. Supreme Sitting Order of Iron Hall (Sup. Ct. Pa. 1888), 12 Cent. Rep. 415; McCallion v. Hibernia Savings & Loan Soc. (1886), 70 Cal. 163, *per* McKee, J.

⁵⁴ Poultney v. Bachman, 31 Hun, 49; McAlees v. Supreme Sitting Order Iron Hall (Sup. Ct. Pa. 1888), 12 Cent. Rep. 415; Oliver v. Hopkins, 144 Mass. 175.

⁵⁵ Grosvenor v. United Soc., etc., 118 Mass. 78; Zelfiff v. Grand Lodge, etc., 53 N. J. Law, 536; Karcher v. Supreme Lodge, etc.,

be clearly useless.⁵⁶ Thus, an adverse vote of fourteen members of a committee of twenty justifies the expelled member in applying to the court before making a motion before the committee to reconsider their determination.⁵⁷ But an abolition of the right of appeal does not excuse the member from exhausting his remedy within the association before applying to the courts when it does not appear that an appeal would have been necessary.⁵⁸

§ 549. (h) **Expulsion ipso facto terminates membership.**—Under a law which makes the non-payment of assessments for a given period after notice operate as a suspension *ipso facto*, it is not necessary that the suspension be judicially determined by any judiciary of the order.⁵⁹ Thus, when the by-laws of an association provided that if a member should neglect for thirty days to pay assessments or dues, his membership should cease and determine without notice, and his claims upon the association be forfeited it was held that no action could be maintained for recovery of an assessment, the payment of which had been thus neglected, as the membership was *ipso facto* terminated.⁶⁰ But where the constitution of a voluntary medical society provided that if the annual dues were not paid by a certain time the defaulter should forfeit his membership; that of this he should be duly notified by the secretary; that notice of the requirement should be served each year, and that on reading the roll of members any such defaulter should be immediately stricken from the roll,—it was held that non-payment of the dues at the specified time, was not *ipso facto* a forfeiture of membership.⁶¹ In respect of religious associations, it has been held that a person, who, being a contributor, is, under the canons of the church of the New Jersey diocese, entitled to vote at parish meetings, is not affected as to that right by the vestry's resolution to receive no further contributions from him.⁶²

§ 550. (i) **Suspension.**—A person suspended from membership is thereby debarred from exercising the rights and enjoying the privileges and benefits incident thereto.⁶³ The penalty of

137 Mass. 368; *Reno Lodge, etc. v. Grand Lodge, etc.*, 54 Kan. 73.

⁵⁶ *Loubat v. Le Roy*, 40 Hun, 546; reversing 15 Abb. N. Cas. 1.

⁵⁷ *Loubat v. Le Roy*, 40 Hun, 546; reversing 15 Abb. N. Cas. 1.

⁵⁸ *Lafond v. Deems*, 81 N. Y. 507.

⁵⁹ *Borgraefe v. Knights of Honor*, 22 Mo. App. 127.

⁶⁰ *McDonald v. Ross-Lewin*, 20 Hun, 87.

⁶¹ *Medical & Surgical Society v. Weatherby* (1883), 75 Ala. 248, *per* Somerville, J.

⁶² *State v. Trinity Church*, 45 N. J. 230.

⁶³ *Knights of Honor Supreme Lodge v. Abbott*, 82 Ind. 1; *Bor-*

suspension is frequently imposed upon members of lodges and mutual benefit societies for delinquency in non-payment of dues. And it is held that the beneficiaries of a member of a benevolent society, who stands suspended for non-payment of assessments, by operation of the laws of the society, at the time of his death, can not recover on the benefit certificate on the ground that the subordinate lodge of which he was a member had continued to treat him as a member, and to treat his unpaid dues to the supreme lodge as dues payable to the subordinate lodge, for which it had extended him credit.⁶⁴ These cases turn largely upon the construction of the by-laws of the lodge or order. In a Minnesota case the by-laws of a benevolent association provided that a member who should fail to pay an assessment should be suspended, but that a payment within three months should reinstate him; and another provision of the by-laws provided for the action of the association in cases where members delinquent for more than three months should desire to pay and obtain a restoration of their rights. A member delinquent for less than three months, paid an assessment while on his death-bed, and it was held that his rights were thus restored without action on the part of the association.⁶⁵ Where a by-law of a benevolent society provided that any subordinate lodge in arrears should stand suspended, and no death benefit should be paid if a death occurred during the suspension, it was held that the by-law was not to be construed as cutting off the right to receive the benefit, except during the continuance of the suspension.⁶⁶

§ 551. **Fines imposed by by-laws.**—By-laws of a non-stock corporation may provide for imposing reasonable fines upon its members, for violation of its rules.⁶⁷ Such a by-law is void, if *ex post facto* or unreasonable, or if the fine is excessive.⁶⁸

B.

SHAREHOLDERS IN STOCK COMPANIES.

§ 552. **Relations of the stockholders toward the corporation.**—A stockholder may be creditor of the corporation and

graeve v. Knights of Honor, 22 Mo. App. 127; Manson v. Grand Lodge, 30 Minn. 509.

⁶⁴ Borgraefe v. Knights of Honor, 22 Mo. App. 127.

⁶⁵ Manson v. Grand Lodge, 30 Minn. 509.

⁶⁶ Knights of Honor Supreme Lodge v. Abbott, 82 Ind. 1.

⁶⁷ Hassey v. Gallagher, 61 Ga. 86, 49 Am. Dec. 604.

⁶⁸ Pulford v. Fire Dept., etc., 31 Mich. 458; Lynn v. Freemansburg, etc., 117 Pa. St. 1.

take security the same as may a stranger to the corporation.⁶⁹ He may sue and be sued by the corporation, in the same way as any other person.⁷⁰ He is not bound by admissions of the corporation.⁷¹ "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law."⁷² A stockholder has an insurable interest in the corporate property.⁷³ He is a competent witness in a contract made by the corporation, where he took no part in its negotiation, and although the other party to the contract is dead.⁷⁴ He can not serve as judge, where the corporation is a party to the suit.⁷⁵ Nor can he act as juror in a suit by or against the corporation.⁷⁶ At common law, the stockholders have exclusive power to make the by-laws, and may delegate the power to the directors, but not the exclusive power.⁷⁷ They have exclusive power to authorize the increase or decrease of capital stock, to elect the board of directors,⁷⁸ to authorize amendment of the charter, and they may dissolve the corporation without express legislative authority, unless the corporation owes special duties to the public, as in case of railways. They can transact no business as a body except at duly called corporate meetings. Votes, or consents elsewhere given, are invalid and void.⁷⁹ Increase or decrease of the capital stock can be carried into effect only by authority of the stockholders given at a corporate meeting.⁸⁰ The stockholder can not change the board of directors during

⁶⁹ *Moore v. Universal, etc. Co.* (1899), 122 Mich. 48.

⁷⁰ *Richardson v. Oliver* (1900), 105 Fed. 277; *Biggs v. Elliston, etc. Co.* (1896), 93 Va. 404.

⁷¹ *American, etc. Co. v. Phoenix, etc. Co.*, 113 Fed. 629.

⁷² *Humphreys v. McKissock*, 140 U. S. 304 (1891).

⁷³ *Riggs v. Commercial, etc. Ins. Co.* (1890), 125 N. Y. 7.

⁷⁴ *Banking, etc. Co. v. Road*, 132 Mo. 256 (1896).

⁷⁵ *Buena Vista, etc. Bank v. Grier* (1901), 114 Ga. 398; *Adams v. Minor* (1898), 121 Cal. 372.

⁷⁶ *McLaughlin v. Louisville, etc. Co.* (1896), 100 Ky. 173.

⁷⁷ *North, etc. Co. v. Bishop*, 103 Wis. 492 (1899); *Brunkerhoff, etc. Co. v. Home Lumber Co.* (1893), 118 Mo. 447; *Alters v. Journeymen, etc. Assn.* (1892), 19 Pa. Super. Ct. 272.

⁷⁸ *Durkee v. People* (1895), 155 Ill. 354.

⁷⁹ *De La Vergne, etc. Co. v. German, etc. Inst.* (1899), 175 U. S. 40; *Duke v. Markham* (1890), 105 N. C. 131.

⁸⁰ *Newport, etc. Co. v. Mimms* (1899), 103 Tenn. 465.

the term for which elected.⁸¹ A stockholder can not be deprived of his right to equal dividends with other stockholders, or of his right to vote. He can not be fined for violation of the by-laws.⁸² Acceptance of amendment to the charter must be made by the stockholders.⁸³ By unanimous consent, the stockholders may voluntarily dissolve a solvent corporation.⁸⁴ And if the corporation be insolvent, or in contemplation of insolvency, it may be dissolved by a majority of the stockholders.⁸⁵ The stockholders can not make contracts for the corporation. They can do no corporate act. The directors represent them and they only can do an executive act.⁸⁶ Even though one person own all the stock of a corporation, he can not act as if he were the corporation.⁸⁷ The stockholders have no power to elect the president or other officers of the board of directors. The directors only have that authority.⁸⁸ The stockholders can not make any corporate contract. It is the exclusive province of the directors, in their discretion to make any contracts for the corporation, within the express or implied corporate power. The stockholders can not direct the use of money received on new issue of stock.⁸⁹ They can not make an assignment for the benefit of creditors.⁹⁰ They have no power to sell the corporate property.⁹¹ A deed of conveyance of corporate property by a stockholder, who owns all the capital stock, conveys no good title to the property.⁹² The corporation may contract with its stockholders as freely as with any other persons.⁹³ The stockholder may be a creditor of the corporation and take security for his debt as freely as may any other creditor. The

⁸¹ *Powers v. Blue, etc. Assn.*, 86 Fed. Rep. 705 (1898).

⁸² *Monroe, etc. Assn. v. Webb* (1899), 40 N. Y. App. Div. 49.

⁸³ *Hope Ins. Co. v. Beckman* (1870), 47 Mo. 93.

⁸⁴ *Kessler v. Continental, etc. Co.* (1890), 42 Fed. 258.

⁸⁵ *Price v. Holcomb* (1893), 89 Iowa, 123.

⁸⁶ *Colorado, etc. Co. v. American, etc. Co.* (1899), 97 Fed. 843; *Sellers v. Greer* (1898), 172 Ill. 549; *Solomon v. Barber* (1897), 58 Kan. 419.

⁸⁷ *Chase v. Michigan, etc. Co.* (1899), 121 Mich. 631.

⁸⁸ *Walsenberg Water Co. v. Moore* (1899), 5 Colo. App. 144.

⁸⁹ *Jones v. Concord, etc. R. R.* (1891), 67 N. H. 119.

⁹⁰ *Rogers v. Pell* (1898), 154 N. Y. 518; *De La Vergne, etc. Co. v. German, etc. Inst.* (1899), 175 U. S. 40.

⁹¹ *Rough v. Breitung* (1898), 117 Mich. 47.

⁹² *Parker v. Bethel Hotel Co.* (1896), 96 Tenn. 252; *Buffalo, etc. Co. v. Medina, etc. Co.* (1900), 162 N. Y. 67.

⁹³ *Gordon v. Preston* (1833), 1 Watts (Pa.), 385; *Moore v. Universal, etc. Co.* (1899), 122 Mich. 48; *Richardson v. Olivier* (1900), 105 Fed. 277; *Martin v. Eagle, etc. Co.* (Oreg. 1902), 69 Pac. 216.

stockholder has no title to any of the property or business profits of a corporation during its corporate existence, except upon declaration of a dividend, or to a distributed share of its property, upon dissolution of the corporation and payment of its debts.⁹⁴ Where a corporation conveyed property, providing in the deed that upon certain happening the land "should revert to the stockholders, their heirs and assigns," it nevertheless reverts to the corporation.⁹⁵ The stockholder and the corporation may sue and be sued by each other at law or in equity under like circumstances as other persons.⁹⁶

Admissions or declarations of the stockholders or of the corporation, do not bind one another, merely because of their relations as corporation and stockholders, or as between the stockholders themselves.⁹⁷ Stockholders are not personally liable for corporate debts.⁹⁸ The stockholder has no power as agent to bind the corporation by his acts or contracts, merely because he is a stockholder.⁹⁹ A stockholder has an insurable interest in the corporation, and may recover upon the policy an amount equal to his interest.^{99a}

§ 553. Fiduciary relations and dealings between the corporation and its stockholders.—The relation between members and the corporation is not such as to prevent dealings between them. The stockholder is not a trustee of the corporation, even when he owns a majority of the stock, and he may deal with it through its officers, or agents, as he might deal with any stranger to the corporation, provided he is not at the time acting as a corporate officer, or agent in the transaction.¹ A stockholder, unlike an officer, is not precluded by the fact that he is personally

⁹⁴ *Lockhart v. Van Alstyne* (1875), 31 Mich. 76.

⁹⁵ *Pettit v. Stuttgart, etc. Institute* (1900), 67 Ark. 430.

⁹⁶ *Biggs v. Elliston Dev. Co.* (1896), 93 Va. 404; *American, etc. Co. v. Phoenix, etc. Co.* (1902), 113 Fed. 629.

⁹⁷ *Wilgus v. Germain* (1896), 72 Fed. Rep. 773.

⁹⁸ *Gorder v. O'Connor* (1898), 56 Neb. 781.

⁹⁹ *Central Trust Co. v. Bridges* (1893), 57 Fed. 753; *Grand Rapids, etc. Co. v. Cincinnati, etc. Co.* (1891), 45 Fed. 671.

^{99a} *Riggs v. Commercial, etc. Ins. Co.* (1890), 125 N. Y. 7.

¹ *Lexington, etc. Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Rogers v. Nashville, etc. Ry. Co. (C. C. A.)*, 91 Fed. 299; *Langston v. Greenville, etc. Co.*, 120 N. C. 132; *International, etc. Co. v. McMorran*, 73 Mich. 467; *Gamble v. Queens, etc. Co.*, 123 N. Y. 91; *Kingman & Co. v. Cornell, etc. Co.*, 150 Mo. 282; *Fox v. Mackay*, 125 Cal. 57; *Russell v. Rock, etc. Co.*, 184 Pa. St. 102.

interested from voting for a contract or other business measure at a meeting of the corporation.² While it cannot be laid down as a general rule that the members of a corporation occupy a fiduciary relation toward one another which forbids all transactions by which any of them may gain an advantage over others,³ yet there are circumstances under which a *quasi* trust relation has been held to exist, and where equity will interfere, on the one hand, to require an accounting from any member seeking to gain an unfair advantage over the whole body of members,⁴ and on the other, to restrain a majority of the company from overriding a dissenting minority.⁵

² Bjorngaard v. Goodhue County Bank, 49 Minn. 483; Gamble v. Queens, etc. Company, 123 N. Y. 91.

³ Gillett v. Bowen (1885), 23 Fed. Rep. 625. In Appeal of Schaabber (Pa. 1889), 17 Atl. Rep. 209, one F., who was the principal stockholder in an ice company, and also the president of a water company, and a large stockholder therein, procured the adoption of a resolution at a stockholders' meeting authorizing the board of directors of the water company to lease its dam to the newly-created ice company for ice purposes. Immediately thereafter the stockholders elected a new board of directors, consisting of F. and others, who were interested in the ice company, in place of the old board, consisting of plaintiffs and others. The lease was accordingly made by the new board. Both before and after making it plaintiffs were given an opportunity and were urged to take stock in the ice company, but they declined; after that company had become a success, however, they sued to cancel the lease. But their bill was dismissed.

⁴ Thompson v. Meisser (1884), 108 Ill. 359, where a shareholder attempted to discharge his liability by an assignment of claims against the company which he

had bought up at a discount. In Aultman's Appeal (1883), 98 Pa. St. 505, where certain stockholders of an insolvent corporation brought its property at a public sale, it was held that they were not entitled to any advantage over other stockholders in respect thereof, and, there being no *laches*, they would be held to account to such other stockholders for profits realized. Cf. Myers v. Scott (1888), 50 Hun, 603, where the complaint alleged that plaintiffs were stockholders in a railway construction company which, under a contract with a company whose road it had constructed, held land-grant bonds secured by mortgages, which it proposed to divide among its members and then dissolve; that the lands were to be appraised, and taken by the bondholders at their appraised value, thus securing equality of rights; but that bonds had been issued by the officers of the company under which such officers and others had derived unfair benefits, and appropriated valuable unappraised portions of the lands, leaving plaintiffs and other shareholders inferior lands. It was decided that the facts alleged entitled plaintiffs to protection and redress.

⁵ Ervin v. Oregon, etc. Co., 20 Fed. 577 (1884).

§ 554. **Rights and powers of stockholders.**—The rights and powers of stockholders are very few and barren.⁶ As stated by Judge Wood, they are: "To meet at stockholders' meetings, to participate in the profits of the business; and to require that the corporate property and funds shall not be diverted from their original purpose. If the company becomes insolvent, it is the right of the stockholders to have the property applied to the payment of its debts. I do not know any other rights, except incidental ones, subsidiary and auxiliary to these. Of course, the stockholder has, ordinarily, the right to a certificate of his stock, to transfer it on the company's books, and to inspect these books. For the invasion of these rights, by the officers of the company, he may sue at law, or in equity, according to the facts in the case." Their rights are meager, unless, in the articles of incorporation and by-laws,⁸ they have by wise foresight, preserved substantial rights and some power of self-protection, against spoliation and plunder at the hands of the managing officers of the corporation, from whom they have the right to expect the greatest measure of protection; but who, on the contrary, are a greater danger to the stockholders than is their liability to third persons, or their danger of loss by reason of perils of the business venture. Shareholders seldom recognize these dangers before entering into membership. "This subject is the most practical one connected with the subject of corporation law. The methods of perpetrating and concealing fraud, and perpetuating power on the one hand, and the mode of detecting and relieving against it, on the other, has resulted in producing a system of rules, making up in volume, probably one-third of the subject of corporation law." "The real remedy lies in the prevention; first, by provisions in the articles of association for the calling of special meetings to remove officers; second, power in the same body and in the same manner to declare dividends and require their payment; third, a more rigid criminal code in reference to this class of vandalism."⁹

Stockholder's right to his stock.—The shareholder's right to his shares is as inviolable as is any other right in property, and can no more be taken away or lessened against the will of the owner,

⁶ *Wheeler v. Pullman I. & S. Co.*, 143 Ill. 197.

⁷ *Wood, J., in Forbes v. Memphis, etc. R. Co.*, 2 Woods, C. C. 323.

⁸ *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114.

⁹ *Andrew's American Law*, p. 586, secs. 496, 497; *Hunter v. Roberts, etc.*, 83 Mich. 63.

than can any other right, unless power is reserved in the first instance when it enters into the constitution of the right.¹⁰

§ 555. **Rights and powers incident to membership.**—Unless otherwise provided by charter or statute, the stockholders or members, acting by vote of the majority, elect or appoint the officers or agents to act for the corporation. This power is inherent or implied.¹³ The principal rights and powers of the members are, to meet and elect directors,¹⁴ to accept or reject applicants for admission,¹⁵ and to prescribe by-laws for the government of the body corporate;¹⁷ to inspect the corporate books;¹⁸ to receive such portion of the profits of the enterprise as the directors may deem it advisable to distribute as dividends;¹⁹ to hold the directors and officers accountable for any breach of the trust committed to them.²⁰ Though the stockholders or members can not control

¹⁰ Kent v. Quicksilver M. Co. (1879), 78 N. Y. 159.

¹³ Beardsley v. Johnson, 121 N. Y. 224; Commonwealth v. Gill, 3 Whart. (Pa.) 228; Wright v. Commonwealth, 109 Pa. St. 560; Protection Life Ins. Co. v. Foot, 79 Ill. 361; Hurlbut v. Marshall, 62 Wis. 590.

¹⁴ *Vide infra*, CORPORATE MEETINGS, §§ 663–685. See “Jurisdiction of Equity to Enjoin Corporate Elections,” by James L. High, 3 So. L. Rev. (N. S.) 211. “The directors are elected by the stockholders, and manage all their affairs, in virtue of the power conferred by the election. The stockholders impart no authority to them, except by electing them as directors. But, we are told, and are told truly, that the authority is given in the charter. The charter authorizes the directors to manage all the business of the corporation. But do they act as individuals, or in a corporate character? If they act as a corporate body then the whole law applies to them as to other corporate bodies. If they act as individuals then we have a corporation which never acts in its corporate character, except in the instances of electing its directors, or instructing them. The corporation possesses many important powers,

and is as a corporation to perform many important acts, scarcely one of which is to be performed in a corporate character. They are all to be performed by agents, acting as individuals under general powers conferred by the charter.” Bank of the United States v. Dandridge (1827), 12 Wheat. 64, 113.

¹⁵ *Vide supra*, § 539; Sutton Hospital Case, 10 Coke, 30; Child v. Hudson’s Bay Co., 2 P. Wms. 207; Mathews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741.

¹⁷ People v. Kip (1822), 4 Cowen, 382, note; Kearney v. Andrews (1854), 10 N. J. Eq. 70; People v. Crossley (1873), 69 Ill. 195; Carroll v. Mullanphy Savings Bank (1880), 8 Mo. App. 249, 253; Juker v. Commonwealth (1853), 20 Pa. St. 484; Commonwealth v. Woelper (1817), 3 Serg. & R. 29; Newling v. Francis (1789), 3 Term Rep. 189. *Of* Samuel v. Holladay (1869), 1 Woolw. 400; Beach on Railways, § 405.

¹⁸ Beach on Railways, §§ 406–410. *Vide supra*, §§ 111–114.

¹⁹ *Vide supra*, DIVIDENDS, §§ 433–467e.

²⁰ Beach on Railways, §§ 412–414. See Annotation of Cook v. Sherman (1882), 20 Fed. Rep. 167, 181, by J. R. Harper.

the directors in the exercise of the discretion vested in them by the charter or general law,²¹ they can not repudiate any act done by authority of the stockholders which they had power to authorize.²² Stockholders may restrain the corporation from *ultra vires* or illegal acts;²³ and in extreme cases, where the directors refuse to act in the matter, may bring and defend suits in the corporate name.²⁴

§ 556. **Participation in corporate management.**—As a general rule the members or stockholders of a corporation have no right to participate directly in the management of its ordinary affairs.²⁵ These are committed to trustees or directors, who,

²¹ Hunt v. American Grocery Co., 80 Fed. 70; McCullough v. Moss, 5 Denio (N. Y.) 567; Wallamet, etc. Co. v. Kittridge, 5 Sawy. 44.

²² Smith v. Wells Manuf. Co., 148 Ind. 333.

²³ Leslie v. Lorillard (1886), 40 Hun, 392; Leonard v. Spencer (1888), 108 N. Y. 338.

²⁴ Beach on Railways, §§ 415-418. Annotations of Cook v. Sherman (1882), 20 Fed. Rep. 167, 182, by J. R. Harper. This subject will be treated in a subsequent chapter.

²⁵ "A commercial or other business corporation is constituted for the specific purpose of suing and being sued, granting and receiving, buying and selling, and doing other business in a corporate name and capacity totally distinct from that of any or all of its members considered as individuals. A corporation is a person. Its property is not the property of its stockholders. Its rights are not their rights. They have only an indirect interest therein. The rights of a stockholder are, to meet at stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purpose. If the company become insolvent, it is the right of the stockholders to have the property applied to the payment

of its debts. I do not know of any other rights, except incidental ones, subsidiary or auxiliary to these. Of course a stockholder has ordinarily a right to a certificate for his stock, to transfer it on the company's books, and to inspect these books. For the invasion of these rights by the officers of the company, he may sue at law, or in equity, according to the nature of the case." Forbes v. Memphis, etc. R. Co. (1872), 2 Woods, 331. "Corporate powers are usually distinguished into legislative, electoral and administrative in private corporations aggregate, though sometimes all of the members act immediately in the administration of its affairs. Usually, for the sake of convenience, the direct management is intrusted by the charter to certain officers or board of managers elected by the members at large, though deriving their ordinary powers from the act of incorporation. These officers exercise the legislative and administrative functions; the former in the institution of by-laws for the general government of the company, the latter in the superintendence and execution of its general business. In other instances a select few, representing all those interested in the object of the association, are erected into and invested with all the powers of a corporation; and sometimes se-

within the scope of their authority, act independently of the members,²⁶ throughout the term for which they were elected.²⁷ A single stockholder can not make a valid contract in the corporate

lected branches are divided into distinct classes. When the corporate existence is devolved on a board of officers, they not only wield the whole corporate authority, but may apply for and agree to radical changes in the instrument to which they owe the corporate being. When such a board is separated into integral parts occupying distinct positions, both must concur in any act having for its object an alteration in the fundamental law, though in the exercise of the ordinary powers of a corporation they act jointly and are governed by a majority of the united bodies. These in their capacity of managers have no authority either to call for or to assent to a change in the corporate constitution but by the agreement of a majority of the corporators." *Commonwealth v. Cullen* (1850), 13 Pa. St. 113.

²⁶ *Beach on Railways*, §§ 468-471; *Conro v. Port Henry Iron Co.* (1851), 12 Barb. 27; *McCullough v. Morse* (1846), 5 Denio, 567; *Railway Company v. Allerton* (1873), 18 Wall. 233; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank* (1875), 2 Colo. 565; *In re Wheeler* (1866), 2 Abb. Pr. (N. S.) 361; *Gashwiler v. Willis* (1867), 33 Cal. 11; *Park v. Grant Locomotive Works* (1885), 40 N. J. Eq. 114, 117, the court saying: "In cases where the power of the directors of a corporation is without limitation, and free from restraint, they are at liberty to exercise a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. Their power over them is absolute so long as they act in the exercise of an honest judgment. . . . And their determination in respect to these

matters, if made in good faith and for honest ends, though the result may show that it was injudicious, is final, and not subject to judicial revision;" *Fleckner v. United States Bank* (1823), 8 Wheat. 338; *Whitwell v. Warner* (1848), 20 Vt. 425; *Ridgway v. Farmers' Bank* (1824), 12 Serg. & R. 256; *Metho-dist Episcopal Church v. Sherman* (1874), 36 Wis. 404; *Salem Bank v. Gloucester Bank* (1820), 17 Mass. 1, 28, 29, where a distinction is drawn between the powers of directors and those of corporate officers, the former being, it is said, the agents of the company, while the latter are its servants. "The duties of both," the court continued, "are pointed out by statute, or prescribed in the by-laws, which are the promulgated will of the company. Acting within the limits of the authority thus given, the company is liable for their acts; but beyond these limits they cannot bind their principals;" *Louisiana v. Bank of Louisiana* (1834), 6 La. Ann. 745; *Bank of Kentucky v. Schuylkill Bank* (1846), 1 Parson's Sel. Cas. 180, 235. *Of. People v. Metropolitan Ry. Co.* (1881), 26 Hun, 82; *Howland v. Myer* (1850), 2 Sandf. Super. Ct. 186, affirmed 3 N. Y. 290; *State v. Curtis* (1874), 9 Nev. 325; *Union Mutual, etc. Ins. Co. v. Keyser* (1855), 32 N. H. 313; *Black v. Delaware, etc. Co.* (1871), 22 N. J. Eq. 130.

²⁷ Ordinarily the shareholders have no power to remove directors before the expiration of their term. *Imperial, etc. Hotel Co. v. Hampson* (1882), 23 Ch. Div. 1, 7. In a late case in West Virginia, a bill by certain stockholders for themselves and others alleged that the president and manager had abused his trust, that a majority

name;²⁸ and the directors may disregard specific directions from the members respecting matters committed generally to their control. The court will not compel compliance therewith, even at the suit of a majority of the members.²⁹

§ 557. Holding shares gives the stockholder no title to the property.—Though the stockholders generally furnish the capital,³⁰ they have no control over it,³¹ or of any legal title to the property of the corporation. The control of the corporate property is in the directors and not in the stockholders. The bare fact that a man holds shares in the capital stock of a corporation gives him no legal title to the property of the corporation. That remains in the corporation and not in the shareholders.³² The

of the directors and stockholders were his near kinsmen, and some of them resided at a distance and allowed him to select the proxy to vote their stock; that they refused to allow a committee appointed to examine the books to employ an expert; that at a meeting to elect directors some of them withdrew and broke up the meeting, and afterwards gave notice of another meeting to elect five directors, ignoring the fact that three had already been elected, was held insufficient, as showing neither that these directors and stockholders had acted fraudulently or in wilful disregard of their duties, nor that a majority of them had disabled themselves from acting in the premises, nor that they had been legally called on to act and had refused to do so. *Rathbone v. Parkersburg Gas Co.* (W. Va. 1889), 8 S. E. Rep. 570. If under the charter or statute, the shareholders have power to remove directors for cause, a court of equity will not interfere with their discretion. *Inderwick v. Snell*, 2 Mac. & G. 216 (1850); nor enjoin a meeting called for the purpose of considering the question of removal. *Isle of Wight Ry. Co. v. Tahourdin* (1883), 25 Ch. Div. 320. See, further, as to the English law of motion, 8 & 9 Vic., ch. 16, §§ 70, 88, 89, 90, 91.

²⁸ *Morelock v. Westminster Wa-*

ter Co. (Md. 1886), 4 Atl. Rep. 404; *Robinson v. Hemstreet*, 21 Fla. 342 (1885). *Cf. Leggett v. New Jersey Manuf. & Banking Co.* (1832), 1 Saxton's Ch. (N. J.) 541, 23 Am. Dec. 728, and note; *Rice v. Peninsular Club* (1883), 52 Mich. 87.

²⁹ *Commonwealth v. Trustees of St. Mary's Church* (1824), 6 Serg. & R. 508; *Dana v. Bank of the United States* (1843), 5 Watts & S. 223, 245; *Dayton, etc. R. Co. v. Hatch* (1855), 1 Disney, 84; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank* (1875), 2 Colo. 565; *Union Mutual Fire Ins. Co. v. Keyser*, 32 N. H. 313; *Granger v. Grubb* (1870), 7 Phila. 350, where it was held that a vote ordered by the directors to be taken by a circular addressed to the stockholders is not binding, but merely advisory; *Conro v. Port Henry Iron Co.* (1851), 12 Barb. 27; *McCullough v. Morse* (1846), 5 Denio, 567; *Hoyt v. Thompson* (1859), 19 N. Y. 207; *Dispatch Line of Packets v. Bellamy Manuf. Co.* (1841), 12 N. H. 205, 226; *Salem Bank v. Gloucester Bank* (1820), 17 Mass. 1, 29; *State v. Bank of Louisiana*, 6 La. Ann. 746.

³⁰ *Cook's Corporation Problem*, 63.

³¹ *Cook on Stock and Stockholders*, § 11.

³² *Hunter v. Roberts, etc.*, 83 Mich. 63; *Gorham v. Gilson*, 28

shares simply represent the proportion to which the respective shareholders, who may be such at the date of dividends, are severally entitled in the distribution of profits arising from the corporate business, which may be made from time to time, and in the final distribution of the estate of the corporation, when from any cause it shall cease to exist, and its estate shall have been fully administered. This event may happen at the expiration of the term of its corporate existence, or it may be accomplished earlier, with the consent of the holders of two-thirds of its shares, and upon the judgment of a court of competent jurisdiction. The shareholders have no right to participate directly in the management of the corporate business.³³ In case of corporate earnings, these are beyond the reach of the stockholders' power to declare any dividend. The managing officers alone have that power.³⁴ But, they may postpone its exercise indefinitely, and instead, the officers may in their own discretion, accumulate and reinvest the earnings, increase the magnitude of their responsibility as agents, and consequently, the measure of their compensation.³⁵ Though the stockholders constitute the body of the corporation, the directors, and the officers and agents chosen by them, are the head to direct, and the arms to execute all the powers of the corporate body;³⁶ with the right to exercise their own wide discretion, and without consultation with the stockholders, and without liability to them, or to the corporation, for any mistakes in judgment.³⁷ They may exercise their own discretion, exclusive of the will of the majority of stockholders, excepting only in the doing of acts that are actually fraudulent.³⁸ Even in such case of fraud by the directors, or other officers, by losing or mis-applying the corporate funds, or other acts of malfeasance, the injury done, in legal theory, is to the corporation, and not

Cal. 484; *Gashwiler v. Willis*, 33 Cal. 19; *Ditch Co. v. Zellerbach*, 37 Cal. 591; *Wright v. Mining Co.*, 40 Cal. 20; *Clark v. San Francisco*, 53 Cal. 311; *Johnson v. Kirby*, 65 Cal. 483; *McCormick v. Insurance Co.*, 66 Cal. 363; *Kohl v. Lillenthal* (Cal. 1890), 22 Pac. Rep. 689.

³³ *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *Ulmer v. Lime Rock R. Co.* (1904), 57 Atl. 1001, 98 Me. 579.

³⁴ *Hunter v. Roberts, etc.*, 83 Mich. 63; *Gibbons v. Manon*, 136 U. S. 549.

³⁵ *Cook on Stocks and Stockholders*, § 545.

³⁶ *Cook v. Berlin Mills*, 43 Wis. 433; *Reichwald v. Commercial Hotel Co.*, 31 W. Va. 798.

³⁷ *Rathbone v. Parkersberg, etc. Co.*, 136 Ill. 439.

³⁸ *Humphreys v. McKissock*, 140 U. S. 304; *Smith v. Hurd*, 12 Met. (Mass.) 371.

directly to the stockholders though, in fact, they are the immediate sufferers. "It is obvious that where wrong is committed by a majority of the managing officers, they will refuse to bring the suit. In that instance, the member has the privilege of bringing a suit in equity, on behalf of the corporation, and all the other stockholders, situated in the same relation, to bring the officers to account."³⁹ Mr. Cook says, "the expense, difficulty and delays of litigation; the power, wealth and unscrupulousness of the guilty parties; the secrecy, skill and evasive nature of their methods, and the fact that the results of even a successful suit, belong to the corporation, and not to the stockholders who sue,—all combine to baffle investigation and exposure, to discourage the stockholders, and to encourage and protect the parties guilty of the wrong."⁴⁰ A stockholder may enjoin the execution of a contract by the president of a corporation, where the only claim of authority was that given at an unauthorized meeting of directors.⁴¹ One can not be held to the relation of stockholder in a corporation without his knowledge and consent. Where one's name was entered in the stock book of a bank as a shareholder, that was not sufficient to charge his estate with liability as stockholder in the absence of proof of his knowledge or acquiescence in the relation.⁴² A corporation is an entity, regardless of the persons who own all its stock. The fact may be that one individual has become the owner of all the stock—but that does not make him and the corporation one and the same person. There is no identity between them.⁴³ The owner of all the stock of a corporation does not own its property.⁴⁴

Property of the corporation. Its ownership and control. The stockholders have no title to it.—The corporation is the trustee for the management of the corporate property, and the stockholders are merely the beneficiaries. The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. The property is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by the corporate authority

³⁹ Andrew's American Law, § 497.

⁴⁰ Cook on Stocks and Stockholders, § 643.

⁴¹ Rankin v. Southwest, etc. Co. (Neb. 1903), 73 Pac. 614.

⁴² Foote v. Anderson (1903), 123 Fed. 659.

⁴³ Ulmer v. Lime Rock R. Co., 57 Atl. 1001, 98 Me. 579.

⁴⁴ City of Louisville v. McAteer (Ky. 1904), 81 S. W. 698.

for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. A conveyance of all the capital stock to a purchaser gives to him only an equitable interest in the property to carry on business under the act of incorporation, and in the corporate name, and the corporation is still the legal owner of the same. A legal distribution of the property, after a dissolution of the corporation and settlement of its affairs, is the inception of any title of the stockholder to it. Although he be the sole stockholder, he does not own all the corporate property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder and nothing else. In analogy to this principle, the sole heirs of an estate have no such title to a promissory note given to their father, as will entitle them to sue the maker. The title and ownership of the note is in the administrator, until distribution of the estate according to law.⁴⁵

§ 558. Power of majority stockholders.—It is illegal and fraudulent for a majority stockholder to sell property to the corporation, at a sale authorized by himself; and the sale may be set aside, as in case of purchase of corporate property by a director.⁴⁶ The stockholders, collectively, constitute and manage the corporation only when acting at a meeting, called as prescribed in the charter and by-laws. The general rule is that the vote of the majority must govern, but its power over the minority is not unlimited. The power of the majority extends only to the transactions which are within the express corporate powers conferred by the charter. The minority, dissenting from any unauthorized act of the majority, may enjoin it or set it aside in equity. Any unauthorized act by the majority, even though all other stockholders may consent, is a breach of trust towards a dissenting stockholder, against which he is entitled to relief in equity. In equity a trust is created, by implication, in favor of the stockholders, that the corporation will manage its business so as to promote only the objects for which it was created, and that it will not misapply its assets, or divert them to other purposes.⁴⁷ Thus, the majority

⁴⁵ *Button v. Hoffman* (1884), 61 Wis. 20, 50 Am. Rep. 131; *Gray v. Portland Bank*, 3 Mass. 365; *Tip-pets v. Walker*, 4 Mass. 495; *Louisville, etc. Co. v. Eisenmann*

(1893), 94 Ky. 83, 19 L. R. A. 684, 42 Am. St. Rep. 335.

⁴⁶ *Robertson v. H. E. Bucklen & Co.* (1903), 107 Ill. App. 369.

⁴⁷ *Russell v. Wakefield, etc. Co.*,

of a solvent corporation can not at their pleasure effect a dissolution, against the will of a dissenting minority.⁴⁸ Nor can they, by the adoption of by-laws or otherwise, deprive a dissenting stockholder of a right secured to him by the corporate articles. Accordingly, a building association can not retire and cancel shares of stock, against the will of the owner thereof.⁴⁹ Upon the same principle a stockholder's claim of a loan, to which the articles of association declare him to be entitled, will be sustained.⁵⁰ An action at law can not be maintained by one member of the company against another member who is in possession of the corporate property, to recover his proportional part thereof;⁵¹ but if a majority of the stockholders, having authority by law to dissolve the company, purchase the corporate property at the distribution sale under an unfair appraisal, they may be held accountable in an action instituted by any one or more of the minority, without making the corporation a party, the company in such a case being considered practically dissolved.⁵² In stock corporations, a majority of the board of directors have power to bind the minority, contrary to their will and even without notice to them.⁵³ The directors hold the assets of the corporation as trus-

L. R. 20 Eq. 474, 1 Smith Cas. 291; *Dodge v. Wolsey*, 18 How. (U. S.) 331; *Stevens v. Rutland, etc. R. Co.*, 29 Vt. 549.

⁴⁸ In a case decided in the New York court of common pleas, the majority of a solvent company, applied under the N. Y. Code Civ. Proc., § 2429, before the expiration of the term for which it was incorporated, to effect a dissolution of the corporation and a distribution of its assets, consisting largely of money received for shares, the later issues of which were taken by the minority at a higher price than the earlier issues held by the majority. The ground of the application was that it would be "beneficial to the interests of the stockholders;" but it was held that in the absence of especial provision giving a majority the right to it, a dissolution is not required by the code, because beneficial to a majority, and should be denied. *In re*

Importers' & Grocers' Exchange (N. Y. Com. Pleas, 1888), 2 N. Y. Supp. 257.

⁴⁹ *Bergman v. St. Paul Mutual Building Assn.* (1883), 29 Minn. 275, where it was further held that the stockholder is not estopped from objecting because an amendment to the by-laws, made before he purchased his stock, authorized the directors to set aside certain money for cancellation of certain shares, or because a subsequent amendment authorizing a forced cancellation of shares was submitted to by other stockholders, and he shared in the benefits accruing to the association.

⁵⁰ *Bergman v. St. Paul Mutual Building Assn.* (1883), 29 Minn. 282.

⁵¹ *Whitehouse v. Spragué*. (Me. 1887), 7 Atl. Rep. 17.

⁵² *Ervin v. Oregon Ry. & Nav. Co.* (1884), 20 Fed. Rep. 577.

⁵³ *Buck v. Troy, etc. Co.* (Vt. 1903), 56 Atl. 285.

tees of the stockholders, during its solvency, but as trustees for the creditors in case of insolvency of the corporation.⁵⁴

In corporations having capital stock.—The minority have certain rights and are entitled to consideration at the hands of the majority,⁵⁵ but the general rule is that the holder of a majority of the shares in an unincorporated company having capital stock shall control the affairs of the concern, and the minority cannot interfere therewith unless they show some good reason for interference.⁵⁶ Thus, the board of directors of a corporation have the general right to apply its property to the payment of its debts; and a majority of stockholders present at a meeting regularly convened, with due notice for the purpose, have the right to ratify such ac-

⁵⁴ *City Nat. Bank v. Goshen, etc.* Co. (Ind. 1903), 69 N. E. 206.

⁵⁵ *Commonwealth v. Cullen*, 13 Pa. St. 133, 33 Am. Dec. 450, where it was said that an opportunity to deliberate and if possible to convince their fellows is the right of the minority; *Wood v. Woad*, L. R. 9 Ex. 190 (1874); *Blisset v. Daniel* (1853), 10 Hare, 493; *Natusch v. Irving* (1824), 2 Coop. Geo. Ch. 358; *Const v. Harrie* (1824), *Turn. & R.* 496. *Vide infra*, § 702. Although it be prescribed that meetings shall be called upon the requisition of a majority, where it is necessary that a meeting should be held and the majority neglect or refuse to demand it, a call may be validly issued at the instance of a minority. *Busey v. Hooper* (1871), 35 Md. 15. There are circumstances under which *mandamus* will issue from a court of competent jurisdiction requiring the proper officials to call a meeting. *McNeely v. Woodruff* (1833), 13 N. J. 352; *People v. Board of Governors of Albany Hospital* (1871), 61 Barb. 397; *State v. Wright* (1875), 10 Nev. 167.

⁵⁶ *Alexander v. Searcy* (1889), 81 Ga. 536, 12 Am. St. Rep. 337, 345; *Leo v. Union Pacific R. Co.* (1884), 19 Fed. Rep. 283, (1883) 17 Fed. Rep. 273; "Power of Majority of Stockholders to Control,"

by J. C. Harper (1884), 20 Fed. Rep. 167, 181; *City of Covington v. Covington, etc.* Bridge Co., 10 Bush, 69, 76 (1873); *McBride v. Porter* (1864), 17 Iowa, 203; *Meeker v. Winthrop Iron Co.* 109 U. S. 108 (1883), 17 Fed. Rep. 48; *Barnes v. Brown* (1880), 80 N. Y. 527; *Wheeler v. Pullman Iron, etc. Co.* (1892), 143 Ill. 197; *Faulds v. Yates* (1870), 57 Ill. 416, 11 Am. Rep. 24; *People v. Albany, etc. R. Co.*, 55 Barb. 344; *Dudley v. Kentucky High School*, 9 Bush, 578; *East Tennessee, etc. R. R. Co. v. Gammon* (1859), 5 Sneed, 567; *New Orleans, etc. R. R. Co. v. Harris* (1854), 27 Miss. 537; *Treadwell v. Salisbury Mfg. Co.* (1856), 7 Gray, 393, 66 Am. Dec. 490; *Gifford v. New Jersey, etc. R. Co.* (1854), 10 N. J. Eq. 174. *Cf. Zabriskie v. Hackensack, etc. R. Co.*, 18 N. J. Eq. 178; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685; *Durfee v. Old Colony, etc. R. Co.*, 5 Allen, 242; *Stevens v. South Devon Ry. Co.*, 9 Hare, 313. By statute in England every proposition at any shareholders' meeting shall be determined by the majority of votes of the parties present, including proxies, the chairman of the meeting being entitled to vote, not only as a principal and proxy, but to have a casting vote if there be an equality of

tion and dissolve the corporation.⁵⁷ So again, directors of a corporation who are in office can not dispute the right of a stockholder holding a majority of the stock to have an election in accordance with the by-laws, on the ground that he intends to use his legal rights for purposes detrimental to the interests of the corporation, and that the desired election is merely a step toward that end.⁵⁸ One who has been induced to subscribe for corporate stock by the assurance of a stockholder that the corporation would not engage in a particular business, does not thereby acquire a right to enjoin the stockholder from voting that the corporation engage in that business.⁵⁹

Public policy.—A contract made by the majority stockholders of a corporation, agreeing to elect certain stockholders to be officers thereof for a specified term, but at a specified salary, is void, as contrary to public policy.⁶⁰

§ 559. Right to exercise all the extraordinary corporate powers.—To the members is reserved also the right of applying to the legislature for amendments of their charter and the power to accept or reject proposed amendments thereof,⁶¹ to alter

votes. The Companies Clauses Act of 1845, 8 Vic., ch. 16, § 76. By the Companies Clauses Act of 1845 it is provided that whenever in that act or in the special act of incorporation the consent of any particular majority of votes at any meeting of the company is required in order to authorize any proceeding of the company, that particular majority shall only be required to be proved in the event of a poll being demanded at the meeting; and if a poll be not demanded, then a declaration by the chairman that the resolution authorizing the proceeding has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient authority for such proceeding without proof of the number or proportion of votes recorded in favor of or against the same. 8 Vic., ch. 16, § 80.

⁵⁷ *Hancock v. Holbrook* (1888), 40 La. Ann. 53.

⁵⁸ *Camden & Atlanta R. Co. v. Elkins* (1883), 37 N. J. Eq. 273.

⁵⁹ *Converse v. Hood* (1889), 149 Mass. 471.

⁶⁰ *Bensinger v. Kantzer* (1904), 112 Ill. App. 293.

⁶¹ *Vide supra*, § 91. "The directors had the management of the concerns of the company; but this did not enable them to apply to the legislature for an increase of their powers. Such application could be made by the authority of the company only. The resolve of the assembly giving power to the company to assess the stockholders was void, because the application was made by the directors only, without any authority from the company. But if the power had been given to the company it could only have been exercised by the stockholders at a proper meeting. As the assessment in question was made by the directors without any authority from the company it is void." *Marlborough Manuf. Co. v. Smith*, 2 Conn. 579, 583 (1818).

the articles of association,⁶² to authorize an increase or reduction of the capital stock,⁶³ to sell or lease the corporate property, or modify the terms of an existing lease,⁶⁴ to consolidate or merge

⁶² *Vide supra*, § 95.

⁶³ Beach on Railways, § 323. When a corporation is authorized by its charter to increase its capital stock, the power cannot be exercised by the directors without the assent of the stockholders. *Eidman v. Bowman* (1871), 58 Ill. 444, where the court said: "That the directors are but the agents or trustees of the shareholders, for the honest, faithful and prudent management of the legitimate affairs of the shareholders, there is no doubt. But the question is at to the extent of their powers. Are they unlimited? Are all of the powers conferred on the company delegated to them by their election and admission to their office, or are there powers which are still reserved to the shareholders? It would seem that the management and transaction of all business for which the company was created, and the general affairs of the corporation devolved upon and may clearly be exercised by them; and there are other powers that are as clearly reserved to the shareholders. The power to appoint or elect directors does not devolve upon them, but that power is reserved to the shareholders. The power to sell and transfer the charter and franchises is not granted to them; the power to dissolve the body is not within the scope of their authority; and other powers which they are unable to exercise might be enumerated. Is the power possessed by them to effect great or radical changes in the organization of the body without the consent of the shareholders? Can they at pleasure, and without the consent of the shareholders, increase or diminish the capital stock of the

company, and thus materially affect the value of the shares and the amount of dividends?" *Port Edwards, etc. Co. v. Arpin*, 80 Wis. 214; *Eidman v. Bowman* (1871), 58 Ill. 444. See *Hoyt v. Thompson* (1859), 19 N. Y. 207. In *Railway Co. v. Allerton* (1873), 18 Wall. 233, 235, *Bradley, J.*, said: "As it respects the constituency or capital and membership, this is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders would be to make them members of an association in which they never consented to become such. It would change the relative influence, control and profit of each member. If the directors alone could do it, they would always perpetuate their own power. Their agency does not extend to such an act, unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not bind the stockholders without their acceptance of it, or assent to it in some form. Even when the additional stock is distributed to each stockholder *pro rata*, it would often work injustice, because many of the stockholders might be unable to take their respective share, and might thus lose their relative interest and influence in the corporate concerns." But see *Lincoln Bank v. Richardson*, 1 Greenl. 70.

⁶⁴ *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 107; *Metropolitan Elevated Ry. Co. v. Manhattan Ry. Co.* (1884), 11 Daly, 367, *Van Brunt, J.*, 15 Am. & Eng. Ry. Cas. 1. See, also, *Cass v. Manchester*, 13 The Reporter, 167; *Flagg v. Metropolitan Ry. Co.*, 20 Blatchf. 142; *Martin v. Conti-*

the company with other corporations;⁶⁵ and in general all extraordinary or unusual powers not conferred upon the directors expressly, or by necessary implication,⁶⁶ are reserved to the members.⁶⁷

mental Passenger Ry. Co., 14 Phila. 10; *People v. Albany, etc. R. Co.*, 77 N. Y. 232. *Of. In re St. Ann's Church*, 23 How. Pr. 285; *Robertson v. Bullions* (1854), 11 N. Y. 243; *Elwell v. Dodge*, 33 Barb. 339; *In re Excelsior Fire Ins. Co.*, 19 Abb. Pr. 14; *Dana v. Bank of the United States*, 5 Watts & S. 246; *Fisher v. New York, etc. R. Co.*, 46 N. Y. 644; *Central Crosstown Co. v. Twenty-Third St., etc. Co.*, 54 How. Pr. 183; *Duncomb v. New York, etc. R. Co.* (1881), 84 N. Y. 190; *Jackson v. New York, etc. R. Co.*, 58 N. Y. 623 (1874).

⁶⁵ This subject is discussed in the treatment of CONSOLIDATION, *infra*, § 1269.

⁶⁶ An example of such necessary implication is the rule that the power to borrow money carries with it the power to mortgage the corporate property to secure the loans. *Beach on Railways*, § 609.

⁶⁷ "Directors, as I shall hereafter attempt to establish, are the agents of the corporation, having, as such, exclusive authority to act within their sphere. But they are also, in some respects, merely the executive agents of the stockholders, and as such may perform certain other acts if specially authorized thereto by their principals, and in respect to such action they are simply the agents of the shareholders, as well as of the corporation. The shareholders, the principals, having fixed the terms and conditions, which they had a right to do, upon which the directors, their agents, were authorized to part with the possession of the property in their charge, and to commit the possession and management thereof into other hands; what right have the agents

to radically change or alter these terms and conditions without consulting their principals? . . . The directors thus being the agents of the corporation, what are their powers, and from whence are they derived, and how must corporative powers residing in the corporation, the right to exercise which is not vested in the directors, be brought into operation? These questions are so intimately connected that they must be disposed of together. The powers of directors are such as are conferred by the charter of their corporation and the laws pertaining thereto, and such corporative powers as are not conferred by law upon the directors remain in the corporation, to be exercised, or at least set in motion by its component parts, the shareholders. In the case at bar, the charter provided that the directors were to manage the business and affairs of the company; and the question involved in this branch of the case is, whether this language conferred the right to exercise every corporate power possessed by the corporation, or merely to manage the ordinary business and affairs of the company for the carrying on of which it was organized, leaving the right remaining in the shareholders composing the company to set in motion or confirm corporate action within the limits of its powers, but extraordinary and unusual in its nature. Within the sphere of their duties, the right of the directors to act is undoubtedly exclusive; and further, all corporate acts must be done through them, as they are the exclusive executive and administrative authority, but nevertheless all

§ 560. **Rights which may arise from estoppel.**—The rights and liabilities of membership may arise from estoppel. When one has been permitted by the company to exercise the privileges and receive the benefits of membership, or has allowed himself to be treated as a member of the corporation, neither he nor the company will be heard to deny the existence of the relation.⁶⁸ Thus, receiving dividends, or any of the benefits of membership,⁶⁹

corporate powers do not reside in the board of directors." *In re Metropolitan Elevated Ry. Co.*, 11 Daly, 367 (1884), 15 Am. & Eng. Ry. Cas. 1, per VanBrunt, J.

⁶⁸ "Whenever a person has been treated as a shareholder by the company, and has acted as a shareholder, both he and the company will be estopped from denying that he is a shareholder." Lindley on Partnership, 29, quoted with approval in *Griswold v. Seligman*, 72 Mo. 110, and in *Union Savings Assn. v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 779. An assignee of shares whose title has been recognized by the company, though not yet registered as a member, is a complete shareholder to the extent of being able to sue the company without making the transferer a party. *Bagshaw v. The Eastern Union R. Co.*, 7 Hare, 114. In an English case on this subject, *In re Littlehampton Steamship Co.*, *ex parte* Gregg, 15 Week. Rep. 82, decided on the ground of acquiescence, the directors had the power of allotting to applicants either shares on which their membership would be completed by registration, or scrip certificates entitling the holder to take up his membership. An applicant was informed that he might have scrip certificates. He asked for them but they were never given him. Some time afterwards his name was inserted in the register of members. Thirteen months afterwards an order was made to wind up the company, and it was held that his name

should be kept upon the list of contributories. *Cf. McAdams v. Boyer* (1889), 37 Fed. Rep. 73, as to what constitutes membership. *McCarthy v. La Vasche*, 89 Ill. 270; *Jewell v. Rock River, etc. Co.*, 101 Ill. 57; *Sanger v. Upton*, 91 U. S. 56; *Boston, etc. R. Co. v. Wellington*, 113 Mass. 79.

⁶⁹ *North of England Banking Co.*, 22 L. J. Ch. 194, 1 D. M. & G. 576; *Northumberland & D. District Banking Co.*, *ex parte* Dixon's Executors, 1 Dr. & Sm. 225; *Hull Flax Co. v. Wellesley*, 5 Hurl. & N. 38; *Phoenix Life Assur. Co., Hare's Case*, 2 J. & H. 229, 31 L. J. Ch. 504. In *In re North of England Joint Stock Banking Co.*, *ex parte* Barnard, 5 De G. & Sm. 283, the purchaser of shares who had taken no transfer, but had received a certificate from the company, and had received dividends for three years, was made a contributory. The owner of several shares in a steam packet company transferred two of them to his son by a document which was not executed by the son, nor entered in the company's books, nor otherwise perfected according to the provision of the deed of constitution; the son was not aware of the transfer. By a rule of the company, every proprietor was always entitled to a free passage by the company's vessels, and the son on several occasions obtained certificates from the company's office that he was a proprietor, which entitled him to a free passage, and he also signed each certificate and the company's books in re-

voting,⁷⁰ or signing a proxy to vote at a meeting of the company,⁷¹ paying calls,⁷² in connection with other circumstances, such as an informal or incomplete contract of subscription or of transfer, have been severally held to raise an estoppel.⁷³ Even though a person be induced by fraud to purchase shares of stock in a corporation, he can not avoid his purchase if, after becoming aware of the fraud, he acts as a shareholder or derives a benefit from his shares.⁷⁴ Where the right to membership in a corporation is restricted to persons of a certain nationality, and persons subscribed and paid for stock and accepted certificates therefor and appeared as stockholders on the corporate books, for a period of three years, during which time debts were contracted, and the corporation became insolvent, they were held to be estopped, in an action to enforce liability to creditors, to assert that they were not stockholders because they were not of the required nationality.⁷⁵

spect of these certificates as proprietor, and obtained a free passage; but he never received dividends nor did any other act as proprietor. The son was made a contributory. *St. George's Steam Packet Co.*, Maguire's Case, 3 De G. & Sm. 31. But where dividends had been paid to an executor in violation of a provision in the deed of settlement of a company that executors should not receive dividends till they had made themselves members, he was not a contributory. *St. George's Steam Packet Co.*, *ex parte* Doyle, 2 Hall & T. 221.

⁷⁰ *Griswold v. Seligman*, 72 Mo. 110.

⁷¹ *Sheffield R. Co. v. Woodstock*, 7 Mees. & W. 574; *Ex parte Sanger*, 18 L. T. (N. S.) 67.

⁷² *Cheltenham Ry. Co. v. Daniel*, 2 Q. B. 281, 6 Jur. 577. But in *London Marine Ins. Assn.*, *ex parte* Smith, 17 W. R. 491, L. R. 4 Ch. 611, a person who had agreed in writing to become a member of a marine insurance association, but had never received a stamp policy, notwithstanding that he had made a claim for

damages to his ship and had paid contributions, was not made a contributory.

⁷³ *Ex parte* Gordon, 3 De G. & Sm. 249. In *Hare's Case*, 2 J. & H. 229, 31 L. J. Ch. 504, the marriage settlement of a shareholder recited that shares had been transferred to trustees and declared trusts, although as a matter of fact the shares were not transferred; but the trustees having been placed on the register of shareholders, and having received dividends, they were made contributories upon the winding up of the company. *Of. Taylor v. Hughes*, 2 Jones & L. 24; *In re General Floating Dock Co.*, 15 L. T. (N. S.) 526; *Ward v. South-Eastern Ry Co.*, 29 L. J. Q. B. 117; *Hare v. London & N. W. Ry. Co.*, John. 722; *Ex parte* Barrett, 33 L. J. Ch. 617; *Bloxham v. Metropolitan Cab Co.*, 12 Week. Rep. 736; *Shelford on Joint Stock Companies*, 122.

⁷⁴ *City Bank v. Bartlett* (1885), 71 Ga. 797. But see *Ex parte* Jones, 17 Week. Rep. 983.

⁷⁵ *Blien v. Rand*, 77 Minn. 110 (1899), 46 L. R. A. 618.

Laches of stockholder.—A stockholder, after long lapse of time, is barred by his laches from maintaining action against the corporation for the issue of stock to him, which he claims to have been entitled to under a resolution of the corporation.⁷⁶

§ 561. “Dummy” stockholders.—A dummy stockholder is an irresponsible person, to whom the owner of stock in an insolvent corporation fictitiously transfers it, or in whose name he has it subscribed for the purpose of concealing his own ownership, or for escaping altogether any personal liability as stockholder.⁷⁷ Such a transfer is voidable at the instance of creditors or of other stockholders, the real owner being held liable as undisclosed principal of his agent, the “dummy.”⁷⁸ In England, the “dummy” is called “a man of straw.” In case of transfer to a “dummy,” the burden of proof is upon the transferrer to show that the transferee is responsible, and that the transferrer’s liability was destroyed by the transfer.⁷⁹

⁷⁶ *Dempster v. Rosehill, etc. Co.* (1903), 206 Ill. 261.

⁷⁷ *Vide supra*, §§ 419, 600, 600a; *Wakefield v. Fargo* (1882), 90 N. Y. 213.

⁷⁸ *Wishard v. Hansen, etc. Co.* (1896), 99 Iowa, 307.

⁷⁹ *People’s Home, etc. R. R. v. Pickard* (Cal. 1903), 73 Pac. 858.

CHAPTER XXI.

STOCKHOLDERS' SUITS

AGAINST OR IN BEHALF OF THE CORPORATION.

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| <p>§ 562. Right to sue on behalf of the corporation.</p> <p>563. Right to defend on behalf of the corporation.</p> <p>564. Shareholders' actions against the corporation.</p> <p>565. Shareholders' suits against directors and other officers and agents.</p> <p>566. (a) For negligence and mismanagement.</p> <p>567. (b) Injunction to restrain <i>ultra vires</i> acts.</p> <p>568. (c) Appointment of receiver.</p> <p>569. (d) The corporation a necessary party to the suit.</p> | <p>§ 570. (e) Suit by single stockholder.</p> <p>571. (f) The stockholders necessary interest in the suit.</p> <p>572. (g) Necessary allegations by stockholders.</p> <p>573. (h) Request to directors to sue, a prerequisite.</p> <p>574. (j) Acquiescence and delay by stockholders to sue.</p> <p>575. Costs of suit. <i>Mandamus</i> to enforce corporate duty.</p> <p>575a. Statutory remedies are cumulative to, and not in exclusion of, common-law remedies.</p> |
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References:

- Stockholders' suits against directors. Sections 565-574.
- Stockholders' remedies against directors and promoters. Sections 255-265 and 628-635.
- Stockholders as parties plaintiff in suits. Section 987.
- Creditors' suits against stockholders. Sections 605-619.
- Stockholders' defenses to creditors' suits. Sections 620-650.

§ 562. Right to sue on behalf of the corporation.—A corporation and its stockholders are distinct persons in law, and either may sue the other. As, a shareholder may sue the corporation for his portion due upon a dividend declared, or the corporation may sue the shareholder upon his subscription to the capital stock of the corporation. Every litigation on the part of a corporation should be in the name of the company, if it really desires to be a party thereto.¹ Accordingly, one who becomes the owner of all the capital stock of a corporation, does not thus entitle himself to maintain, in his own name, replevin for its property.² And, gen-

¹ MacDougall v. Gardiner, 1 Ch. Div. 13 (1875).

² Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131.

erally, stockholders can not sue individually for the conversion of corporate property;³ to enforce the payment of subscriptions to the capital stock;⁴ to obtain an injunction to restrain slander of the title of property belonging to the corporation;⁵ or to remove a cloud from the title of the company's property.⁶ Where, however, the refusal of the corporate management to institute or defend legal proceedings with respect to the corporate interests, partakes more of a disregard of duty than of an error of judgment, where it is a non-performance of a manifest official obligation, amounting to what the law considers a breach of trust, although it may not involve an intentional moral delinquency, the stockholders have the right to interfere.⁷ In a stockholder's suit, in behalf of the corporation against an individual, the stockholder must show the company's right of action against defendant, and that the directors have refused to sue, and that the plaintiff stockholder has right to bring the suit.⁸ Suit by minority stockholders on behalf of the corporation to enforce alleged corporate rights, is not maintainable, where the corporation is estopped to sue, or honestly refuses to sue.⁹ But minority stockholders may bring suit for fraud by appropriation of corporate funds by its officers, and without first making demand on the officials to bring suit.¹⁰ A stockholder can not maintain a suit for conspiracy to injure or ruin the corporation.¹¹

§ 563. Right to defend on behalf of the corporation.—The right of a stockholder to defend on behalf of his company, is governed by the same principles as his right to sue on its be-

³ Tomlinson v. Bricklayers' Union, 87 Ind. 308.

⁴ Wallworth v. Holt, 4 Mylne & C. 613.

⁵ Langdon v. Hillside Coal & Iron Co. (1890), 41 Fed. Rep. 609.

⁶ Baldwin v. Canfield, 26 Minn. 43, 56.

⁷ Beach on Railways, §§ 415, 416; Dodge v. Woolsey, 18 How. 331; Sheridan v. Sheridan Electric Light Co., 38 Hun, 396. "It is admitted that according to Gray v. Lewis, 29 L. T. (N. S.) 12, and Foss v. Harbottle, 2 Hare, 261, a suit for the benefit of shareholders ought to be instituted by the company and not by a shareholder on behalf of himself and

the other shareholders who take a similar view with himself. Is there any exception to that rule? Vice Chancellor Bacon suggests two: (1) Where the company cannot sue, and (2) where it will not sue. He thought the difficulty in the later case might be got over by application to the court for leave to use the name of the company." 56 L. T. 452 (1874).

⁸ Rosenbaum v. Rice (1903), 83 N. Y. S. 494.

⁹ Kessler v. Ensley Co. (1903), 123 Fed. 546.

¹⁰ McConnell v. Combination, etc. Co. (Mont. 1904), 76 Pac. 194.

¹¹ Converse v. United, etc. Co. (Mass. 1904), 70 N. E. 444.

half.¹² Accordingly he has no right to defend the company against an illegal tax;¹³ to appeal from a judgment rendered against it,¹⁴ nor to object to a compromise of an action against the company agreed to by the directors.¹⁵ Nor can a stockholder question a judgment against the corporation, even when called upon to satisfy it personally.¹⁶ And in a suit against a corporation, he can not file an answer without showing that the corporation has refused to defend.¹⁷ So, also, a conveyance of all the capital stock of a corporation to an individual stockholder, does not entitle him to defend a suit brought against the corporation, unless the latter refuses to defend.¹⁸ But where a bond of a corporation expressly created a lien on the corporate property, and by law the stockholders were jointly and severally liable, it has been held, in a suit against the corporation to enforce the lien, that the stockholders were properly made defendants to avoid a multiplicity of suits.¹⁹ And where any fraud has been perpetrated by the directors of a company, by which the property or the interest of the stockholders is affected, they have a right to come in as parties to a suit against the company, and ask that their property shall be relieved from the effect of the fraud.²⁰ So, also, where land of a private corporation was sold in a suit instituted by creditors for the satisfaction of their debts against the corporation, it has been held that the proceedings might be opened four years afterwards, at the instance of stockholders denying the

¹² Stockholders in an old corporation, the property of which has come into the hands of a new corporation standing in the shoes of the old one, some of whom permitted their stock to be forfeited for non-payment of assessments, some of whom never paid anything for their stock in the first place, and some of whom took part in the organization of the new corporation, and encouraged its expenditures, have no standing in court to oppose its claim to the property of the old corporation. *St. Louis, etc. Co. v. Sandoval, etc. Co.*, 116 Ill. 170.

¹³ *Dodge v. Woolsey*, 18 How. 331.

¹⁴ *Silk Manuf. Co. v. Campbell*, 27 N. J. 539.

¹⁵ *Shawhan v. Zinn*, 79 Ky. 300; *Donohue v. Mariposa, etc. Co.*, 66 Cal. 317.

¹⁶ *Farnum v. Ballard, etc. Shop* (1853), 12 Cush. 507; *Came v. Brigham* (1854), 39 Me. 35. *Vide supra*, § 726. Except in the case of fraud, a decree against a corporation is conclusive against a stockholder thereof, even though there was no personal service upon him. *Glenn v. Springs*, 26 Fed. Rep. 494.

¹⁷ *Park v. New York, etc. Co.*, 26 W. Va. 486.

¹⁸ *Park v. Ulster, etc. Co.* (1884), 25 W. Va. 108.

¹⁹ *Marine, etc. Manuf. Co. v. Bradley*, 105 U. S. 175.

²⁰ *Bayliss v. Lafayette, Muncie, etc. Ry. Co.*, 8 Biss. C. Ct. 193.

validity of the debts under which the sale was made, and charging fraud in procuring the sale.²¹

§ 564. Shareholders' actions against the corporation.— Stockholders can not usually bring actions against their company, unless there has been some illegal, oppressive or fraudulent or *ultra vires* act on the part of the company or a majority thereof.²² Accordingly, a stockholder has no right of action against the corporation based on a depreciation in value of his stock, in common with the rest of the stock.²³ And a member of an incorporated society can not sue to have declared null and void, as illegal, certain by-laws thereof, although indirectly injurious to him in his business relations.²⁴ So, also, a bill alleging that one class of stockholders was being favored by the company to the injury of another class, without an allegation that the rights of the latter were imminently threatened, is no ground for an injunction restraining the first class from voting their stock, or the payment of dividends until the controversy was settled.²⁵ But a corporator whose membership has been denied by the corporation, may sue it to establish his right thereto.²⁶ And a petition by a stockholder to restrain his company from expending money in the operation of a road, and in the construction of other lines, in violation of the franchises of another company, has been held not to present a fictitious issue in fraud of the court.²⁷ So, also, holders of scrip who accepted it under an agreement that it was to be taken for lands of the company or be redeemed in cash, may enjoin the company from re-issuing scrip retired; as the redemption of their scrip and its security would be impaired thereby.²⁸ On a bill by

²¹ Kirtland v. Purdy University, 7 Lea (Tenn.), 243.

²² MacDougall v. Gardiner, 1 Ch. Div. 13 (1875), citing Mozley v. Alston, 1 Ph. 790; Lord v. Copper, etc. Co., 2 Ph. 740; Foss v. Harbottle, 2 Hare, 461. Acc. Graham v. Boston, etc. R. Co., 118 U. S. 161, affirming 14 Fed. Rep. 753; Oglesby v. Attrill, 105 U. S. 605; Forbes v. Whitlock (1841), 3 Edw. Ch. 446; Dale v. Grant, 34 L. J. 142.

²³ Oliphant v. Woodburn, etc. Co. (1885), 63 Iowa, 332.

²⁴ Thomas v. Musical, etc. Union (1890), 121 N. Y. 45; reversing 49 Hun, 171.

²⁵ Mackintosh v. Flint, etc. R. Co. (1887), 32 Fed. Rep. 350.

²⁶ Tipton Fire Co. v. Barnheisel, 92 Ind. 88.

²⁷ Teachout v. Des Moines, etc. Ry. Co., 75 Iowa, 722.

²⁸ Rogers v. New York, etc. Co., 49 Hun, 606, holding also that a complaint by scripholders against a land company for refusing to carry out its agreement to take its scrip for land, is defective if it does not state that the plaintiffs had been damaged, or that defendant had refused to receive from them scrip for lands as agreed.

stockholders to hold a corporation liable for mismanagement, irregularities in its formation can not be inquired into;²⁹ although it has been held that a stockholder is not estopped by his subscription to deny the lawful existence of a corporation prohibited by the State constitution.³⁰

§ 565. **Shareholders' suits against directors and other officers and agents.**—The stockholders may sue the corporate directors or officers only upon the same principles that govern their suits against the corporation.³¹ Accordingly, only in cases of aggravated misconduct, will equity interfere with the acts of corporate officers.³² And although a shareholder in a proper case may maintain proceedings to restrain the directors from a contemplated action which is illegal and *ultra vires*, notwithstanding that all the other shareholders approve and assent to the action, an injunction will not be granted unless a clear and strong showing is made.³³ A stockholder can not hold the corporation itself liable for the negligence of its directors.³⁴ He may, however,

²⁹ Merchants' & Planters' Line v. Waganer, 71 Ala. 581.

³⁰ St. Louis Colonization Assn. v. Hennessy, 11 Mo. App. 555.

³¹ Cicotte v. Anciaux (1884), 53 Mich. 227.

³² Cicotte v. Anciaux (1884), 53 Mich. 227. After the undertaking has been under statutory powers handed over to another company in consideration of moneys which are in the control of the directors of the old company, a shareholder may maintain an action for account, against the directors. Browne & Theobald's Ry. Law, 104, citing Cramer v. Bird, 6 Eq. 143. Similarly, when an act directed that a company should transfer its property to another company and be dissolved, and that the money to be paid by the purchasing company should be applied in a particular way among creditors and preferential shareholders, it was held that a properly framed bill by a creditor and preferential shareholder might be sustained. Ward v. Sittingbourne, etc. Ry. Co., 9 Ch. 488.

³³ Thus, in an action under a statute providing that stockhold-

ers and creditors of corporations may sue the officers to compel an accounting for official misconduct, where the allegations of the complaint are that plaintiff is a creditor and stockholder of the corporation; that the president, who was one of the defendants, had appropriated property of the corporation to his own use, and intended to remove all the corporate property from the county where the corporation did business; that it had ceased to do business; and that both it and the president were insolvent, although specifically denied, an injunction against defendant's interfering with the corporate property until the trial will not be disturbed. Hayt v. Malone (1890), 9 N. Y. Supp. 877, construing N. Y. Code Civ. Proc., §§ 1781, 1782; Du Pont v. Northern Pac. R. Co., 18 Fed. Rep. 467, 21 Blatchf. C. Ct. 534, which was a proceeding to restrain the directors of defendant corporation from issuing a large amount of second mortgage bonds.

³⁴ Oliphant v. Woodburn, etc. Co., 63 Iowa, 332.

maintain an action on behalf of the corporation against the officers for fraud, wrongs, breaches of trust and for the money of which they have fraudulently deprived the company, and the corporation may be joined as a party defendant.³⁵ Actions against directors to compel them to the performance of their duties, must be instituted ordinarily in the name of the company,³⁶ and the damages recovered belong not to the stockholders but to the corporation.³⁷

§ 566. (a) **Shareholders' suits for negligence and mismanagement.**—The losses resulting by reason of the negligence of directors or other corporate officers, are injuries to the stockholders, although indirectly; but in contemplation of law the injury is to the corporation, and the officers are therefore liable to it, and not to the stockholders in an action at law for damages.³⁸ The general rule is that the remedy by the corporation against the directors, is at law and not in equity.³⁹ If the corporation corruptly neglects or refuses to bring the action, a stockholder's remedy is in equity, in his own behalf, and that of all the other stockholders.⁴⁰ A receiver may bring the suit in equity upon the liability of directors for negligence and mismanagement.⁴¹ The suit by receiver for negligence should be at law, and separately against each director.⁴² It does not abate by reason of death of the defendant director.⁴³ Under order of the court, the receiver may compromise the suit for negligence, and release the directors,

³⁵ *Beach v. Cooper* (1887), 72 Cal. 99.

³⁶ *Hersey v. Veazie*, 24 Me. 9, 41 Am. Dec. 364; *Smith v. Hurd*, 12 Met. 371, 46 Am. Dec. 690; *Taylor on Corporations*, § 615. But where the organizers of a joint-stock company put in, as a part of the capital stock, certain patent-rights, and by fraudulent puffing induced others to buy the stock at fictitious rates, it was held that whether the buyers could set aside the sales or not, they were not entitled to gain control of the company, and pursue their remedy against the directors in the corporate name. *Flagler, etc. Co. v. Flagler*, 19 Fed. Rep. 468.

³⁷ *Wallace v. Lincoln Sav. Bank* (1891), 89 Tenn. 630; *Grant v. Lookout, etc. Co.* (1894), 93 Tenn.

691; *Fox v. Hale, etc. Co.* (1895), 108 Cal. 475; *Dewing v. Perdicaris*, 96 U. S. 193, 198; *Smith v. Hurd*, 53 Mass. 371, 46 Am. Dec. 690; *Smith v. Poor*, 40 Me. 415, 63 Am. Dec. 672; *Evans v. Brandon*, 53 Tex. 56; *Carter v. Ford, etc. Co.*, 85 Ind. 180.

³⁸ *Empire, etc. Bank v. Beard* (1896), 151 N. Y. 638.

³⁹ *Empire, etc. Bank v. Beard* (1896), 151 N. Y. 638.

⁴⁰ *Flynn v. Brooklyn, etc. R. R.* (1896), 9 N. Y. App. Div. 269; *Hanna v. People's, etc. Bank* (1901), 35 N. Y. Misc. Rep. 517.

⁴¹ *Fisher v. Parr* (1901), 92 Md. 245; *Cockrill v. Abeles* (1898), 86 Fed. 505.

⁴² *Dykman v. Kenney* (1897), 154 N. Y. 483.

⁴³ *O'Brien v. Blaut* (1897), 17 N. Y. App. Div. 288.

even against dissent of some of the stockholders.⁴⁴ Directors in national banks are largely exempt from personal liability for negligence.⁴⁵ A director, having knowledge that an unauthorized act is being done by the corporation, cannot avoid personal liability therefor, unless he by his protest prevents the act, or institutes action in equity to prevent or to remedy the wrong.⁴⁶ As example of negligence for which the directors may be held personally liable, bank directors are liable for accepting notes which are not good, in payment of a subscription to its stock.⁴⁷ A depositor in a bank may hold the directors liable for loss of his money through their gross negligence, or false statements as to the financial condition of the bank,⁴⁸ or for receiving the deposit after knowledge of the insolvency of the bank.⁴⁹ A bank president is liable where he cancels a debt for a relative, taking in payment securities which become worthless.⁵⁰ Bank directors are responsible for losses to the bank where they leave the business to irresponsible subordinate officers, who make illegal loans, or loans upon insufficient security.⁵¹ Where the plaintiffs, stockholders and owners of scrip in a land company, sued the company, and the directors thereof, to secure an accounting for land-scrip issued by the company, which was distributed among the stockholders, but afterwards retired, then distributed as dividends and taken again for land of the company, to the detriment of the redemption of other land-scrip, it was held that as the action was brought, not for any loss or injury to plaintiffs, but to sustain the rights of the company alone against the misconduct of its directors, the right to maintain it depended upon plaintiffs showing a misappropriation of the scrip by the directors.⁵² In these cases in the nature of an accounting, the acts constituting the default of the officers need not be set forth in detail.⁵³ The fact that one of the stockholders of a cor-

⁴⁴ *People v. Anglo-American, etc. Assn.* (1901), 66 N. Y. App. Div. 9; *Woerz v. Schumacher*, 37 N. Y. App. Div. 374 (1899); *Chetwood v. California Nat. R. R.*, 113 Cal. 414 (1896).

⁴⁵ *Briggs v. Spaulding* (1891), 141 U. S. 132.

⁴⁶ *Cassidy v. Uhlmann* (1902), 170 N. Y. 505.

⁴⁷ *Coddington v. Canaday*, 157 Ind. 243 (1901), 61 N. E. 567.

⁴⁸ *Solomon v. Bates* (1896), 118 N. C. 311, 24 S. E. 478.

⁴⁹ *Cassidy v. Uhlmann* (1902), 170 N. Y. 505.

⁵⁰ *Lawrence v. Stearns* (1897), 79 Fed. 878.

⁵¹ *Robinson v. Hall* (1894), 63 Fed. 222; *Campbell v. Watson*, 62 N. J. Eq. 396 (1901), 50 Atl. 120; *Commercial Bank v. Chatfield*, 127 Mich. 407 (1901).

⁵² *Rogers v. Phelps* (1890), 9 N. Y. Supp. 886.

⁵³ *Halsey v. Ackerman*, 38 N. J. Eq. 501, affirming 37 N. J. Eq. 356. See, also, *Gardner v. Pollard*, 10

poration is offensive to the trustees and obstructive in his manner and methods, is no excuse for their neglect of the business of the corporation.⁵⁴ And the fact that a stockholder has a suit pending at law against the trustees of a corporation, does not deprive him of a standing in a court of equity to set aside a purchase by trustees at a foreclosure sale of the company's property.⁵⁵ Where directors of a railway company voted unlawfully to pay a salary, and at a subsequent meeting some of them voted to issue the company's notes for the salary, an action by the stockholders can not be maintained against those who voted to pay the salary, but did not vote for the issue and negotiation of the notes.⁵⁶

§ 567. (b) **Injunction to restrain ultra vires acts.**—In suit against the president for misappropriation of money, he owning a majority of the stock, may be enjoined from holding an election for a new board of directors, inasmuch as they may defeat the objects of the suit.⁵⁷ Where a corporation has borrowed money in excess of its authority to incur indebtedness, and used the money for the benefit of the corporation and stockholders, they can not claim the act to be illegal, although the money may have been used for an *ultra vires* purpose.⁵⁸

§ 568. (c) **Appointment of receiver.**—Though the court has extensive powers in the appointment of receivers, it will do so in case of fraud of directors, only where the business of the corporation can no longer be conducted with advantage to the stockholders; because, in such case, the appointment of receiver, often in effect, is to punish the innocent for the acts of the guilty.⁵⁹

Suspension of the powers of officers during receivership.—"It is well settled that there is no jurisdiction in equity with regard to removal of corporate officers of any description," but their powers are suspended by appointment of receiver.⁶⁰

Bosw. 674, 2 N. Y. Rev. Stat. 589, § 1, and 591, § 16.

⁵⁴ Raleigh v. Fitzpatrick (1887), 43 N. J. Eq. 501.

⁵⁵ Raleigh v. Fitzpatrick (1887), 43 N. J. Eq. 501.

⁵⁶ Metropolitan Ry. Co. v. Kneeland (1890), 120 N. Y. 134, modifying 45 Hun, 590.

⁵⁷ Cox v. Huntsville, etc. Co. (1901), 129 Ala. 496, 29 So. 867.

⁵⁸ Traer v. Lucas P. Co. (Iowa, 1904), 99 N. W. 290.

⁵⁹ Hyde Park Gas Co. v. Kerber (1879), 5 Ill. App. 132; United,

etc. Co. v. Louisiana, etc. Co., 68 Fed. 673 (1895); Edison v. Phonograph Co. (1894), 52 N. J. Eq. 620; Edwards v. Bay State Gas Co. (1898), 91 Fed. 942; Fisher v. San Francisco Supreme Court, 110 Cal. 129 (1895); Stockton v. Harmon (1893), 32 Fla. 312, 13 So. 833; North American, etc. Co. v. Watkins (1901), 109 Fed. 101; Worth, etc. Co. v. Bingham, 116 Fed. 785 (1902).

⁶⁰ Neall v. Hill (1860), 16 Cal. 145, 76 Am. Dec. 508.

§ 569. (d) The corporation a necessary party to the suit.—

The corporation is an indispensable party to a stockholders' suit to set aside as fraudulent, and to cancel, an instrument executed by the corporation. In its absence, the court will not entertain a motion for preliminary injunction.⁶¹ If justice to stockholders can not be attained through an action by the corporation, they may sue, making the corporation a party defendant.⁶² In all cases where the corporation is not a party plaintiff it must be made defendant, as in proceedings to restrain the usurpation of corporate franchises;⁶³ in a suit against directors of a dissolved corporation for mismanagement of its affairs;⁶⁴ where a bill is filed to set aside a mortgage made by the corporation;⁶⁵ and where a bill is filed under a statute to wind up and dissolve the company and sell its property and distribute the proceeds.⁶⁶

Allegations which are necessary.—A stockholder, to maintain a suit for a corporation, or for his associate stockholders, where the rights of the corporation are involved, must allege that the directors decline to bring suit or permit him to do so in the name of the corporation, and the corporation must be made a party, otherwise no cause of action appears, a necessary party not being before the court; and the defect can not be remedied by special demurrer, nor can the court require the corporation to be made a party, but the suit must be dismissed;⁶⁷ although leave may be given to amend and to add the company as a defendant.⁶⁸ Where, in an action by a corporation, the complaint avers that the action was commenced by a minority of the stockholders "by express consent, direction and authority of the corporation," a demurrer

⁶¹ *Morehead v. Southern Pac. Co.* (1903), 123 Fed. 350.

⁶² *Brewster v. Hatch*, 10 Abb. N. Cas. 400. In this case, although a mining corporation was the party primarily aggrieved, the complaint showed special damages entitling the plaintiff subscribers to maintain the action as against defendant promoters who had retained certain proceeds of a trust sale. So, where officers of a corporation have assets in their possession belonging to the corporation, the corporation, and not the stockholders, is the proper party to bring an action to compel them to account, unless it is

made to appear that it is necessary for the stockholders to bring the action in order to prevent a complete failure of justice. In the latter case, the corporation must be made a party defendant. *Byers v. Rollins* (1889), 13 Colo. 22.

⁶³ *People v. Flint*, 64 Cal. 49.

⁶⁴ *Camp v. Taylor* (N. J. 1890), 19 Atl. Rep. 968.

⁶⁵ *Coxe v. Hart* (1884), 53 Mich. 557.

⁶⁶ *Hurst v. Coe* (1887), 30 W. Va. 158.

⁶⁷ *Shawhan v. Zinn* (1882), 70 Ky. 300.

⁶⁸ *Silber Light Co. v. Silber*, 12 Ch. Div. 717.

that it has no legal capacity to sue, because the suit was commenced without authority of the directors or a majority of its stockholders, is not well taken.⁶⁹ It would seem that in England where a single shareholder brings an action in the name of the company, the court may direct a meeting of the company, and if a majority disapprove of the action, the name of the company will be struck out as plaintiff.⁷⁰

§ 570. (e) **Suit by a single stockholder.**—A single stockholder, in a proper case, may sue for himself and others,⁷¹ as when a corporation is under the control of officers who should be made defendants in a suit to investigate the mismanagement of the corporate affairs.⁷² So, also, where a company's charter was repealed by the legislature and its franchises and property transferred to another, and the company refused to seek a remedy, it was held that a stockholder asking for an injunction on the ground that the statute impaired the obligation of a contract, had a standing in equity.⁷³ So, again, where the majority of the stockholders of a corporation are illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other stockholders, and which can only be restrained by a court of equity, an action to obtain equitable relief may be maintained by an aggrieved stockholder, and those whose rights are thus affected may join as plaintiffs in the action.⁷⁴ And a complaint, to procure the cancellation of illegal stock, although in form in behalf of plaintiff alone, stating that other stockholders are injured, and that the stock was issued against their wishes, and praying for relief which inures to the benefit of all, is in behalf of all, and any stockholder may become a party plaintiff on application.⁷⁵ But one who is a stockholder in two corporations, can not bring suit, to enjoin the owner of a controlling interest in one of them from voting at a stockholders' meeting in favor of its engaging in a certain business, on the ground that engaging therein would be an illegal interference with the rights of the other corpora-

⁶⁹ *Lang Syne Min. Co. v. Ross* (1888), 20 Nev. 127.

⁷⁰ *MacDougall v. Gardiner*, 1 Ch. Div. 13; *Exeter, etc. Ry. Co. v. Buller*, 5 Rob. C. 211; *East Pant Du Lead Min. Co. v. Merryweather*, 13 W. R. 216; 2 H. & M. 254. See, too, *Cape Breton Co. v. Fenn*, 17 Ch. Div. 198.

⁷¹ *Ithaca, etc. Co. v. Truman*, 30 Hun, 212.

⁷² *Ithaca Gas Light Co. v. Truman*, 30 Hun, 212.

⁷³ *Greenwood v. Union Freight R. Co.*, 105 U. S. 13.

⁷⁴ *Barr v. New York, L. E., etc. R. Co.*, 96 N. Y. 444.

⁷⁵ *Wood v. Union, etc. Assn.*, 63 Wis. 9 (1885).

tion.⁷⁶ Nor can he maintain a suit to enjoin the corporation itself from engaging in the business, on the ground that by so doing, it will expose itself to vexatious and expensive litigation, and so diminish the value of plaintiff's stock.⁷⁷ Nor does he acquire the right to maintain the suit by the fact that when he subscribed for his stock, he remonstrated against the corporation engaging in that business, and that the corporation and its principal stockholder agreed not to engage therein.⁷⁸ Where an action is thus brought in respect of an *ultra vires* act, which may affect the rights of any particular class of shareholders, that class is sufficiently represented by one of its members.⁷⁹ But one can not sue on behalf of scrip and stock holders, when it is conceded that the stockholders have no cause of action.⁸⁰ For the class which the plaintiff represents must be a class of persons having the same interest, and must not be composed of persons who have adverse claims;⁸¹ although if the illegal act is the act of the whole company or its executive, different classes of shareholders need not be independently represented.⁸² Under a constitutional provision that a list of the stockholders of the corporation shall be kept in its office for the inspection of stockholders and creditors, *mandamus* will not lie to compel the corporation to allow a stockholder to make a list of the other stockholders in order that they may be induced to join with him in a suit he proposes to institute against the corporation, and to share with him the expenses of the suit.⁸³

§ 571. (f) The stockholder's necessary interest in the suit.—

A real and present interest in the stock is necessary to enable the

⁷⁶ *Converse v. Hood* (1889), 149 Mass. 471.

⁷⁷ *Converse v. Hood* (1889), 149 Mass. 471.

⁷⁸ *Converse v. Hood* (1889), 149 Mass. 471.

⁷⁹ *Hoole v. Great Western Ry. Co.*, 3 Ch. 262. See *Cramer v. Bird*, 6 Eq. 143. He is entitled to sue on behalf of himself and all others similarly interested, although no member of the class besides himself may be willing to sue. *Browne & Theobald's Ry. Law*, 104, and cases there cited. But though there may be members of the class willing and entitled to sue, the suit cannot be

maintained if the plaintiff is personally precluded from suing. *Burt v. British, etc. Assn.*, 4 De Gex & J. 158.

⁸⁰ *Rogers v. New York, etc. Co.* (1888), 1 N. Y. Supp. 908.

⁸¹ *Ward v. Sittingbourne, etc. R. Co.*, 9 Ch. 88.

⁸² *Browne & Theobald's Ry. Law*, 105, citing *Hoole v. Great Western Ry. Co.*, 3 Ch. 262.

⁸³ *Appeal of Empire, etc. Co.* (Pa. 1890), 7 Ry. & Corp. L. J. 470; *Commonwealth v. Iron Co.*, 105 Pa. St. 111; *Buck v. Collins*, 57 Ga. 391; *Webber v. Townley*, 43 Mich. 534; *Bean v. People*, 7 Colo. 200.

owner thereof to bring a suit against the company. It is no objection to an action by a shareholder, that he has become a shareholder for the purpose of bringing the action.⁸⁴ And a stockholder may maintain an action to set aside an election of directors, although at the same time of the election no stock had stood in his name on the books of the corporation, sufficiently long to entitle him to vote.⁸⁵ So, also, the original allottee, or the purchaser of scrip issued to raise funds for a particular purpose, whether he has been registered or not, may maintain an action on behalf of himself and other scripholders to restrain the company from applying the funds to other purposes, and the vendor of the scrip need not be a party.⁸⁶ And again, a stockholder may enjoin the misapplication of corporate funds under an agreement entered into before his stock was issued, where he had a vested right to receive it before the agreement was made.⁸⁷ A further example of this principle is that owners of stock in a corporation have the right to enjoin the corporation from performing an *ultra vires* contract, made before they became stockholders, and the right can not be defeated by the refusal of the officers to transfer the stock upon the company's books.⁸⁸ But an action can not be maintained against a corporation by a stockholder where the bill contains no allegation that plaintiff was a stockholder at the time of the transaction complained of, or that he acquired his shares by operation of law.⁸⁹ Neither should a corporation be enjoined from paying a debt in the mode agreed to by all of its shareholders, except the plaintiff, who had not paid for his stock.⁹⁰ Nor, it would seem, may a shareholder who is a mere trustee, maintain a representative action against the company;⁹¹ nor the

⁸⁴ *Seaton v. Grant*, 2 Ch. 459; *Bloxam v. Metropolitan Ry. Co.*, 3 Ch. 337. But see *Rice v. Rockefeller* (N. Y. Sup. Ct. Gen. Term, 1890), 8 Ry. & Corp. L. J. 129, reviewed at length, *infra*, § 950. And a person who is indemnified by other parties, and is not *bona fide* acting in his own interest as shareholder, will not be allowed to maintain an action. *Forrest v. Manchester, etc. Ry. Co.*, 7 Jur. (N. S.) 887, 4 De Gex, F. & J. 126; *Tilber v. London, B. & S. C. Ry. Co.*, 1 Hurl. & M. 489; *Browne & Theobald's Ry. Law*, 105.

⁸⁵ *Wright v. Central California*

Colony Water Co. (1884), 67 Cal. 532.

⁸⁶ *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 114.

⁸⁷ *Hill v. Glasgow R. Co.* (1890), 41 Fed. Rep. 610.

⁸⁸ *Carson v. Iowa City, etc. Co.* (1890), 80 Iowa, 638, 45 N. W. Rep. 1068.

⁸⁹ *Whittemore v. Amoskeag Bank*, 26 Fed. Rep. 819; *Dannemeyer v. Coleman*, 8 Sawy. 51; *Taylor v. Holmes*, 127 U. S. 489.

⁹⁰ *Landes v. Globe Planter Mfg. Co.* (1885), 73 Ga. 176.

⁹¹ *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 114, 2 Macn. & G.

holder of a scrip certificate after he has assigned the shares mentioned in the scrip.⁹² And a shareholder in one company can not sue a second company to enjoin it from making an exchange of stock with a third, in the stock of which his company has an equitable interest. Even if he has the right to sue for his company, it can not interfere with a company in which it holds no stock.⁹³

§ 572. (g) **Necessary allegations by stockholders.**—Any fraudulent, *ultra vires* or negligent act by the directors, being an injury to the corporation, its duty is to bring an action to remedy the wrong. Upon its failure therein any stockholder may sue, but he is required first to request of the corporate officers, that suit be brought by the corporation; upon refusal or neglect to act upon this request, the stockholder himself may bring the suit.⁹⁴ In his bill of complaint, he must allege the request and non-compliance.⁹⁵ For failure to make the request, the plaintiff's bill will be dismissed.⁹⁶

Request.—His request to the directors is sufficient. He need not apply to the stockholders.⁹⁷ As to remedy of an *ultra vires* act it is not necessary for the plaintiff stockholder to make the request to the directors.⁹⁸ The request is unnecessary, and the allegation of request may be omitted when the guilty directors control the corporation,⁹⁹ but the bill must clearly explain why the request was not made.¹ It would be a mockery to require or permit a suit against them to be brought and prosecuted under their management.²

§ 573. (h) **Request to directors to sue, a prerequisite.**—Stockholders can not sue the corporation for the purpose of remedying the wrongs committed by its officers, without first applying to

389. See *Great Western Ry. Co. v. Rushout*, 5 De G. & S. 290.

⁹² *Doyle v. Muntz*, 5 Hare, 509.

⁹³ *Mayor v. Denver, etc. R. Co.* (1889), 38 Fed. Rep. 197.

⁹⁴ *Morgan v. King* (1900), 27 Colo. 539, 63 Pac. 416.

⁹⁵ *Taylor v. Holmes* (1888), 127 U. S. 489; *Dillon v. Lee* (1899), 110 Iowa, 156.

⁹⁶ *Weidenfeld v. Allegheny, etc. R. R.* (1891), 47 Fed. 11; *South-west, etc. Co. v. Fayette, etc. Co.* (1892), 145 Pa. St. 13; *Roman v. Woolfolk* (1893), 98 Ala. 219.

⁹⁷ *Miller v. Murray* (1892), 17 Colo. 408, 30 Pac. 46.

⁹⁸ *Stebbins v. Perry County*, 167 Ill. 567 (1897).

⁹⁹ *Loomis v. Missouri, etc. Ry.* (1901), 165 Mo. 469; *Northern, etc. Co. v. Snyder* (1902), 113 Wis. 516; *Sheridan, etc. W. v. Marion, etc. Co.* (1901), 157 Ind. 292.

¹ *Louisville, etc. R. R. v. Neal* (Ala. 1900), 29 So. 865.

² *Heath v. Erie Ry.* (1871), 8 Blatchf. 347.

the directors to interfere and put a stop to the wrongs, and a refusal by the directors to do so.³ Nor can they sue on behalf of the company in their own names, without showing that they have endeavored in vain to secure action on the part of the directors.⁴ And a bill by stockholders against a corporation for mismanagement, should show that plaintiffs have endeavored to secure their rights through the meetings of the corporation, and that they have solicited the use of its name to bring suit against the offending directors.⁵ Before an individual stockholder can be heard in equity to ask that the transactions of the corporation, acting through a majority of its stockholders and through its directors, be interfered with and set aside, he must show that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes.⁶ And where a stockholder brings suit to obtain redress for grievances common to others, and to vindicate the rights of the corporation, he must show that he has made an earnest, not a simulated, effort to obtain redress within the corporation, and, where time has permitted, that he has endeavored to induce the stockholders, as a body, to take action.⁷ His bill must also set forth in detail the efforts made by him to secure, on the part of the corporation, the desired action, or it will be dismissed.⁸ An averment that the corporation refuses to sue, is essential, and the want of it may be taken advantage of by demurrer or by objection to evidence.⁹ But in an action by a stockholder to procure the cancellation of illegal stock, the objection that the plaintiff did not, before suit, apply to the direc-

³ *Boyd v. Sims* (1889), 87 Tenn. 771; *Hawes v. Oakland*, 104 U. S. 450; *Dimpfell v. Railroad Co.*, 110 U. S. 209. Where a corporation by a valid contract acquires a majority of the stock of another corporation, shareholders in the latter have no standing in court to restrain the acts of the directors of the former, it not appearing that they have unsuccessfully tried, within the corporation, to get what they want, or that their interests are betrayed or jeopardized. It is not enough that the former corporation is violating its contract. *Converse v. Dimock*, 22 Fed. Rep. 573.

⁴ *Taylor v. Holmes* (1888), 127 U. S. 489, 492; *Rothwell v. Robinson* (1888), 39 Minn. 1; *City of Chicago v. Cameron*, 120 Ill. 447; *Park v. Ulster, etc. Co.*, 25 W. Va. 108.

⁵ *Merchants' & Planters' Line v. Waganer*, 71 Ala. 581.

⁶ *Dimpfell v. Ohio, etc. Ry. Co.*, 110 U. S. 209.

⁷ *Dannemeyer v. Coleman*, 8 Sawy. 51.

⁸ *Foote v. Cunard Mining Co.*, 17 Fed. Rep. 46; *Dannemeyer v. Coleman*, 8 Sawy. 51.

⁹ *Doud v. Wisconsin, etc. Ry. Co.* (1885), 65 Wis. 108.

tors for relief, goes to the capacity of the plaintiff to sue, and is waived if not demurred to.¹⁰ If through fraudulent conspiracy the directors have refused to sue, they should be made parties defendant to the action brought by the stockholder.¹¹ When a corporation has been dissolved by a foreclosure sale of its franchises, but its existence is continued by statutory provision for a term of five years, during which suit may be brought in its name to wind up its affairs, a bill by stockholders is well filed if it appears that the suit is not a collusive one, and that the plaintiffs have applied to such of the late directors as they can reach to bring the suit, but they have refused to do so. Under these circumstances the stockholders may, in their individual right, sue the receiver, to call him to an accounting.¹² A request by stockholders to the directors to bring a suit by the corporation to enjoin a sale of corporate stock, was insufficient as an attempt to bring about corporate action, where no facts were given to the directors upon which to base such a suit.¹³ Where a request, that the corporation itself bring the desired suit, is apparently useless, it is excused and need not be made.¹⁴ Accordingly, where the directors of a corporation, having the authority to direct its litigation, are themselves guilty of the wrong complained of, a court of equity will interfere at the instance of the stockholders, without a demand and refusal, upon the part of the directors to bring the suit.¹⁵ For it would be against the plainest principles of justice

¹⁰ Wood v. Union Gospel Church Building Assn. (1884), 63 Wis. 9.

¹¹ Slattery v. St. Louis, etc. Co., 91 Mo. 217, 60 Am. Rep. 245.

¹² Lafayette Co. v. Neely, 21 Fed. Rep. 738.

¹³ Doherty v. Mercantile Co., 69 N. E. 335 (Mass. 1903).

¹⁴ Doud v. Wisconsin, etc. Ry. Co. (1885), 65 Wis. 108.

¹⁵ Davis v. Gemmell (1889), 70 Md. 356, 376. And where the officers of a corporation have wasted its funds, a shareholder desiring redress need not, before resorting to the courts, make a demand, which necessarily would be unavailing, on the officers to bring suit. Kelsey v. Sargent (1885), 40 Hun, 150. So suit for the re-

scission of an illegal contract may be brought by a stockholder of an insolvent corporation without a previous demand upon the corporation to sue, if the corporation appears unable to act by reason of its directors being under the control of the persons with whom the contract was made. Currier v. New York, etc. R. Co., 35 Hun, 355. And where in a suit by a stockholder against a corporation of which he was a member, the declaration alleged a conversion and misapplication of money by the corporation and its president, and that the latter kept false books of account and refused to pay over money rightly due plaintiff, it was held, that a sufficient cause of action had been

to permit the perpetrators of the wrong to conduct a litigation against themselves.¹⁶ Thus, an unlawful consolidation sanctioned by the directors and a majority of the stockholders,¹⁷ or the unlawful voting by an outside corporation of a majority of the stock of the complainant's corporation, when the former has already constituted its friends a majority of the board of the latter, may be restrained without previous request to sue.¹⁸ But the fact that a majority is apparently against the party desiring to bring suit, is not sufficient to excuse failure to make a request that the corporation act in the matter.¹⁹ So also where, although a

stated, without alleging that the corporation had refused to bring suit. *Brown v. Buffalo, etc. R. Co.*, 27 Hun, 342.

¹⁶ *Davis v. Gemmell* (1889), 70 Md. 356, 376; *Peabody v. Flint*, 6 Allen, 52; *Brewer v. Boston Theatre*, 104 Mass. 378; *Pond v. Vermont Valley R. Co.*, 12 Blatchf. 280; *Salomons v. Laing*, 12 Beav. 377; *Currier v. New York, etc. R. Co.*, 35 Hun, 355; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Rothwell v. Robinson* (1888), 39 Minn. 1. Where a stockholder filed a bill against the corporation, and all the directors thereof, and another stockholder, charging that the latter defendants had entered into a conspiracy to do an unlawful and fraudulent act, in furtherance of their individual interests, which would destroy or seriously impair the value of the property of the corporation; that the directors and their co-defendant stockholder held among themselves seven-tenths of the stock of the corporation, and that they had procured a vote of the stockholders authorizing the directors to carry out the project, he could maintain the bill to protect his individual rights, and his suit was not to be defeated because it did not show a previous effort on his part to secure redress by an appeal to the directors or stockholders for remedial action. *Barr v. Pittsburgh Plate-Glass Co.* (1890), 40 Fed. Rep. 412.

¹⁷ *Nathan v. Tompkins*, 82 Ala. 437.

¹⁸ *Mack v. De Bardeleben* (Ala. 1890), 8 Ry. & Corp. L. J. 394.

¹⁹ Thus, a stockholder cannot sue the manager until he has tried to obtain his rights within the corporation, even though the manager owns a majority of the stock and elects a majority of the directors. *Allen v. Wilson*, 28 Fed. Rep. 677. And a stockholder, complaining of misconduct of the treasurer of a corporation, is not excused from applying to the directors to bring suit, before bringing it himself, by the fact that the treasurer owns the majority of the stock, though that fact does excuse him from applying to a stockholders' meeting. *Dunphy v. Travelers' Newspaper Assn.* (1888), 146 Mass. 495. Nor can stockholders of a company, without a like demand upon it and refusal, sue another company, which is charged with wrongfully interfering with the rights of their company, simply because a majority of their directors are stockholders to a larger extent in the defendant company than in their own, and a minority are also directors in the defendant company. *Boyd v. Sims* (1889), 87 Tenn. 771; *Huntington v. Palmer*, 104 U. S. 482; *Gas Co. v. Williamson*, 9 Heisk. 314, 338; *Deaderick v. Wilson*, 8 Baxt. 131.

corporation has expired by lapse of time, if it still exists for the purpose of winding up; and although most of the directors are dead, if one of them survives, application should be made to him to bring the suit, or an effort should be made to call together the stockholders and obtain united action in support of a claim.²⁰ An allegation that the stockholders repeatedly protested against the evils complained of, without averring that their protests were made to the directors, is entirely insufficient to authorize them to sue.²¹ Again, where two of the three directors voted against bringing any suit, alleging, as the ground for their action, that they feared they could not obtain justice in the State courts, while the third director, a non-resident, was willing to trust the local courts, upon suit brought in the federal court by him the next day after the vote, it was held that the refusal was not so clearly real and persistent, as to give him authority to sue on behalf of the corporation.²² It is not required of a stockholder before suing the corporation and its directors, to first request action on the part of the directors, where the corporation was controlled by directors of a rival corporation, and the suit was to cancel as fraudulent a contract between the corporations.²³ Nor, where the directors sell to the corporation, property belonging to one of them, a stockholder, and they are still in office and the suit is to set aside the sale, and for repayment of the consideration to the corporation.²⁴ Where the corporation had but four directors, one of whom was also treasurer, and two of the directors signed and served demand upon the other two directors to sue the treasurer for money claimed as due from them to the corporation, such demand was held to be sufficient, and its refusal entitled other stockholders to bring suit on behalf of the corporation.²⁵

²⁰ Taylor v. Holmes (1888), 127 U. S. 489.

²¹ Boyd v. Sims, 87 Tenn. 771. (1889).

²² Detroit v. Dean, 106 U. S. 537. Acc. Hawes v. Oakland, 104 U. S. 450; Huntington v. Palmer, 104 U. S. 482. In a case where the only effort appearing to have been made to induce the corporation to assert its rights consisted of a written demand sixteen days before suit brought, and where the facts justified the inference of

an attempt by a simulated arrangement to foist upon the federal court jurisdiction of a case not belonging to it, the court refused to consider the complaint. Quincy v. Steel (1887), 120 U. S. 241, 7 Sup. Ct. 520.

²³ Lowenstein v. Diamond, etc. Co. (1904), 88 N. Y. S. 313, 94 App. Div. 383.

²⁴ Polhemus v. Polhemus, 88 N. Y. S. 273 (1904).

²⁵ The Telegraph v. Lee (Iowa, 1904), 48 N. W. 364.

§ 574. (j) Acquiescence and delay by stockholders to sue.—

The right to restrain corporate acts, ceases when the members have consented to the will of the majority.²⁶ Acquiescence and the receipt of money from the corporation by reason of the illegal acts, will prevent the stockholder from impeaching its legality.²⁷ Consent may be either express, or inferred from the acquiescence of the shareholders after full knowledge of the transaction,²⁸ or it may be implied by their silence for a long period of time.²⁹ Accordingly, to maintain a bill for fraud, conspiracy or *ultra vires* acts against the corporation, its officers and others who participate therein, the stockholders must act promptly or forfeit their right to equitable relief.³⁰ They can not, however, be charged with

²⁶ *Leo v. Union Pac. Ry. Co.*, 19 Fed. Rep. 283. Where a stockholder buys into a railroad corporation, with knowledge that it is acting on an assumed power to invest in the stock of railroad corporations outside the state of its creation, his purchase under these circumstances will be regarded as an implied recognition of the assumed power. *Venner v. Atchison, etc. R. Co.*, 28 Fed. Rep. 581.

²⁷ *Alexander v. Searcy* (1889), 81 Ga. 536, 12 Am. St. Rep. 337.

²⁸ *Evans v. Smallcombe, L. R.* 3 H. L. 249, affirming *L. R.* 3 Eq. 769.

²⁹ *Allen v. Wilson*, 28 Fed. Rep. 677; *Graham v. Boston, etc. R. Co.*, 118 U. S. 161; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322; *Kitchen v. St. Louis, etc. R. Co.*, 69 Mo. 224; *International, etc. R. Co. v. Bremond*, 53 Tex. 96; *Royal Bank v. Grand Junction R. Co.*, 125 Mass. 490; *In re Pinto, etc. Co.*, 8 Ch. Div. 273; *In re Magdalena, etc. Co.*, 6 Jur. (N. S.) 975; *Harwood v. Railroad Co.*, 17 Wall. 78; *Badger v. Badger*, 2 Wall. 87; *Boardman v. Lake Shore, etc. Ry. Co.*, 84 N. Y. 157; *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 89; *Shelden, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 607; *Alexander v. Searcy* (1889),

81 Ga. 536; *Gifford v. New Jersey R. Co.*, 10 N. J. Eq. 171; *Boston, etc. R. Co. v. New York, etc. R. Co.*, 13 R. I. 260; *Ashhurst's Appeal*, 60 Pa. St. 290.

³⁰ *Alexander v. Searcy*, 81 Ga. 536 (1889), 12 Am. St. Rep. 337; *Dimpfell v. Ohio, etc. R. Co.*, 110 U. S. 209; *Peabody v. Flint*, 88 Mass. 54; *Dumphy v. Travelers' Newspaper Assn.*, 146 Mass. 495 (1888); *Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co.*, 11 Daly, 373, 14 Abb. N. Cas. 103; *Zabriskie v. Hackensack, etc. R. Co.*, 18 N. J. Eq. 178; *Ashhurst's Appeal*, 60 Pa. St. 290; *McLoughlin v. Detroit, etc. Ry. Co.*, 8 Mich. 100; *Spackman v. Evans, L. R.* 3 H. L. 171; *Downes v. Ship, L. R.* 3 H. L. 343; *Gray v. Chaplin*, 2 Russ. 136; *Zabriskie v. Cleveland, etc. R. Co.*, 23 How. 381; *Hervey v. Illinois, etc. Ry. Co.*, 28 Fed. Rep. 169; *Thompson v. Lambert*, 44 Iowa, 239; *Vigers v. Pike*, 8 Clarke & F. 562, 650; *Graham v. Birkenhead, etc. Co.*, 2 Macn. & G. 146; *Great Western Ry. Co. v. Oxford, etc. Ry. Co.*, 3 De Gex, M. & G. 341; *Aurora, etc. Soc. v. Paddock*, 80 Ill. 263; *Stewart v. Erie, etc. Transportation Co.*, 17 Minn. 372; *Gregory v. Patchett*, 33 Beav. 595; *Brotherhood's Case*, 31 Beav. 365.

acquiescence by remaining still while some of their number are seeking to impeach the transactions.³¹

A stockholder of a corporation, which unlawfully purchased bank stock and received the dividends for years, until the bank became insolvent, cannot be held personally liable as a stockholder. All parties who acquiesced are estopped to set up their *ultra vires* acts.³² When the stockholder has full knowledge of a fraud or of negligence by the director, and unreasonably delays action, he will be barred by his laches from bringing suit. Where he had no notice of meetings, and no opportunity to inspect the records, he is not chargeable with laches, and the lapse of time without notice or means of knowledge is no bar.³³ But the means of knowledge is presumptive knowledge. With sufficient information to lead him to a fact, the stockholder will be chargeable with knowledge of that fact.³⁴ If, after knowledge of the fact, he unreasonably delays action, such knowledge and delay will constitute laches, as a bar to his suit.³⁵ Delay presumes acquiescence and estoppel. Delay is the basis of laches.³⁶ Where a stockholder compromised a suit to set aside a forfeiture of stock for fraud, he was not allowed, eight years later, to bring another suit to set aside assessment upon charge of newly discovered fraud.³⁷ Reasonable time is allowed to bring suit in equity, after the discovery of the facts of fraud or negligence.³⁸ The period of the statute of limitations is often allowed as time for bringing a suit.³⁹

§ 575. Cost of suit. Mandamus to enforce corporate duty.

Costs.—Stockholders bringing a suit on behalf of the corporation, and other stockholders who may come in, are liable *per capita* and not *pro rata* upon their shares, for the costs and expenses of the suit.⁴⁰ *Mandamus* will lie against a corporation to

³¹ Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co., 11 Daly, 573, 14 Abb. N. Cas. 103.

³² Hunt v. Hauser, etc. Co., 96 N. W. 95 (Minn. 1903).

³³ Joy v. Fort Worth, etc. Co., 24 Tex. Civ. App. 94 (1900); Fox v. Robbins (Tex. 1901), 62 S. W. 815.

³⁴ Jessup v. Illinois, etc. R. R. (1890), 43 Fed. 483.

³⁵ Loomis v. Missouri, etc. Ry. (1901), 165 Mo. 469.

³⁶ Montgomery, etc. Co. v. La-

hey (1899), 121 Ala. 131, 25 So. 1006.

³⁷ Marks v. Evans (Cal. 1900), 62 Pac. 76.

³⁸ Stoddard v. Decatur, etc. Co. (1900), 184 Ill. 53.

³⁹ Boyd v. Mutual, etc. Assn., 90 N. W. 1086 (Wis. 1902); Montgomery v. Lahey (1899), 121 Ala. 131, 25 So. 1006.

⁴⁰ Commonwealth v. New York, etc. Co., 138 Pa. St. 58.

enforce its performance of any duty imposed upon it by charter or by statute, or to enforce the right of stockholders or members.⁴¹

§ 575a. Statutory remedies are cumulative to, and not in exclusion of common law remedies.—A statutory remedy by or against a corporation is cumulative to the common law, as “where the statute created a special duty for the neglect of which a common law action would lie.” That action is not excluded by the fact merely that an extraordinary liability in the nature of a penalty is also provided by statute. The latter is only cumulative.⁴² But the statutory remedy for non-performance is exclusive in case of a duty imposed by statute, which duty does not exist at common law.⁴³

⁴¹ *People v. Pacific, etc. Co.*, 50 Barb. (N. Y.) 280.

⁴² *Iba v. Hannibal & St. Joseph R. Co.*, 45 Mo. 469.

⁴³ *Stevens v. Proprietors, etc.*, 12 Mass. 466.

CHAPTER XXII.

LIABILITY OF STOCKHOLDERS.

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| <p>§ 576. No liability at common law for debts of the corporation.</p> <p>577. Statutory liability, and liability at common law.</p> <p>578. Constitutional and statutory provisions.</p> <p>579. Provisions not self-enforcing.</p> <p>580. Constitutionality of statutes.</p> <p>581. Construction of statutes.</p> <p>582. Extra-territorial effect of statutes.</p> <p>583. Penal statutes strictly local.</p> <p>584. Debts to which the statutes apply.</p> <p>585. "Debts and liabilities" construed.</p> <p>586. "Double liability."</p> <p>587. "Dissolution" and "failure" construed.</p> <p>588. Proportional liability. National banks.</p> <p>589. Liability contingent upon capital stock not being fully paid in.</p> <p>590. Liability for debts due laborers, etc.</p> <p>591. Creditors first to exhaust remedy against the corporation.</p> <p>592. Exceptions to the foregoing rule.</p> <p>593. Liability of one holding stock as trustee.</p> | <p>§ 594. Liability of pledgee of stock as collateral security.</p> <p>595. Priority among creditors.</p> <p>596. Contribution among shareholders.</p> <p>597. Effect of increase or reduction of the capital stock.</p> <p>598. Partnership liability of stockholders, in case of unauthorized or defective incorporation.</p> <p>599. Liability to corporate creditors on unpaid subscriptions.</p> <p>600. Effect of transfer of shares. Liability of transferrer at common law.</p> <p>600a. Liability of original subscriber, distinguished from that of transferee.</p> <p>601. (a) Statutory liability of transferrer.</p> <p>602. (b) Liability of transferee at common law.</p> <p>603. (c) Statutory liability of transferee.</p> <p>604. (d) Liability of transferee as purchaser of forfeited stock.</p> <p>604a. Statutory and common-law liability, distinguished as to the effect of transfer.</p> <p>604b. Stockholders' liability on stock issued below par.</p> |
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References:

Liability to payment of damages in tort. Sections 958-981.

Liability to criminal indictment and prosecution. Sections 1015-1031.

Execution, attachment and garnishment of shares. Sections 651-662a.

Liability of shareholders in unincorporated association. Sections 1372-1394.

Creditors' suits against stockholders. Sections 605-619.

Stockholders' defenses to creditors' suits. Sections 620-650.

Taxation of shares in the hands of stockholder and non-residents. Sections 507-509a.

Calls and assessments upon stockholders. Sections 302-337e.

Forfeiture of shares for non-payment of subscription. Sections 320-326.

Enforcement of stockholders' liabilities. 50 L. R. A. 273.

§ 576. No liability at common law for debts of the corporation.—At common law the stockholders in a corporation are not liable individually for the corporate debts. The capital stock is the fund to which alone the creditors may resort, except in cases of fraud.¹ The personal responsibility of the stockholders is inconsistent with the nature of a body corporate.² It is always a creature of statute. It does not exist at common law;³ nor can

¹ Salt Lake City National Bank v. Hendrickson (1878), 40 N. J. 52; Atwood v. Rhode Island Agricultural Bank (1850), 1 R. I. 376; Van Sandan v. Moore (1826), 1 Russ. Ch. 392, 408; Warfield, Howell & Co. v. Marshall County Caning Co. (1887), 72 Iowa, 666, 2 Am. St. Rep. 263. See, generally, as to the status and liabilities of members of corporations and limited companies, articles in 79 Law Times, 414, 438; 49 Law Times, 182; 44 Law Times, 329; 43 Law Times, 2, 97, 192, 194; 42 Law Times, 419, 495; 40 Law Times, 459; 7 Law Times, 20, 52, 72, 126. In Alabama, West Virginia, Missouri, Nebraska and Oregon, there are constitutional guaranties that stockholders shall in no case be liable otherwise than for unpaid stock owned by them. Stimson's Am. Stat. Law (1886), § 449. In Carr v. Iglehart (1854), 3 Ohio St. 457, counsel argued that stockholders in a corporation are individually liable for its debts, unless by some provision of the charter, or statute law, they are exempted from such responsibility. "The counsel for the complain-

ant," said the court, "admits that Blackstone and divers other eminent writers upon the law and also certain courts, have entertained a contrary opinion, but he is very clear that they were all wrong, and he hopes and thinks this court will not be governed by such loose and inconsiderate expressions, either of text books or judges." But the court was of opinion that counsel was wrong and said: "We suppose that no law is better settled than that they are not liable."

² Myers v. Irwin (1816), 2 Serg. & R. 371; Liverpool Ins. Co. v. Massachusetts (1870), 10 Wall. 566, 575; Walker v. Lewis (1878), 49 Tex. 123; Jones v. Jarman, 34 Ark. 323 (1879); Windham Prov. Inst. v. Sprague (1871), 43 Vt. 502; Wood v. Hicks, 7 Lea, 40; New England Bank v. Stockholders (1859), 6 R. I. 188; Green v. Beckman (1881), 59 Cal. 545; Salt Lake City, etc. v. Hendrickson, 40 N. J. Law, 52.

³ Terry v. Little (1879), 101 U. S. 216; Marshall Foundry Co. v. Killain (1888), 99 N. C. 501, 6 Am. St. Rep. 539; Morley v.

it be created by a majority vote of the shareholders, nor by a by-law of the corporation.⁴ It is one of the distinguishing features of corporations that the individual property of members is exempt from liability for corporate debts. Herein consists the great superiority of a corporation over a partnership or an unincorporated joint-stock company.⁵ Immunity from such liability is one of the inducements which has led to the multiplication of private corporations, and caused them to supersede the ordinary partnership to a great extent, in hazardous enterprises, or enterprises requiring large capital.⁶ The corporate creditor contracts with the corporation and not with the members.⁷ There is no privity of contract between the subscriber for stock and the creditor of a corporation, though it be insolvent. Unless by authority of statute, the creditor can maintain no suit at law against the

Thayer (1880), 3 Fed. Rep. 737; Chase v. Lord (1879), 77 N. Y. 1; Slee v. Bloom (1822), 19 Johns. 453, 473; Great Falls, etc. R. Co. v. Copp (1859), 38 N. H. 124; State v. Morristown Fire Assn. (1851), 3 Zab. 195; Gray v. Coffin (1882), 63 Mass. 192, 199; French v. Teschmaker, 24 Cal. 518, 540; Inhabitants of Norton v. Hodges (1868), 100 Mass. 241; Oliver v. Liverpool, etc. Ins. Co. (1868), 100 Mass. 531, 539; Coffin v. Rich (1858), 45 Me. 511. In Jerman v. Benton (1884), 79 Mo. 148, it is held that a street railway company is a railroad corporation under Mo. Rev. Stat., § 57, imposing only single liability on the stockholders of "all existing railroad corporations." In Wise v. Miller (1887), 45 Ohio St. 388, it was held that the stockholders being indirectly liable for the debts of the corporation to an amount equal to the stock held by them, and beneficially interested in its credit and property thereby obtained, their covenant of indemnity to him who, on the faith of it, indorsed the paper of the corporation, for their mutual benefit, expressly created an obligation, like that which the law implies on the part of every principal,

and their relation to him, if not strictly that of a surety, is analogous to it, giving rise to corresponding rights and remedies. For further treatment of this subject see articles in 7 Ir. L. T. 267; 24 Leg. Obs. 321; 3 Mo. West. Jur. 385; 3 Cent. L. J. 667; 4 Am. L. Mag. 363, 921; 1 Am. L. Mag. 96; 2 L. Int. 210, 240, 269; 19 Sol. J. & Rep. 230; and the notes in 99 Am. Dec. 435; 49 Am. Dec. 310; 3 Am. St. Rep. 806; Warfield v. Marshall County, 72 Iowa, 666, 2 Am. St. Rep. 263; Norton v. Hodges, 100 Mass. 241; Jackson v. Meek, 87 Tenn. 69, 10 Am. St. Rep. 620, 9 S. W. 225; Coffin v. Rich, 45 Me. 507, 71 Am. Dec. 559.

⁴ Ireland v. Palestine, etc. Co., 19 Ohio, 369; Gamwell v. Pomeroy, 121 Mass. 207; Flint v. Pierce (1868), 99 Mass. 68; Trustees of Free School v. Flint (1847), 54 Mass. 539; Kennebec, etc. R. Co. v. Kendall (1850), 31 Me. 470; Reid v. Eatonton Manuf. Co., 40 Ala. 98 (1869).

⁵ Spense v. Iowa Valley Construction Co. (1873), 36 Iowa, 407.

⁶ Smith v. Huckabee (1875), 53 Ala. 191; "Growth of Corporate Organization," 20 Cent. L. J. 481.

⁷ Wood v. Hicks, 7 Lea, 40.

subscriber for the unpaid subscription.⁸ Even when the law of the State provides that where an execution against a corporation is unsatisfied, execution may issue against stockholders to the extent of their unpaid stock, it does not make the stockholder a debtor to the corporate creditor, nor furnish the latter any remedy against the estate of the stockholder.⁹ And wherever the debt of a corporation is satisfied in part, there is also a *pro tanto* discharge of the liability of stockholders.¹⁰ So that if the whole amount due upon unpaid subscriptions be not required to meet the corporate liabilities, then only so much as is requisite can be collected in an action instituted by the creditors of the company.¹¹ And evidence may be introduced to show, whether or not there is any property in the hands of the assignee for the benefit of creditors, which can be applied in satisfaction of the claim.¹² But, although the corporation may have assets consisting of debts owing it from other parties, the creditors will not be required to await the collection of doubtful claims or claims in litigation. "The shareholders must pay, and pay promptly, and take upon themselves the *onus* of delay and risk, as to all such cases."¹³ Incorporators are also individually liable for money illegally received by the corporation, where the corporation is but a cloak for illegal transactions.¹⁴ The most distinguishing feature of the corporation is the limitation of the liability of a stockholder to the par value of the stock he holds, and herein a corporation is distinguished from a partnership. Amendment of a charter, un-

⁸ *Brown v. Fisk*, 23 Fed. 228; *Peterson v. Lynde*, 106 U. S. 519; *Cooper v. Frederick*, 9 Ala. 739; *Thomson, etc. Co. v. Murray*, 60 N. J. Law, 20, 37 Atl. 443; *Spear v. Grant*, 16 Mass. 9; *Jones v. Jarman*, 34 Ark. 323.

⁹ *Donnelly v. Hodgeson* (1885), 13 Mo. App. 15, construing Mo. Rev. Stat., § 736.

¹⁰ *San Jose Savings Bank v. Pharis* (1882), 58 Cal. 380.

¹¹ *Bell's Appeal* (1887), 115 Pa. St. 88; *Beach on Railways*, § 420. But see *Citizens' Trust Co. v. Gillespie* (1887), 115 Pa. St. 564, holding that where subsequently to an assignment made by a corporation for the benefit of its creditors, suit to collect unpaid subscriptions is instituted, and no

evidence of an assessment is ad-
duced, recovery can be had only
in case the whole of the unpaid
subscriptions is needed for the
payment of the corporate debts.

¹² *Sleeper v. Goodwin*, 67 Wis.
577, holding also that when no
such property can be found, the
court may in accordance with
Wis. Rev. Stat. (1878), § 3224, es-
timate the respective liabilities of
the shareholders and enforce the
same by judgment without the ap-
pointment of a receiver.

¹³ *Moses v. Ocoee Bank*, 1 Lea,
398, 414. *Acc. Stark v. Burke*, 9
La. Ann. 341. See, also, *Beach on
Railways*, § 420.

¹⁴ *McGrew v. City Produce Ex-
change* (1886), 85 Tenn. 572, 4
Am. St. Rep. 771.

der a new statute, renders the shareholders liable to a statutory liability imposed by the new statute.¹⁵ Generally the statutory liability of stockholders is not a penalty but is a contract liability.¹⁶ Statutory liability is strictly construed,¹⁷ such a statute does not apply to the existing charter, unless the statute expressly so provides, nor does it apply to charters granted without reserved power of amendment.¹⁸

§ 577. **Statutory liability, and liability at common law.**—At common law the shareholders of corporations are liable for the debts of the corporation, only so far as they may have agreed to contribute to the capital stock.¹⁹ Properly speaking, this is not a personal liability to corporate creditors for the debts of the company, but a liability to the company itself upon the contract between themselves and it.²⁰ No further liability can be imposed by means of by-laws,²¹ nor by a resolution of the trus-

¹⁵ *Senn v. Levy* (Ky. 1901), 63 S. W. 776.

¹⁶ *Hanson v. Davison* (1898), 73 Minn. 454.

¹⁷ *Foster v. Row* (1899), 120 Mich. 1, 77 Am. St. Rep. 565.

¹⁸ *Steiffel v. Tolhurst* (1902), 67 N. Y. App. Div. 521; *Ochiltree v. Railroad Co.* (1874), 21 Wall. 249.

¹⁹ *Jackson v. Meek* (1888), 87 Tenn. 69, 10 Am. St. Rep. 620.

²⁰ *United States v. Knox*, 102 U. S. 422; *Terry v. Little* (1879), 101 U. S. 216, 217; *Knower v. Haines* (1887), 31 Fed. Rep. 513; *Seymour v. Sturgess* (1862), 26 N. Y. 134; *Freeland v. McCullough*, 1 Denio, 414, 422 (1845), 43 Am. Dec. 685, 689, saying: "Without the provision of the statute there is no legal liability, no cause of action against the defendant, assuming him to have been a stockholder at the time the debt was contracted;" *Smith v. Huckabee* (1875), 53 Ala. 191; *Nimick v. Mingo Iron Works* (1884), 25 W. Va. 184; *Woods v. Hicks*, 7 Lea, 40; *Walker v. Lewis* (1878), 49 Tex. 123; *Jones v. Jarman* (1879), 34 Ark. 323; *Bird v. Calvert*, 22 S. C. 292; *South Carolina Manuf. Co. v. Bank of South Carolina*, 6 Rich. Eq. 227; *Inhabitants of Nor-*

ton v. Hodges (1868), 100 Mass. 241; *Spear v. Grant*, 16 Mass. 9; *Vose v. Grant*, 15 Mass. 505; *Trustees v. Flint*, 15 Met. 539; *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 593; *Atwood v. Rhode Island, etc. Bank* (1850), 1 R. I. 376; *Warfield, Howell & Co. v. Marshall County Canning Co.*, 72 Iowa, 666 (1887), 2 Am. St. Rep. 263, where it was held that shareholders who have fully paid their subscriptions cannot be required to pay an additional sum to corporate creditors by reason of the manager of the company having made use of a letter head on which the capital stock was stated to be more than it was in fact, the creditors not being shown to have relied on the representation in extending credit to the company; *Adams v. Wiscasset Bank*, 1 Me. 361, 10 Am. Dec. 88; *Dauchy v. Brown* (1852), 24 Vt. 197; *Salt Lake City Nat. Bank v. Hendrickson* (1878), 40 N. J. 52; *Green v. Beckman* (1881), 59 Cal. 545; *French v. Teschmaker* (1864), 24 Cal. 518; *Hampson v. Weare* (1856), 4 Iowa, 13; *Shaw v. Boyland* (1861), 16 Ind. 384.

²¹ *Reid v. Eatonton Manuf. Co.*, 40 Ga. 98, 2 Am. Rep. 563; *Trus-*

tees.²² Neither can a further liability be created by the words, "individual property of stockholders liable," on the face of the corporate liabilities.²³ It can arise only by statute; and when such provision is made, it can be enforced only as therein provided.²⁴ It is true that in the early turnpike companies of New England, the members were liable to assessment beyond the amount due on their stock; but the shares of those companies had no fixed par value; and a member might escape assessment by submitting to a forfeiture for non-payment.²⁵ But an additional personal liability to corporate creditors, over and above the amount due the company upon their subscriptions, is imposed by statute in nearly all of the United States.²⁶ This liability is generally limited in amount to an additional sum equal to the par value of the shares held by each member.²⁷ But a charter, or statutory, provision that the members shall be jointly and severally liable for all debts contracted during the time they held stock in the company, without specifying the extent to which they shall be liable, is held to impose an unlimited liability.²⁸ Without any formal subscription, a stockholder may become personally liable, by acquiescence and acceptance of the benefits of membership.²⁹ The subscriber's obligation depends upon the terms of the subscription paper, and not upon representations made by anyone soliciting the subscription.³⁰ Where the statutes provide that the stockholders shall be individually liable for debts of the corporation upon its "failure," or insolvency of, or dissolu-

tees of Free Schools v. Flint, 13 Met. 539. See note to Thompson v. Reno Savings Bank, 3 Am. St. Rep. 835.

²² Vincent v. Chapman, 10 Gill & J. 279.

²³ Lowry v. Inman (1871), 46 N. Y. 119.

²⁴ Knower v. Haines (1887), 31 Fed. Rep. 513; Note to Thompson v. Reno Savings Bank, 3 Am. St. Rep. 835.

²⁵ Middlesex Turnpike Co. v. Swan (1814), 10 Mass. 384, 6 Am. Dec. 139.

²⁶ In some states, however, there are constitutional guaranties against the enactment of such statutes. Ala. Const. (1875), art. xiv, § 8; West Va. Const. (1872),

art. xi, § 2; Mo. Const. (1875), art. xii, § 9; Neb. Const. (1875), art. xi, § 4; Stimson's Am. Stat. Law (1886), § 449; Schrick v. Ridings, 65 Mo. 208; Provident Savings Inst. v. Jackson (1873), 52 Mo. 552; Miller v. Marion, 50 Mo. 55; Perry v. Turner (1874), 55 Mo. 418.

²⁷ *Vide infra*, § 586.

²⁸ Patterson v. Wyomissing Mfg. Co. (1861), 40 Pa. St. 117. *Cf.* Marsh v. Burroughs, 1 Woods, 403; Erickson v. Nesmith (1866), 46 N. H. 371.

²⁹ Clevenger v. Moore (N. J. 1904), 58 Atl. 88.

³⁰ Tanner v. Nichols (Ky. 1904), 80 S. W. 225.

tion, or other prescribed condition, the liability occurs only upon the existence of that condition to be proved in an action against the stockholder.³¹ "Failure" of a corporation as used in the statutes is construed to occur upon its insolvency, or upon its making an assignment for the benefit of creditors, or upon its ceasing to do business, or upon the appointment of a receiver. Suspension of specie payment by a bank is its failure. Inability of a corporation to pay its matured obligations, by reason of loss of all its assets, or when a judgment has been recovered, and an execution is returned unsatisfied, or when the corporation has no property subject to execution,—constitutes its "failure."³²

Who are liable as stockholders.—A person is not liable, merely because his name appears upon a subscription paper or corporate books, unless by his consent.³³ One cannot be made liable by transfer of stock to him, without his consent.³⁴ The term "corporators" is construed to include stockholders.³⁵

Other Corporations.—A corporation may take and hold stock in another corporation, and become liable to its creditors to the same extent as any other stockholder.³⁶

Partners.—When stock is owned by a partnership, the partners are liable for corporate debts to the same extent as other stockholders.³⁷

§ 578. **Constitutional and statutory provisions.**—The constitutional and statutory provisions of the various States relating to the liability of corporate members for the debts of the company, are of five kinds: First, those which guaranty the members of corporate bodies against legislation in abrogation of the common law rule of limited liability,³⁸ or which merely reaffirm that

³¹ Blair v. Gray, 104 U. S. 769.

³² Godfrey v. Taylor, 97 U. S. 171; Hathorn v. Calef, 53 Me. 471; Mechanics, etc. Bank v. Fidelity, etc. Co., 91 Fed. 456.

³³ Fowler v. Ludwig, 34 Me. 455; Stevens v. Follett, 43 Fed. 832; Mudgett v. Horrell, 33 Cal. 25.

³⁴ Simmons v. Hill, 96 Mo. 679, 2 L. R. A. 476; Robinson v. Lane, 19 Ga. 337.

³⁵ Gulliver v. Roelle, 100 Ill. 141.

³⁶ American File Co. v. Garrett, 110 U. S. 288; Gray v. Coffin, 9 Cush. 63; National Bank v. Case, 99 U. S. 628; Citizens, etc. v.

Hawkins, 34 U. S. App. 423, 71 Fed. 369; Kennedy v. California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69.

³⁷ Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176.

³⁸ See constitutions of Alabama, West Virginia, Missouri and Nebraska, cited *supra*, § 577. So, also, N. Y. Laws of 1838, ch. 260, § 23, declare in respect to stockholders in banking corporations other than national banks (Laws 1838, ch. 260, § 23) that "no shareholder of any such association shall be liable in his individual

rule by declaring them liable for the amount remaining unpaid on their stock or subscriptions;³⁹ second, those which impose an additional liability upon the contingency of the capital stock not having been fully paid in;⁴⁰ third, imposing an absolute personal liability to certain classes of creditors, such as servants, employes and material-men;⁴¹ fourth, imposing an absolute liability for all the debts of the corporation, limited, however, to an additional amount equal to the par value of the shares held by each;⁴² or limited to such a proportional amount of the corporate debts, as the shares held by each bear to the whole subscribed stock;⁴³ and fifth, abrogating entirely the rule of limited liability.⁴⁴

capacity for any contract, debt or engagement of such association, unless the articles of association by him signed shall have declared that the shareholder shall be so liable." But see *Sherman v. Smith*, 1 Black, 587, in regard to the amendments as to state banks issuing notes.

³⁹ In New York it is provided that each stockholder in railway corporations shall be individually liable to corporate creditors to an amount equal to the amount unpaid on the stock held by him (General Railroad Act of 1850, N. Y. Laws of 1850, ch. 140, § 10, as amended by Laws of 1854, ch. 282, § 16) or such proportion of that sum as shall be required to satisfy the debts of the company. 1 N. Y. Rev. Stat., tit. 3, ch. 18, § 5. See, also, *infra*, § 585.

⁴⁰ R. I. Rev. Stat., ch. 128, § 1, provides that the members of every incorporated manufacturing company shall be jointly and severally liable for all the debts of the company until the whole amount of the capital stock fixed by the charter, or by vote, shall have been paid in, and a certificate thereof made and recorded, etc. In Maryland the ordinary statutory liability, until the capital stock is paid in, makes the stockholder liable for unsubscribed shares. *Hager v. Cleve-*

land (1872), 36 Md. 476. *Of Morris v. Johnson* (1871), 34 Md. 485.

⁴¹ N. Y. Laws of 1875, ch. 392, § 8; Mich. Const. (1850), art. xv, § 7. See, also, *infra*, § 590.

⁴² Ala. Const. (1868), art. xiii, §§ 2, 3; Ala. Code (1867), § 1760, abolished by Ala. Const. (1875), art. xiv, § 8; *McDonald v. Alabama Gold Life Ins. Co.* (1889), 85 Ala. 401; Ohio Const. (1851), art. xiii, § 3; Kansas Const. (1859), art. xii, § 2, excepting railway, religious and charitable corporations. Imposing such liability upon holders of bank stock are the following: N. Y. Const. (1846), art. viii, § 7; W. Va. Const. (1872), art. xi, § 6; Ind. Const. (1851), art. xi, § 6; Ill. Const. (1870), art. xi, § 6; Iowa Const. (1857), art. viii, § 9; Neb. Const. (1857), art. xiii, § 7.

⁴³ Cal. Const. (1873), art. xii, § 3. The stockholder in all corporations is "individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association." Cal. Const. (1873), art. xii, § 3.

⁴⁴ *Vide infra*, CHAPTER VIII, PARTNERSHIP LIABILITY.

§ 579. **Provisions not self-enforcing.**—Constitutional provisions declaring in general terms that shareholders shall be individually and personally liable, each for his proportion of the corporate liabilities, without specifying the extent of the liability,⁴⁵ or which, while designating the amount of liability, indicate that the creditors' remedy "shall be provided by law,"⁴⁶ are not self-enforcing, and legislative action is necessary to render them effective. If the statutory provision expressly imposes individual liability for corporate debts, without prescribing any remedy for enforcement, the creditor's appropriate remedy applicable to that right, follows as an incident.⁴⁷ The provision should be construed as self-executing, and its language as addressed to the courts, if the right conferred, is fixed by the provision itself, so that the court can determine its nature and extent, and if there is nothing in the language to show that the subject was referred to the legislature for its action.⁴⁸

§ 580. **Statutes. Constitutionality of statutes.**—When the constitution of a State declares that shareholders shall be individually liable for corporate debts, there is no doubt respecting the power of the legislature to determine the extent and means of enforcing the liability.⁴⁹ In such case it has no power to exempt them from liability, or to impose a different liability,⁵⁰ if the constitution merely provides that the stockholders shall be individually liable for the corporate debts, but does not fix the

⁴⁵ *United States v. Stanford*, 69 Fed. 25, 161 U. S. 412; *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194; *Tuttle v. National Bank, etc.*, 161 Ill. 497, 34 L. R. A. 750; *Williams v. Citizens' etc. Co.*, 153 Ind. 496, 55 N. E. 425; *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 34 L. R. A. 757; *French v. Teschemaker* (1864), 24 Cal. 518.

⁴⁶ *Morley v. Thayer* (1880), 3 Fed. Rep. 737. *Of. Peek v. Miller* (1874), 39 Mich. 594; *Hampson v. Weare* (1856), 4 Iowa, 13.

⁴⁷ *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281, 31 Am. St. Rep. 626.

⁴⁸ *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163; *Willis v. Mabon*, 48 Minn. 140, 31 Am. St.

Rep. 626; *Jones v. Jarman*, 34 Ark. 323.

⁴⁹ *Diversey v. Smith*, 103 Ill. 378, 385; *Weidinger v. Spruance* (1882), 101 Ill. 278; *Shufeldt v. Carver*, 8 Ill. App. 545; *Hampson v. Weare* (1857), 4 Iowa, 13, 66 Am. Dec. 116; *Larabee v. Baldwin* (1868), 35 Cal. 155; *French v. Teschemaker* (1864), 24 Cal. 518; *Milroy v. Spur Mountain, etc. Mining Co.*, 43 Mich. 231. *Of. Peek v. Miller* (1878), 39 Mich. 594.

⁵⁰ *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565; *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149; *Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874; *Central, etc. Co. v. Alabama, etc. Co.*, 70 Ala. 120.

extent of their liability, or provide the mode of enforcing it. The legislature has the power to prescribe the extent of the liability and the mode of its enforcement, and also to prescribe such mode when the constitution fixes the extent of the liability.⁵¹ In the absence of such a constitutional provision, the legislature may, where the State has reserved the power of amending and repealing corporate charters, impose an additional personal liability upon the members of an existing corporation for debts thereafter incurred. For, when this reserved power exists, every subscriber takes his stock subject to whatever legislation may be thereafter passed respecting it, and there is accordingly no impairment of the obligation of contract.⁵² The legislature, at the time the corporation is created, may impose upon the stockholder individual liability for corporate debts, to any extent it may see fit.⁵³ But an act passed by the legislature, after a person became stockholder and paid for his stock, making stockholders liable for future debts to be contracted by the corporation, does not render him liable. The attempt to do so, would be to impair his contract and therefore unconstitutional and void.⁵⁴ He will waive his right to complain, by express consent, or making no objection, and participating in corporate management or in benefits conferred by the statute.⁵⁵ Though the charter, as granted, imposed no liability upon stockholders for corporate debts, they will become subject to such liability, imposed afterward by general law, by corporate acceptance of amendment of the charter subjecting it to general laws.⁵⁶ Every person, becoming a stockholder, takes his stock subject to individual liability as to future debts, when lia-

⁵¹ *Hampson v. Weare*, 4 Iowa, 13, 66 Am. Dec. 116; *Willis v. Ma-bon*, 48 Minn. 140, 31 Am. St. Rep. 626, 16 L. R. A. 281.

⁵² *In re Lee's Bank* (1860), 21 N. Y. 9; *In re Empire City Bank* (1858), 18 N. Y. 199; *Weidinger v. Spruance* (1882), 101 Ill. 278; *Sleeper v. Goodwin* (1887), 67 Wis. 577; *Sherman v. Smith*, 1 Black, 587 (1861); *Meadow Dam Co. v. Gray* (1849), 30 Me. 547; *Gardner v. Hope Ins. Co.* (1869), 9 R. I. 194. *Cf. Gulliver v. Roelle* (1882), 100 Ill. 101; *Black v. Womer* (1882), 100 Ill. 328; *The Sinking Fund Cases*, 99 U. S. 700; *Green v. Biddle*, 8 Wheat. 1, 84;

Bailey v. Hollister (1862), 26 N. Y. 112; *Oldtown, etc. R. Co. v. Veazie* (1854), 39 Me. 571.

⁵³ *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149; *Sherman v. Smith*, 1 Black (U. S.), 587; *In re Reciprocity Bank*, 22 N. Y. 9; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

⁵⁴ *Evans v. Nellis* (C. C. A.), 101 Fed. 620; *Wincock v. Turpin*, 96 Ill. 135; *Ireland v. Palestine, etc.*, 19 Ohio St. 369.

⁵⁵ *Dows v. Naper*, 91 Ill. 44.

⁵⁶ *Arenz v. Weir*, 89 Ill. 25; *Weidenger v. Spruance*, 101 Ill. 278.

bility is imposed by legislation, directed or authorized by constitutional provision. All existing statutes or charter provisions imposing an additional liability upon stockholders for the corporate debts, enter into and become a part of all contracts between the company and its creditors, and the obligation thereby imposed is not to be impaired by a repeal of the statute or an amendment of the charter, such legislation operating only upon subsequently contracted debts.⁵⁷ The same rule is applied to a change in the constitution of a State. Thus, a "paid-up" policy of life insurance issued on no new consideration, and in pursuance of an express agreement in the original policy to issue it, not being a new contract, is not to be affected by a change in the constitution, made between the time of its issue and that of the original, abolishing individual liability of stockholders for debts of the company.⁵⁸ But when the liability imposed is in the nature of a penalty, it may be abolished even in respect of claims arising prior to the enactment of the statute; for there can be no vested right to the enforcement of a penalty.⁵⁹ And a statute changing the form of the creditor's remedy, without affecting the shareholder's liability, is likewise operative upon previously existing debts.⁶⁰

⁵⁷ *Vide* cases cited *supra*, § 60, and *McDonnell v. Alabama*, etc. Ins. Co. (1889), 85 Ala. 401; *Central Agricultural, etc. Assn. v. Alabama*, etc. Ins. Co. (1881), 70 Ala. 120; *Milroy v. Spur Mountain, etc. Mining Co.*, 43 Mich. 231; *French v. Teschemaker* (1864), 24 Cal. 518.

⁵⁸ *McDonnell v. Alabama Gold Life Ins. Co.* (1889), 85 Ala. 401.

⁵⁹ *Union Iron Co. v. Pierce*, 4 Biss. 327; *Breitung v. Lindauer*, 27 Mich. 217; *Gregory v. German Bank*, 3 Colo. 332.

⁶⁰ *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747. Thus, in *Merchants' Ins. Co. v. Hill* (1884), 12 Mo. App. 148, (1886) 86 Mo. 466, a law providing that on the return of an unsatisfied execution against a corporation, execution may issue on notice and motion against any stockholder to the extent of the unpaid balance due from him on his stock, was held, although retrospective, to be

valid notwithstanding, and applicable to a corporation previously chartered under a special act exempting its shareholders from the double liability imposed by a general statute. Under Cal. Const. (1879), art. xxii, § 1, which provides that all laws in force at its adoption not inconsistent therewith shall remain in force, and art. xii, § 3, which provides that "each stockholder of a corporation shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was stockholder as the amount of stock or shares owned by him bears to the whole of the capital stock," it is held that the Civil Code, section 322, adopted in 1876, fixing the stockholders' liability, was not in conflict with article xii, section 3, of the constitution, the provisions being the same, except that under the code no one creditor can collect more

§ 581. **Construction of statutes.**—The general principle that statutes in derogation of the common law are to be strictly construed, has been frequently applied to acts and charters under which the creditors of corporations have sought to hold the owners of shares, liable beyond the amount remaining unpaid on their stock.⁶¹ Thus, in Vermont, a provision in the charter of a company, that if at any time the capital stock should be impaired by losses or otherwise, the directors should forthwith repair the same by assessment, was held to be intended merely to prevent the continuance of business with an impaired capital and not to impose an additional liability upon the shareholders in favor of creditors which could be enforced by a receiver after the company had become insolvent.⁶² Where, however, there is no doubt that the legislative intent was, to provide an additional security for the benefit of corporate creditors, there seems to be no reason for a stricter construction of the remedial provisions of these statutes, than is followed in interpreting other remedial enactments.⁶³ And a reasonable and sensible construction may be

than the share of his own particular debt of a stockholder, whether he has paid his share of the debts to other stockholders or not. *Borland v. Haven* (1889), 37 Fed. Rep. 394.

⁶¹ *Chase v. Lord* (1879), 77 N. Y. 1; *Lowry v. Inman* (1871), 46 N. Y. 119; *Diven v. Lee* (1867), 36 N. Y. 302; *Grose v. Hill* (1853), 36 Me. 22; *Coffin v. Rich* (1858), 45 Me. 511; *Windham Provident Institution, etc. v. Sprague*, 43 Vt. 502 (1871); *Dauchy v. Brown*, 24 Vt. 197 (1852); *Moyer v. Pennsylvania Slate Co.* (1872), 71 Pa. St. 293, 297; *Youghiogheny Shaft Co. v. Evans* (1872), 72 Pa. St. 331; *Salt Lake City Nat. Bank v. Hendrickson* (1878), 40 N. J. 52; *Nimick v. Mingo Iron Works Co.* (1884), 25 W. Va. 184, 199; *O'Reilly v. Bard* (1884), 105 Pa. St. 569, 573; *Mean's Appeal*, 85 Pa. St. 75, 78 (1877); *Potter v. Stevens Machine Co.* (1879), 127 Mass. 592; *Chamberlain v. Huguenot Manuf. Co.* (1875), 118 Mass. 522; *Gray v. Coffin* (1852), 9

Cush. 192; *Dane v. Dane's Manuf. Co.* (1859), 14 Gray, 488, 489. But see *Hicks v. Burns* (1859), 38 N. H. 141, holding that these statutes, being from one point of view contracts, are to be interpreted in the same way as any other contract containing like provisions. *Cf. Davidson v. Rankin* (1868), 34 Cal. 503; *Mokelumne Hill, etc. Co. v. Woodbury* (1859), 14 Cal. 265; *Priest v. Essex Hat Manuf. Co.* (1874), 115 Mass. 380; *Ripley v. Sampson* (1830), 10 Pick. 371; *Knowlton v. Ackley* (1851), 8 Cush. 93; *Bassett v. St. Alban's Hotel Co.*, 47 Vt. 313 (1875); *O'Reilly v. Bard*, 105 Pa. St. 569.

⁶² *Dewey v. St. Alban's Trust Co.* (1885), 57 Vt. 332.

⁶³ *Freeland v. McCullough*, 1 Denio, 413 (1845), 43 Am. Dec. 685; *Marion Township, etc. Draining Co. v. Norris*, 37 Ind. 424, 429; *Gauch v. Harrison*, 12 Ill. App. 457, 461. *Cf. Carver v. Braintree Manuf. Co.* (1843), 2 Story, 433.

properly adopted.⁶⁴ Although, of course, where the statute is penal in its nature, the courts will hesitate more about enlarging the meaning of doubtful terms, than where it is remedial.⁶⁵

§ 582. **Extra-territorial effect. Foreign corporations. Non-resident members.**—The enforcement of the shareholder's personal liability depending upon the jurisdiction of the court over his person or property, and process served without the State conferring no such jurisdiction,⁶⁶ it is customary to institute proceedings against non-resident members in the State of their domicile. It is important, therefore, to ascertain how far the courts of one State will enforce the statutes of another imposing such a liability. That the statutes of a State do not operate extra-territorially, *proprio vigore*, is well settled. How far they should be enforced beyond the limits of the State which has enacted them, must depend on several considerations, as whether any wrong or injury will be done to the citizens of the State in which they are sought to be enforced, whether the policy of its own laws will be contravened or impaired, and whether its courts are capable of doing complete justice to those liable to be affected by their decrees.⁶⁷ Where a person becomes a stockholder in a corporation organized under the laws of a foreign State, he must be held to contract with reference to all the laws of the State under which the corporation is organized, and which enter into its constitution; and the extent of his individual liability as a shareholder to the creditors of the company, must be determined by the laws of that State, not because such laws are in force in the other State, but because he has voluntarily agreed to the terms of the company's constitution. It is equally clear, upon both principle and authority, that this liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary

⁶⁴ Carver v. Braintree Manuf. Co. (1843), 2 Story, 433, 437; Lane v. Morris (1850), 8 Ga. 475; Bohn v. Brown (1876), 33 Mich. 257; Mokelumne Hill, etc. Co. v. Woodbury (1859), 14 Cal. 265; Ingalls v. Cole (1859), 47 Me. 540; Dewey v. St. Alban's Trust Co. (1885), 57 Vt. 332; Weighley v. Coal Oil Co., 5 Phila. 67; Rider v. Fritchey, 49 Ohio St. 285, 15 L. R. A. 513; Priest v. Essex Hat Manuf. Co., 115 Mass. 380.

⁶⁵ Thompson on Liability of Stockholders, § 54; Esmond v. Bullard, 16 Hun, 65; Cable v. McCune (1858), 26 Mo. 371, 72 Am. Dec. 214; Cady v. Smith, 12 Neb. 628.

⁶⁶ Wilson v. Seligman (1888), 36 Fed. Rep. 154; Howell v. Manglesdorf (1885), 33 Kan. 194.

⁶⁷ New Haven, etc. Co. v. Linden Spring Co. (1886), 142 Mass. 349.

parties. This does not depend upon any principle of comity, but upon the right to enforce in another jurisdiction, a contract validly entered into.⁶⁸ The decisions of the State under which the corporation was created, will determine the liability of the stockholder for the corporate debts, and those decisions will be followed by the courts of the State where the liability is sought to be enforced against a non-resident stockholder.⁶⁹ The validity, interpretation and effect of the act imposing the liability, are determined by the law of the State creating the corporation. The remedy, however, does not enter into the contract itself, and for this reason, the individual liability of shareholders can only be enforced by the remedies provided by the laws of the forum.⁷⁰

⁶⁸ First Nat. Bank v. Gustin, etc. Mining Co. (1890), 42 Minn. 327, 6 L. R. A. 676, 18 Am. St. Rep. 510; Flash v. Connecticut, 109 U. S. 371; Lowry v. Inman (1871), 46 N. Y. 119; *Ex parte* Van Riper (1839), 20 Wend. 614; McDonough v. Phelps (1856), 15 How. Pr. 372; Sacketts Harbor Bank v. Blake (1849), 3 Rich. Eq. 225; Bank of Virginia v. Adams, 1 Pars. Sel. Eq. Cas. 534 (1850); Woods v. Hicks (1881), 7 Lea, 40; Paine v. Stewart (1866), 33 Conn. 516; Healy v. Root (1831), 11 Pick. 389; Gale v. Eastman (1843), 7 Met. 14. In Aultman's Appeal, 98 Pa. St. 505 (1883), it was held under the constitution and laws of Ohio which make the stockholders of a certain corporation, incorporated under the laws of that state, personally liable to its creditors in an amount equal to the stock subscribed, that the company having become hopelessly insolvent, all its assets being exhausted, and all the stockholders residing in Pennsylvania and being capable of being served with process, the Pennsylvania courts had jurisdiction to enforce their personal liability against them. Erickson v. Nesmith, 15 Gray, 221 (1860), (1862) 4 Allen, 233, (1866) 46 N. H. 371; Hutchins v. New England Coal Mining Co. (1862), 4 Allen, 580; Bond v.

Appleton (1812), 8 Mass. 472; Bateman v. Service (1881), L. R. 6 App. Cas. 386; Halsey v. McLean (1866), 12 Allen, 438; Smith v. Mutual Life Ins. Co. (1867), 14 Allen, 336; First Nat. Bank v. Price (1870), 33 Md. 487. Thus, the provision of the Missouri statute (1 Wag., ch. 37, § 22) providing that if any company formed under this act dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of dissolution, without joining the company in such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of the dissolution for the recovery of the portion of such debt for which they were liable," has been held in New York to create a personal liability on the part of the stockholder which may be enforced by a common law action in other states. Savings Assn. v. O'Brien (1889), 3 N. Y. Supp. 764, 20 N. Y. St. Rep. 826.

⁶⁹ Hancock Nat. Bank v. Ellis, 166 Mass. 414, 55 Am. St. Rep. 414, 172 Mass. 39, 70 Am. St. Rep. 232, 42 L. R. A. 296.

⁷⁰ First Nat. Bank v. Gustin, etc. Mining Co. (Minn. 1890), 7 Ry. & Corp. L. J. 174; Fourth Nat. Bank v. Francklyn (1887),

whether the proceedings be taken in a State or in a federal court.⁷¹ Accordingly, if the statute imposing the liability prescribes the remedy and is to be construed as restricting the enforcement of the creditor's demands to a peculiar procedure which does not exist in the foreign State, the shareholder can not be held.⁷² Thus, where the statute provides that the creditor's remedy shall be by bill in equity, the liability can not be enforced in a State which has no general system of equity jurisprudence and procedure.⁷³ The remedy prescribed by the statute of the State from which the corporation derives its charter, should be stated in the pleading, and it should be made to appear therein that it can be employed in the State of the forum.⁷⁴ The statutory liability of shareholders, depends upon the law of the State from which the corporation derives its existence, and not of the State in which the stockholder may reside.⁷⁵ If no additional liability be imposed upon its members in the State of its origin, they enjoy the same

120 U. S. 747; *Chase v. Curtis*, 113 U. S. 452; *Fairfield v. County of Gallatin*, 100 U. S. 47; *South Ottawa v. Perkins*, 94 U. S. 260, 267; *Peik v. Chicago, etc. R. Co.*, 94 U. S. 164; *Leavenworth v. Barnes*, 94 U. S. 70; *Adams v. Nashville*, 95 U. S. 19; *Elmwood v. Marcy*, 92 U. S. 289; *Jessup v. Carnegie* (1880), 80 N. Y. 441; *Hunt v. Hunt* (1878), 72 N. Y. 236; *Elmendorf v. Taylor*, 10 Wheat. 152, 160; *Shelby v. Guy*, 11 Wheat. 367; *Nimick v. Mingo Iron Works* (1884), 25 W. Va. 184; *Drinkwater v. Portland, etc. R. Co.* (1841), 18 Me. 35. *Cf.* *Taft v. Ward*, 106 Mass. 518 (1871); *Lowry v. Inman* (1871), 46 N. Y. 119.

⁷¹ *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Knower v. Haines* (1887), 31 Fed. Rep. 513. *Cf.* *Flash v. Cohn*, 109 U. S. 371.

⁷² *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Lowry v. Inman* (1871), 46 N. Y. 119, 127; *Erickson v. Nesmith* (1862), 4 Allen, 233, (1860) 15 Gray, 221; *Nimick v. Mingo Iron Works*, 25 W. Va. 184 (1884). *Cf.* *Erickson v. Nesmith* (1866), 46 N. H. 371.

⁷³ *Erickson v. Nesmith* (1862), 4 Allen, 233, (1860) 15 Gray, 221;

Patterson v. Lynde, 106 U. S. 519, 112 Ill. 196.

⁷⁴ *Rice v. Merrimaack, etc. Co.*, 56 N. H. 114.

⁷⁵ *Payson v. Withers* (1873), 5 Biss. 269; *Merrick v. Van Santvoord* (1866), 34 N. Y. 208; *Seymour v. Sturgess* (1862), 26 N. Y. 134; *McDonough v. Phelps* (1846), 15 How. Pr. 372; *Ex parte Van Riper* (1839), 20 Wend. 614; *Hill v. Beach* (1858), 12 N. J. Eq. 31; *Land Grant, etc. Ry. Co. v. Coffey County* (1870), 6 Kan. 254; *Nabob of Carnatic v. East India Co.*, 1 Ves. 371; *Dutch West India Co. v. Hennequez*, 1 Str. 612; *King of Spain v. Mullett*, 2 Bligh (N. S.), 3. *Cf.* "Enforcement of Liability of Resident Stockholders in Foreign Corporations," by W. W. Thornton, 21 Cent. L. J. 522; "Position of English Shareholders in a Foreign Company," 18 Sol. J. & Rep. 810; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414; 55 Am. St. Rep. 414, 42 L. R. A. 296, 172 Mass. 39, 70 Am. St. Rep. 232; *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163; *Ball v. Anderson*, 196 Pa. St. 86; 79 Am. St. Rep. 693.

exemption in foreign States, wherever the corporation may transact its business, and wherever they may chance to reside, although the laws of such other States may impose a personal liability upon the members of its own corporations.⁷⁶ A non-resident shareholder is liable to creditors for the amount of his statutory liabilities as ascertained in proceedings held in the State, to which he was not a party, except as represented by the corporation; and such liability may be enforced at law against him in the State of his domicile.⁷⁷

§ 583. Penal statutes are strictly local.—An exception is made to the rule laid down in the preceding section, when the liability sought to be enforced against the corporate members, is in the nature of a penalty.⁷⁸ For penal laws are strictly local,⁷⁹ and cannot have any operation beyond the jurisdiction of the country where they were enacted.⁸⁰ Thus, for example, statutes that create liability because of failure on the part of corporate

⁷⁶ *Second Nat. Bank v. Hall*, 35 Ohio St. 158 (1878); *Bateman v. Service*, L. R. 6 App. Cas. 386. *Cf.* *Jessup v. Carnegie* (1880), 80 N. Y. 441; *Ball v. Anderson*, 196 Pa. St. 86, 79 Am. St. Rep. 693; *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163.

⁷⁷ *King v. Cochran* (Vt. 1904), 56 Atl. 667.

⁷⁸ *Flash v. Conn*, 109 U. S. 371; *Steam Engine Co. v. Hubbard*, 101 U. S. 188; *Sayles v. Brown* (1890), 40 Fed. Rep. 8, 7 Ry. & Corp. L. J. 2; *Hawthorne v. Calef* (1864), 2 Wall. 10; *Jones v. Barlow* (1875), 62 N. Y. 202; *Story v. Furman*, 25 N. Y. 214 (1862); *Lowry v. Inman* (1871), 46 N. Y. 119, 127; *Corning v. McCullough* (1847), 1 N. Y. 47, 49 Am. Dec. 287; *Freeland v. McCullough* (1845), 1 Denio, 414, 43 Am. Dec. 685; *Strong v. Wheaton* (1861), 38 Barb. 625; *Irwin v. McKean*, 23 Cal. 472. *Cf.* *The Antelope* (1825), 10 Wheat. 66; *Woods v. Hicks*, 7 Lea, 40 (1881); *Ogden v. Folliot* (1790), 3 Term. Rep. 726; *Lawler v. Burt* (1857), 7 Ohio St. 340.

⁷⁹ *Moies v. Sprague* (1869), 9 R. I. 541; *Cuykendall v. Corning*

(1882), 10 Fed. Rep. 342; *Yeaton v. United States* (1809), 5 Cranch, 281; *Norris v. Crocker* (1851), 13 How. 429; *State v. John* (1831), 5 Ohio, 217; *Scoville v. Canfield*, 14 Johns. 338 (1817); *United States v. Lathrop* (1819), 17 Johns. 4; *Gale v. Eastman*, 7 Met. 14; *Andrews v. Murray* (1861), 33 Barb. 354; *Shaler, etc. Quarry Co. v. Bliss* (1861), 34 Barb. 309; *Bird v. Hayden* (1863), 1 Robt. (N. Y. Super. Ct.) 383; *Kritzer v. Woodson* (1854), 19 Mo. 327; *Cable v. McCune* (1858), 26 Mo. 371; *Lawler v. Burt* (1857), 7 Ohio St. 340; *Sturges v. Burton* (1858), 8 Ohio St. 215. *Cf.* *Squires v. Brown*, 20 How. Pr. 35 (1860).

⁸⁰ *Scoville v. Canfield* (1817), 14 Johns. 338; *Derrickson v. Smith* (1858), 27 N. J. 166; *First Nat. Bank v. Price* (1870), 33 Md. 487; *Halsey v. McLean* (1866), 12 Allen, 438; *Hill v. Frazier* (1853), 22 Pa. St. 320; *Harrisburgh Bank v. Commonwealth* (1856), 26 Pa. St. 451; *Hodgson v. Cheever*, 8 Mo. App. 321 (1880); *Manville v. Edgar* (1880), 8 Mo. App. 324; *Queenan v. Palmer* (1886), 117 Ill. 619, 34 Alb. L. J. 117; *Norris*

authorities to give certain specified notices, or to make certain reports, or because certain forbidden contracts are entered into by the corporation, are essentially penal in their nature and can not be enforced out of the State.⁸¹ The principle of international law, that the courts of one State or country will not enforce the penal laws of another State or country, has by some courts been applied to statutes imposing a liability for corporate debts, by treating the liability in the nature of a penalty.⁸² But the later cases take the different view, that such statutes are not penal, in the strict and proper sense of imposing punishment for offenses

v. Wrenschall (1871), 34 Md. 492; Terry v. Calnan (1879), 13 S. C. 220; Tinker v. Van Dyke (1876), 1 Flippin, 532; Brown v. Hitchcock (1879), 36 Ohio St. 678; Hatch v. Burroughs (1870), 1 Woods, 443; Story on Conflict of Laws, §§ 620, 621; Wharton on Conflict of Laws, § 853 *et seq.*; Rorer on Interstate Laws, 148, 149.

⁸¹ Under R. I. Rev. Stat., ch. 128, § 12, which provides that if any manufacturing company shall fail to file a certificate stating the amount of all assessments voted by the company and actually paid in, and the amount of all existing debts, the stockholders shall be jointly and severally liable for the debts of the company, it is held that Rhode Island stockholders in a Rhode Island corporation, against whom a liability was enforced under the last-named section, could not call upon stockholders residing in another state for contribution, as the liability under the section was penal. Sayles v. Brown (1889), 40 Fed. Rep. 8, 7 Ry. & Corp. L. J. 2. So the twelfth section of the New York Manufacturing Companies Act, to the effect that the corporate officers shall be liable for the debts of the corporation, in case they fail to make an annual public report of the business of the corporation (Laws of 1848, ch. 40) is held to be penal in its character. Chase v. Curtis, 113 U. S. 452; Stokes v. Stickney (1884), 96

N. Y. 323; Pier v. Hanmore, 86 N. Y. 95 (1881); Pier v. George (1881), 86 N. Y. 613; Veeder v. Baker (1880), 83 N. Y. 156; Knox v. Baldwin (1880), 80 N. Y. 610; Easterly v. Barber, 65 N. Y. 252; Wiles v. Suydam, 64 N. Y. 173; Merchants' Bank of New Haven v. Bliss (1886), 35 N. Y. 412. *Cf.* Western Transportation, etc. Co. v. Kilderhouse (1882), 87 N. Y. 430; Lemmon v. People (1860), 20 N. Y. 562; Boughton v. Otis, 21 N. Y. 261 (1860); Losee v. Bullard (1880), 79 N. Y. 404. But in Cochran v. Weichers (1889), 53 Hun, 636, it was held that an action against a stockholder in a corporation organized under an act which provides that all the stockholders shall be individually liable to the creditors of the company to an amount equal to the stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed by the charter has been paid in, and a certificate thereof made and recorded, to enforce defendant's liability for the corporation's debts, the certificate not having been recorded, is not an action to recover a penalty, but arises on contract and survives against defendant's personal representative.

⁸² Sayles v. Brown (1889), 40 Fed. 8; Halsey v. McLean, 12 Allen, 438, 94 Mass. 438, 90 Am. Dec. 157; Flash v. Connecticut, 109 U. S. 371.

against the State, but that they are remedial as respects the creditors, and as such are to be liberally construed, and are entitled to enforcement in such other State or country as are other contractual liabilities.⁸³ In the construction of constitutions and statutes providing for individual liability of stockholders for corporate debts, whether the liability is contractual or held otherwise, as penal, depends upon the intended effect of the statute, and not upon its form alone. If its object is clearly to punish the doing of what is prohibited, or failing to do what is commanded, it is penal, and is none the less penal, because it is also remedial.⁸⁴ Thus, is held to be penal, a statute providing individual liability of the stockholder, for corporate debts incurred before the performance of conditions precedent to the organization of the corporation;⁸⁵ for commencing corporate business before the whole amount of the capital stock is paid in;⁸⁶ for the issue by a bank of unauthorized bank-paper;⁸⁷ for failure to make annual report of the amount of capital-stock paid in, and amount of existing debts, etc.⁸⁸ Whoever becomes a stockholder, impliedly agrees to all the provisions in the charter, which is the contract of incorporation, and he agrees to its provisions, whether or not it is required by the constitution or statute that he shall be individually liable for corporate debts. His liability is thus the result of his agreement, and is in its nature contractual, and not penal.⁸⁹ The corporation is the agent of its stockholders, and they are liable upon its contracts and debts to the extent they have agreed,⁹⁰ and cannot be released from such liability by repeal of the statute which was in force when the debts were contracted; for this would contravene the constitutional prohibition against laws impairing the obligation of contracts.⁹¹ The statute of New York, imposing liability for corporate debts upon directors or other corporate officers for not making annual reports to the State, or

⁸³ *Huntington v. Attrill* (1892), 146 U. S. 657; *Davis v. Mills*, 99 Fed. 39 (1902); *Fitzgerald v. Weidenbeck*, 76 Fed. 695.

⁸⁴ *Sedgwick, Stat. & Const. Law*, 14.

⁸⁵ *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14.

⁸⁶ *Gridley v. Barnes*, 103 Ill. 378.

⁸⁷ *Norris v. Wrenschall*, 34 Md. 492.

⁸⁸ *Hogue v. Capital Nat. Bank*,

47 Neb. 929, 66 N. W. 1936; *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214.

⁸⁹ *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194, 42 L. R. A. 804; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559; *Concord, etc. Bank v. Hawkins*, 174 U. S. 364.

⁹⁰ *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163.

⁹¹ *Hawthorne v. Calef*, 2 Wall. (U. S.) 10.

for making false reports, is not penal. A judgment thereon in New York, is therefore enforceable in other States. And the Maryland court of appeals, in deciding this case against the plaintiff on the ground that the judgment of the New York court was not one which it was bound to enforce, denied to the judgment the full faith credit and effect, to which it was entitled under the constitution of the United States.⁹² But such liability of corporate officers to make reports, is generally held to be penal, and not enforceable by other States.⁹³ The question is not of local law, but of international law. The test is whether the statute appears to the tribunal which is called on to enforce it, to be in its effect a punishment of an offense against the public, or a grant of a civil right to a private person.⁹⁴ In nearly all the States, the courts agree in holding that the stockholder's statutory liability to creditors is a contract liability.⁹⁵

§ 584. **Debts to which the statutes apply.**—The corporate obligations, for which the stockholder is held liable, are variously designated in the constitutional and statutory provisions upon the subject, as "debts," "dues," "indebtedness," "demands," etc., which terms are variously construed by the courts, but any one of the terms will include any obligation arising in contract.

"*Debt.*"—Debt is not limited to the demands for which the common law action of debt will lie, but will include unliquidated damages recoverable for breach of contract;⁹⁶ or for breach of warranty of title to goods sold;⁹⁷ and includes a judgment on contract liability;⁹⁸ or for money loaned to the corporation.⁹⁹

"*Dues.*"—Dues will include all obligations arising on contract, excluding *ultra vires* contracts;¹ and debts contracted through

⁹² *Huntington v. Attrill* (1892), 146 U. S. 657.

⁹³ *Davis v. Mills* (1902), 113 Fed. 678; *Chase v. Curtis* (1885), 113 U. S. 452; *Sayles v. Brown* (1899), 40 Fed. 8; *Farmers' Bank v. Stringer* (1902), 75 N. Y. App. Div. 127.

⁹⁴ *Huntington v. Attrill* (1892), 146 U. S. 657.

⁹⁵ *Hanson v. Davison* (1898), 73 Minn. 454; *Close v. Potter* (1898), 155 N. Y. 145; *Dennis v. Superior Court* (1891), 91 Cal. 548.

⁹⁶ *Dryden v. Kellogg*, 2 Mo. App. 87; *Haynes v. Brown*, 36 N. H.

545; *Proprietors, etc. v. Hovey*, 21 Pick. (Mass.) 417.

⁹⁷ *Dryden v. Kellogg*, 2 Mo. App. 87.

⁹⁸ *Frost v. St. Paul, etc. Co.*, 57 Minn. 325; *Powell v. Oregonian Ry. Co.*, 36 Fed. 726, 38 Fed. 187; *Smith v. Schmitz*, 10 Neb. 600; *Stedman v. Eveleth*, 6 Metc. (47 Mass.) 114.

⁹⁹ *Borland v. Haven*, 37 Fed. 394; *Grund v. Tucker*, 5 Kan. 70; *In re Warren's Estate*, 52 Mich. 557.

¹ *Ward v. Joslin*, 44 C. C. A. 456, 105 Fed. 224.

fraud and collusion with the directors;² and a judgment recovered against the corporation for a tort.³ *Per contra*.⁴ A stockholder is liable for corporate torts where the statute makes him individually liable "for all acts of, and contracts made by" the corporation.⁵

Mortgage debts.—When the corporation purchases land subject to a mortgage, and assumes to pay it, it is not a debt of the corporation for which the stockholder is liable to creditors.⁶ The stockholder is liable for corporate debts contracted by the corporation in other states, as well as for debts incurred within the State.⁷

§ 585. "Debts and liabilities," construed.—The "debts" of a corporation for which its members are made liable by statute are such claims against it as arise from contract,⁸ and do not include a judgment against the company for tort,⁹ even though

² *National, etc. Manuf. Co. v. Story, etc. Co.*, 111 Cal. 531; *Jewell v. Rock River, etc. Co.*, 101 Ill. 57.

³ *Child v. Boston, etc. Works*, 137 Mass. 516, 50 Am. Rep. 328; *Heacock v. Sherman*, 14 Wend. (N. Y.) 58; *Bohn v. Brown*, 33 Mich. 257; *Brown v. Trail*, 89 Fed. 641; *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214.

⁴ *Contra, Rider v. Fritchey*, 49 Ohio St. 285, 15 L. R. A. 513; *Carver v. Braintree Manuf. Co.*, 2 Story, 432, Fed. Cas. No. 2,485; *Child v. Boston, etc. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328.

⁵ *Kelley v. Clark*, 21 Mont. 291, 69 Am. St. Rep. 668.

⁶ *Barron v. Paine*, 83 Me. 312, 22 Atl. 218; *Barron v. Burrill*, 86 Me. 72. *Vide infra*, § 595.

⁷ *Hutchins v. New England, etc.*, 4 Allen (Mass.), 580; *Cookus v. Hollister Mining Co.*, 92 Wis. 325.

⁸ *Child v. Boston, etc. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328; *Mill Dam Foundry Co. v. Hovey*, 21 Pick. 417; *Chase v. Curtis*, 113 U. S. 452; *Heacock v. Sherman*, 14 Wend. 58; *Esmond v. Bullard* (1878), 16 Hun, 65, af-

firmed *sub nom.* *Losee v. Bullard* (1880), 79 N. Y. 404; *Archer v. Rose* (1871), 3 Brewst. (Pa.) 264; *Cable v. Gatty*, 34 Mo. 573; *Cable v. McCune* (1858), 26 Mo. 371, 72 Am. Dec. 214; *Dryden v. Kellogg* (1876), 2 Mo. App. 87; *Bohn v. Brown* (1876), 33 Mich. 257, 263; *Doolittle v. Marsh*, 11 Neb. 243 (1881). *Contra, Carver v. Braintree Manuf. Co.*, 2 Story, 432, 447. *Of Wyman v. American Powder Co.*, 8 Cush. 168, 182; *Gray v. Bennett*, 3 Met. 522.

⁹ *In re Boston, etc. Iron Works* (1884), 23 Fed. Rep. 880; *Heacock v. Sherman* (1835), 14 Wend. 59; *Child v. Boston, etc. Iron Works* (1884), 137 Mass. 516; *Mill Dam Foundry Co. v. Hovey*, 21 Pick. 417 (1839). *Of Chase v. Ingalls* (1867), 97 Mass. 524; *Lowell v. Street Commissioners*, 106 Mass. 540 (1871); *Zimmer v. Schleeauf* (1874), 115 Mass. 52. Under Ind. Rev. Stat. 1881, § 3869, which provides that stockholders of manufacturing and mining companies shall only be liable for the amount of the stock subscribed by them, a creditor cannot sue a stockholder or a sub-

the tortious act might have been considered a breach of contract;¹⁰ nor costs in such action.¹¹ But the word has been held to cover a judgment for waste obtained against the company.¹²

Liability to amount due on the stock.—A provision, making the stockholders individually liable to corporate creditors, to the amount due on their stock, though it may make them directly liable to creditors, imposes no greater liability than already exists in equity.¹³

Unlimited liability.—A charter or statute provision that the stockholders shall be jointly or severally liable as individuals, for all corporate debts incurred during their respective ownership of shares, and without reference to the amount paid thereon, is unlimited liability. It removes the common law exemption from individual liability, and makes stockholders liable as partners. Under such provision there can be only a partnership, but no corporation except in name.¹⁴

Statutory liability for making a false report, applies only to debts created subsequent to the time the report is made.¹⁵

Waiver by creditors of their rights under the State.—A corporate creditor by his act may waive the statutory liability of shareholders.¹⁶ The word "debt" in statutes, imposing personal liability upon shareholders, includes only a liability arising from contract, and not a liability arising from tort.¹⁷

§ 586. "Double liability."—A statutory double liability may be enforced against a single stockholder of an insolvent corpora-

scriber to the original articles of association for the amount of unpaid stock or subscriptions; as the only liability is to the corporation, or to a receiver in case of its insolvency, and it is immaterial that plaintiff alleges that he is the only creditor. *Wheeler v. Thayer* (Ind. 1890) 22 N. E. Rep. 972.

¹⁰ *Cable v. McCune* (1858), 26 Mo. 371, 72 Am. Dec. 214; *Bohn v. Brown* (1876), 33 Mich. 257; *Heacock v. Sherman*, 14 Wend. 58.

¹¹ *Schouton v. Kilmer* (1853), 8 How. Pr. 527; *Lathrop v. Singer* (1863), 39 Barb. 396. *Contra*, *Lane v. Baker* (1853), 2 Grant Cas. 424. *Cf. Veeder v. Mudgett* (1882), 27 Hun, 519.

¹² *Powell v. Oregonian Ry. Co.* (1888), 36 Fed. Rep. 726.

¹³ *Patterson v. Lynde*, 112 Ill. 196, 106 U. S. 519; *Mills v. Stewart*, 41 N. Y. 384; *Kelley v. Clark*, 21 Mont. 291, 69 Am. St. Rep. 668.

¹⁴ *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Harger v. McCullough*, 2 Denio (N. Y.) 119.

¹⁵ *Torbett v. Godwin*, 62 Hun, 407 (1891).

¹⁶ *United States v. Stanford*, 70 Fed. 346 (1895), 161 U. S. 412; *Wells v. Black* (1897), 117 Cal. 157, 37 L. R. A. 619.

¹⁷ *Brown v. Trail* (1898), 89 Fed. 641.

tion, without making the other stockholders parties; the stockholder's liability being several and not joint.¹⁸ A corporation as purchaser of all of the stock of another corporation, wherein the stockholders were subject to double liability under the statute, is not relieved of the double liability merely because it is a corporation, and is the only stockholder.¹⁹ Statutes enacting that shareholders shall be liable to corporate creditors "to the amount of their subscriptions," are construed to be merely declaratory of their common law liability;²⁰ but statutes imposing a liability "to the amount of their stock," are construed to mean not only the amount remaining unpaid on their subscriptions, but also an additional sum equal to the amount of their stock.²¹ The New York General Manufacturing Act of 1848,²² upon which the statutes of many of the States are modelled, is more explicit, its language being, "to an amount equal to their stock," yet it was not without litigation that the phrase has been admitted to impose an additional liability.²³ A comparison of this language with that of the General Railroad Act of 1850, however, which declares the railway shareholder liable to creditors "to an amount equal to the amount *unpaid* on the stock held by him,"²⁴ renders evident the meaning attached to the words of the former, the latter being merely declaratory of the common law.²⁵ Statutes imposing a liability "to double the amount of the stock held by them," receive the same construction as those making the shareholders liable "to

¹⁸ Gamewell, etc. Co. v. Fire, etc. Co. (Ky. 1903), 76 S. W. 862, 25 Ky. Law Rep. 1010.

¹⁹ Gamewell, etc. Co. v. Fire, etc. Co. (Ky. 1903), 76 S. W. 862, 25 Ky. Law Rep. 1010.

²⁰ Walker v. Lewis (1878), 49 Tex. 123.

²¹ Root v. Sinnock (1887), 120 Ill. 350, 60 Am. Rep. 558; McDonnell v. Alabama Gold Life Ins. Co. (1889), 85 Ala. 401; Briggs v. Penniman, 8 Cow. 387, 18 Am. Dec. 454; Pettibone v. McGraw, 6 Mich. 441; Sacketts Harbor Bank v. Blake, 3 Rich. Eq. 225. *Contra*, Lewis v. St. Charles County, 13 Mo. App. 48. *Cf.* Gausan v. Buck (1878), 68 Mo. 545; Schricker v. Ridings (1877), 65 Mo. 208.

²² N. Y. Laws of 1848, ch. 40.

²³ Wheeler v. Millar (1882), 90

N. Y. 353, 359; *In re Empire City Bank* (1858), 18 N. Y. 199, 218; *Ohio Life Ins. Co. v. Merchants' Ins. Co.* (1850), 11 Humph. (Tenn.) 1; *Lewis v. St. Charles Co.* (1878), 5 Mo. App. 225; *South. & Jones on Manuf. & Business Corps.*, § 100. *Cf.* *Briggs v. Penniman* (1824), 8 Cow. 387; *Bank of Poughkeepsie v. Ibbotson* (1840), 24 Wend. 473.

²⁴ N. Y. Laws of 1850, ch. 140, § 10, amended by Laws of 1854, ch. 282.

²⁵ *Patterson v. Lynde*, 106 U. S. 519; *Stephens v. Fox* (1881), 83 N. Y. 313; *Mills v. Stewart* (1870), 41 N. Y. 384, 389; *Brundage v. Monumental, etc. Co.*, 12 Oreg. 322; *Bush v. Cartwright*, 7 Oreg. 329.

the amount of their stock.”²⁶ In either case the statute imposes what is called a “double liability.”²⁷ In Missouri, a provision that, “in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him or her,” is held to relieve the stockholder from liability, after payment in full of the amount of his stock.²⁸ Shareholders’ liability for “double” the amount of their stock means twice its par value in addition to unpaid subscription, this amounting to a triple liability.²⁹ While the corporation and its creditors retain the amount of an assessment upon the stockholders, equity will not enforce its collection again from the original subscribers at the suit of a receiver.³⁰

§ 587. “Dissolution” and “failure,” construed.—Statutes imposing an additional liability upon shareholders for the corporate debts, which provide for the accrual of the liability upon the dissolution of the corporation, are held to be applicable whenever the corporation becomes a nominal, inert body, its property and funds exhausted, reduced to insolvency, rendering legal remedies against it unavailing.³¹ But “dissolution,” as used in such statutes, is held not to be restricted to the usual idea of expiration of

²⁶ Appeal of Parish (Pa. 1890), 19 Atl. Rep. 569, holding that Pa. Act of April 10, 1873 (P. L. 674), incorporating the Miners’ Bank of Summit Hill, which provides (§ 13) that “the stockholders of said bank shall be held individually responsible . . . for all contracts, debts and engagements of said bank, to the extent of double the amount of the stock subscribed for or held by them,” creates a liability in favor of creditors against the stockholders in twice the amount of stock held by them, respectively, without regard to the question whether or not the stock has been paid for in full to the corporation. Perry v. Turner (1874), 55 Mo. 418; Matthews v. Albert (1866), 24 Md. 527; Norris v. Johnson (1871), 34 Md. 485; Booth v. Campbell (1872), 37 Md. 522; Schricker v. Ridings (1877), 65 Mo. 208; Gay v. Keys (1863), 30 Ill. 413.

²⁷ Coleman v. White, 14 Wis.

700, 80 Am. Dec. 797; Root v. Sinnock, 120 Ill. 350, 60 Am. Rep. 588.

²⁸ Gausen v. Buck, 68 Mo. 545; Louis v. St. Charles County, 13 Mo. App. 48; Schricker v. Ridings, 65 Mo. 208.

²⁹ Driesbach v. Price (1890), 133 Pa. St. 560.

³⁰ Wyman v. Bowman (Iowa, 1904), 127 Fed. 257 (U. S., C. C. A.).

³¹ Central Agricultural Assn. v. Alabama Gold, etc. Ins. Co., 70 Ala. 120 (1881); Morley v. Thayer (1880), 3 Fed. Rep. 737; Bank of Poughkeepsie v. Ibbotson (1840), 24 Wend. 473; Penniman v. Briggs (1825), Hopk. Ch. 300, *sub nom.* Briggs v. Penniman (1826), 8 Cow. 387; Slee v. Bloom (1822), 19 Johns. 456; Perry v. Turner, 55 Mo. 418 (1874); State Savings Assn. v. Kellogg (1873), 52 Mo. 583; Dryden v. Kellogg, 2 Mo. App. 87. Cf. Blair v. Gray, 104 U. S. 769.

the charter, or other cessation of legal corporate existence, but contemplates practical dissolution as, by loss of all its property, and insolvency;³² suspension of business for a year, and of all business except that of closing up its affairs;³³ suspension of payment by a bank, and appointment of receiver; assignment of all its property for the benefit of all its creditors.³⁴ Under charter provision, rendering stockholders liable in case of "failure," the suspension of specie-payment by a bank was held to constitute such "failure."³⁵ Upon dissolution of the corporation by expiration of the charter, judgment of forfeiture or otherwise, the creditors may in equity compel the stockholder to pay up in full any balance due on their stock necessary to the payment of creditors' claims.³⁶ The word "failure" used in a similar connection has been held to apply to a case where a bank suspended specie-payments.³⁷

§ 588. **Proportional liability. National banks.**—Statutes imposing upon stockholders a personal liability "in proportion to the amount of the shares" held by them, renders each of them liable for so much of the whole indebtedness of the company as the number of shares owned by him is to the whole number into which the capital stock is divided.³⁸ This is a several liability. One shareholder does not have to make good the deficit caused by the delinquency of others.³⁹ Nor is his liability increased by the fact that a part of the capital stock is held by the corporation itself,⁴⁰ and having paid the whole or a part of his proportion

³² *Central, etc. Assn. v. Alabama, etc. Ins. Co.*, 70 Ala. 120.

³³ *Brigham v. Nathan*, 62 Kan. 243, 62 Pac. 319; *First Nat. Bank v. King*, 60 Kan. 733; *Seattle Nat. Bank v. Pratt*, 103 Fed. 62.

³⁴ *Stebbins v. Scott*, 172 Mass. 356, 52 N. E. 535; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798; *Peter v. Farrel, etc. Co.*, 53 Ohio St. 534; *Godfrey v. Terry*, 97 U. S. 171.

³⁵ *Terry v. Calnan*, 13 S. C. 220; *Godfrey v. Terry*, 97 U. S. 171.

³⁶ *Germantown, etc. Co. v. Fittler*, 60 Pa. St. 124, 100 Am. Dec. 546.

³⁷ *Lane v. Morris* (1850), 8 Ga. 468, 476; *Terry v. Calnan*, 13 S. C. 220. Cf. *Terry v. Tubman*, 92

U. S. 156; *Terry v. Anderson*, 95 U. S. 632.

³⁸ *Branch v. Baker* (1874), 53 Ga. 502, 512; *Adkins v. Thornton* (1856), 19 Ga. 325, 328; *Robinson v. Lane* (1856), 19 Ga. 337; *Morrow v. Superior Court* (1883), 64 Cal. 383; *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 71 Am. St. Rep. 36; *Dane v. Young*, 61 Me. 160.

³⁹ *United States v. Knox*, 102 U. S. 422, 425; *Crease v. Babcock*, 51 Mass. 524, 555; *Adkins v. Thornton* (1856), 19 Ga. 325, 328; *Maine Trust, etc. Co. v. Southern, etc. Co.*, 92 Me. 444.

⁴⁰ *Crease v. Babcock*, 51 Mass. 525.

of the corporate debts, he is discharged from further liability *in toto*, or *pro tanto*, as the case may be.⁴¹ One creditor, however, whose claim is sufficient, may enforce the payment of the whole amount due from a single stockholder.⁴² In computing the amount of a shareholder's liability under these acts, any legitimate evidence is admissible to prove the amount of the company's liabilities.⁴³ But the capital stock is to be taken as stated in the charter.⁴⁴ In California, under such provision for proportional liability, the stockholder is held to two liabilities; first, to the corporation to the full payment of amount that may be due on his subscription to the capital stock for the payment of corporation creditors, and second, he is held individually liable to each creditor, proportionally. The two liabilities and their remedies thereon, are concurrent, and he can not recover back by subrogation or otherwise, any payments he may have made to the corporation or to the creditor, upon either liability.⁴⁵

National banks.—When the assets of a national bank are insufficient to meet all its outstanding debts, each shareholder is individually liable to contribute such a sum as will bear the same proportion to the whole amount of the deficit, as his stock bears to the whole amount of the capital stock of the bank at its par value, whether held by shareholders or by the bank itself, and whether held by solvent or insolvent owners, within or beyond the jurisdiction of the court.⁴⁶ The decision of the comptroller of the currency as to the necessity for bringing proceedings against the stockholders and the extent to which their liability should be enforced, is conclusive upon them.⁴⁷ But in calculating

⁴¹ *Branch v. Baker* (1874), 53 Ga. 502, 512; *Jones v. Wiltberger*, 42 Ga. 575; *Belcher v. Wilcox*, 40 Ga. 391.

⁴² *Hatch v. Burroughs* (1870), 1 Woods, 439; *Branch v. Baker*, 53 Ga. 502 (1874); *Lane v. Harris* (1854), 16 Ga. 217; *Lane v. Morris* (1850), 8 Ga. 468; *Larrabee v. Baldwin* (1864), 35 Cal. 155. *Cf.* *Bank of Poughkeepsie v. Ibbotson* (1840), 24 Wend. 473.

⁴³ *Robinson v. Lane* (1856), 19 Ga. 337.

⁴⁴ *Lane v. Morris*, 8 Ga. 468.

⁴⁵ *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 71 Am. St. Rep. 36.

⁴⁶ *United States v. Knox*, 102 U. S. 422, 425. "The shareholder of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." U. S. Rev. Stat., § 5151.

⁴⁷ *National Bank v. Case*, 99 U. S. 628; *Casey v. Galli*, 94 U. S. 673; *Kennedy v. Gibson*, 8 Wall. 498; *Bailey v. Sawyer*, 4 Dill. 463.

the liability of the shareholders, unrepresented claims are not to be taken into account, since no creditor who fails to appear and prove his claim, is entitled to recover.⁴⁸ The creditors can not in their own names proceed against the shareholders. The receiver is the proper party to bring the suit, and neither the creditors nor the bank are necessary parties to the action against the stockholders.⁴⁹ The receiver may be appointed either by the comptroller or by a court of competent jurisdiction.⁵⁰ If a bill, as originally framed against an insolvent national bank, seeks only the collection of assets, but is afterwards amended so as to enforce the personal liability of stockholders, they should not be charged with the expense of a receiver, appointed under the bill as originally framed, but who was not necessary for the enforcement of the statutory liability.⁵¹ The insolvency of any one stockholder, or his absence beyond jurisdiction of the court, in no way affects the liability of any other stockholder. And if the bank holds some of its stock, it is as if held by a natural person, and is to be so computed as to the liability of the other stockholders.⁵² In case of deficiency of assets to pay the corporate debts, the comptroller may continue to make assessments upon the stockholders until their full liability is exhausted.⁵³ His order is conclusive as to necessity for assessment in any suit by the receiver against a stockholder.⁵⁴ The assessment bears interest for the time payable.⁵⁵ The comptroller can not sue.⁵⁶ The assessments are collected by the bank receiver by suit at law, or in equity in his own name, or in that of the bank,⁵⁷ in the courts of any State where the stockholder may be found,⁵⁸ or in the federal courts, without regard to the amount of the claim.⁵⁹

⁴⁸ *Richmond v. Irons*, 121 U. S. 27.

⁴⁹ *Kennedy v. Gibson* (1868), 8 Wall. 498.

⁵⁰ *Harvey v. Lord*, 11 Biss. 144.

⁵¹ *Richmond v. Irons*, 121 U. S. 27.

⁵² *United States v. Knox*, 102 U. S. 422.

⁵³ *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 663; *Aldrich v. Yates*, 95 Fed. 78.

⁵⁴ *Bushnell v. Leland*, 164 U. S. 684; *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 663.

⁵⁵ *Bowden v. Johnson*, 107 U. S. 251; *Davis Estate v. Watkins*, 56 Neb. 288, 76 N. W. 575; *Casey v. Galli*, 94 U. S. 673.

⁵⁶ *Kennedy v. Gibson*, 8 Wall. (U. S.) 498.

⁵⁷ *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227.

⁵⁸ *Bank of Bethel v. Pahquioque Bank*, 14 Wall. (U. S.) 383.

⁵⁹ *Brown v. Smith*, 88 Fed. 565; *National Bank, etc. v. Kennedy*, 17 Wall. (U. S.) 19.

§ 589. **Liability contingent upon capital stock not being fully paid in.**—Under one statutory form, the stockholders are subjected to an additional liability only when the capital stock has not been fully paid in.⁶⁰ These acts differ from those statutes which merely declare the common law liability of stockholders, each for the unpaid balance due on his shares, in that under them, stockholders who have paid the full amount of their shares may be required to make good the deficit caused by the delinquency of others.⁶¹ And liability under these acts, is in no way affected by the amount of capital which may be paid in, so long as any remains unpaid.⁶² But it may be terminated even after suit has been begun, by a payment which makes up the full amount of the capital stock.⁶³ Under these statutes it becomes important to determine wherein payment consists.⁶⁴ Where the company has accepted property as payment for its capital stock, it is for the jury to determine whether the transaction was made in good faith or with intent to evade the statute.⁶⁵ A gross discrepancy between the valuation at which the property was accepted, and its actual value, is presumptive evidence of fraud.⁶⁶ Where, by statute, the stockholders are held individually liable to creditors to the amount of the unpaid stock, for all acts and contracts of the corporation till all the capital stock subscribed for is paid, the stockholders are liable, if their stock was issued for property transferred to the corporation at a valuation known to be excessive, and are liable to the extent of the difference between the par value of the stock and the real value of the property;⁶⁷

⁶⁰ N. Y. Laws of 1848, ch. 40, § 10.

⁶¹ *Tiballs v. Libby*, 87 Ill. 142; *Butler v. Walker*, 80 Ill. 345.

⁶² *Norris v. Johnson* (1871), 34 Md. 485; *Norris v. Wrenschall*, 34 Md. 492.

⁶³ *Booth v. Campbell* (1872), 37 Md. 522.

⁶⁴ An arrangement made in good faith among the stockholders of a corporation whose subscription to its capital stock has never been made public, entered into before the corporation has incurred debts, whereby, instead of issuing stock to the amount of the original subscriptions, each subscriber is given full paid-up stock

to the amount that he has actually paid on his subscription, is valid, as against creditors, and they cannot enforce the original subscriptions, except as to the deficiency between the amount of paid-up stock so issued and the minimum allowed by the charter for the transaction of business. *Hill v. Silvey* (1889), 81 Ga. 500.

⁶⁵ *Lake Superior Iron Co. v. Drexel* (1882), 90 N. Y. 87.

⁶⁶ *Thurston v. Duffy* (1886), 38 Hun, 327.

⁶⁷ *Kelley v. Clark*, 21 Mont. 291, 69 Am. St. Rep. 668; *Lloyd v. Preston*, 146 U. S. 630; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Addison v. Pacific Coast Milling Co.*, 79

but, it has been held that the fact that it was worth only a fifth of the value put upon it, though presumptive evidence of fraud, does not charge the incorporators with legal fraud where they appear to have made their valuation in good faith.⁶⁸ In Illinois the liability of stockholders for the debts of a corporation contracted before the whole capital stock has been paid in, can not be enforced by a single creditor, suing on his own behalf. The bill must be brought in behalf of all creditors, and the assets of the corporation must first have been exhausted.⁶⁹

§ 590. Liability for debts due laborers, etc.—In many of the States there are statutes making the shareholders of corporations individually liable for debts due to its servants, laborers, clerks, employes and apprentices,⁷⁰ designed for the protection of those who “usually look to the reward of a day’s labor or service for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence;”⁷¹ such, for example, as an engineer and fireman, although sometimes acting as superintendent also,⁷² a civil engineer,⁷³ a reporter employed by a newspaper company, and a city or assistant editor, if not an officer of the company,⁷⁴ an overseer and book-keeper,⁷⁵ and a book-keeper having no other duties

Fed. 459; *Sprague v. National Bank of America*, 172 Ill. 149, 64 Am. St. Rep. 17, 42 L. R. A. 606; *Corbin & Co. v. Jones*, 167 N. Y. 158.

⁶⁸ *Young v. Erie Iron Co.*, 65 Mich. 111 (1887).

⁶⁹ *Harper v. Union Manuf. Co.* (1882), 100 Ill. 225.

⁷⁰ N. Y. Laws of 1848, ch. 40, § 18, laborers, servants and apprentices; N. Y. Laws of 1875, ch. 392, § 8, amending N. Y. Laws of 1850, ch. 140, § 10, laborers and servants of railways, other than contractors; Wis. Rev. Stat. (1878), § 1769, clerks, servants and laborers; Ind. Rev. Stat. (1881), § 3869, laborers, servants, apprentices and employes; Tenn. Acts of 1875, ch. 142, § 21, servants and employees; Pa. Act of April 29, 1874, work done or material furnished; Mich. Const. (1850), art. xv, § 7; *Moyer v. Pennsylvania Slate Co.* (1872), 71

Pa. St. 293; *Weiss v. Mauch Chunk Iron Co.* (1868), 58 Pa. St., 295; *Reading Industrial Manuf. Co. v. Graeff* (1870), 64 Pa. St. 395; *Wegley v. Coal Oil Co.*, 5 Phila. 67 (1862).

⁷¹ *Wakefield v. Fargo* (1882), 90 N. Y. 213, 217. *Cf.* *Williamson v. Wadsworth*, 49 Barb. 294; *Adams v. Goodrich* (1875), 55 Ga. 335; *Jones v. Avery*, 50 Mich. 326; *Brockway v. Innes*, 39 Mich. 47, 33 Am. Rep. 348.

⁷² *Vincent v. Bramford*, 1 Jones & S. 506, 12 Abb. Pr. (N. S.) 252.

⁷³ *Conant v. Van Schaick*, 24 Barb. 87. *Cf.* *Williamson v. Wadsworth*, 49 Barb. 294. *Contra*, *Pennsylvania, etc. R. Co. v. Leuffer* (1877), 84 Pa. St. 168.

⁷⁴ *Harris v. Morvell*, 1 Abb. N. Cas. 127.

⁷⁵ *Hovey v. Ten Broeck* (1865), 3 Rob. (N. Y. Sup. Ct.) 316; *Wakefield v. Fargo*, 90 N. Y. 213.

than such as usually pertain to that position,⁷⁶ a foreman in a manufacturing corporation, although he may not perform manual labor.⁷⁷ But in general, only manual or menial laborers are protected by these statutes.⁷⁸ General agents, such as superintendents,⁷⁹ or an overseer on a plantation,⁸⁰ or an agent of a mining corporation employed to take charge of its mines in a foreign country,⁸¹ or secretaries of manufacturing companies, are not within these statutes.⁸² And secretaries⁸³ and general managers⁸⁴ can not claim their protection by reason of performing the duties of a book-keeper in addition. The mere fact that one does some manual labor incidental to his position as manager or foreman or superintendent, will not constitute him a laborer within the intent of the statutes.⁸⁵

"Laborer."—A laborer is one who does manual work, for example, a railroad section hand, a telegraph or telephone lineman, a porter, driver, truckman, etc.⁸⁶

"Servant."—Servant is a term broader than laborer, and includes any one who renders subordinate personal service to his employer, and remains under his direction and control.⁸⁷ Con-

⁷⁶ Chapman v. Chumar (1889), 54 Hun, 636.

⁷⁷ Sleeper v. Goodwin (1887), 67 Wis. 577. In Short v. Medberry (1883), 29 Hun, 39, the plaintiff was given a situation at a monthly salary of \$1,000 per year by a manufacturing corporation on condition that he should obtain for the corporation a loan of \$3,000. He acted as foreman, helped to manufacture stone, kept time of the hands, solicited orders, and did whatever told to do by the superintendent, and it was held that he was a laborer or servant within the meaning of the statute.

⁷⁸ Adams v. Goodrich (1875), 55 Ga. 335. Cf. Heebner v. Chave, 5 Pa. St. 115 (1847); Harrod v. Hamer (1873), 32 Wis. 162; Southworth & Jones on Manufacturing & Business Corporations, § 96.

⁷⁹ Kincaid v. Dwinelle (1875), 59 N. Y. 548. Cf. Gordon v. Jennings, 8 Q. B. Div. 45; Gurney v.

Atlantic, etc. Ry. Co. (1874), 58 N. Y. 358.

⁸⁰ Whittaker v. Smith (1879), 84 N. C. 340. *Contra*, Hovey v. Ten Broeck (1875), 3 Rob. (N. Y. Sup. Ct.) 316.

⁸¹ Hill v. Spencer (1874), 61 N. Y. 274; Krauser v. Ruckel, 17 Hun, 463 (1879); Dean v. De Wolf (1878), 16 Hun, 186; Kincaid v. Dwinelle, 59 N. Y. 548.

⁸² Coffin v. Reynolds (1868), 37 N. Y. 640, overruling Richardson v. Abendroth, 43 Barb. 163.

⁸³ Viele v. Wells (1882), 9 Abb. N. Cas. 277.

⁸⁴ Wakefield v. Fargo (1882), 90 N. Y. 213.

⁸⁵ Krauser v. Ruckel (1870), 47 Hun, 463; Ericsson v. Brown, 38 Barb. 390 (1862).

⁸⁶ Jones v. Avery, 50 Mich. 326; Brockway v. Innes, 39 Mich. 47, 33 Am. Rep. 348.

⁸⁷ Hill v. Spencer, 61 N. Y. 274; Sleeper v. Goodwin, 67 Wis. 577.

sulting engineers,⁸⁸ assistant chief engineers⁸⁹ and contractors, are not within the meaning of these acts;⁹⁰ nor is a traveling salesman, employed by a corporation, a laborer within the constitutional provision of the constitution of Michigan.⁹¹ Where the statute makes stockholders personally liable for the corporate debts due to "servants," "laborers" or "employees," the question to determine is, who so classed by the statute is not a laborer or employee.⁹² A clerk is not a "laborer," nor is a draftsman, superintendent or book-keeper,⁹³ nor are foremen,⁹⁴ nor is a superintendent of a mine,⁹⁵ nor is a general manager.⁹⁶ A book-keeper is an employee.⁹⁷ The president is not an employee or workman,⁹⁸ nor is a traveling agent.⁹⁹ A salaried corporation attorney is not an employee within the meaning of such statute.¹ But such a statute renders the stockholder liable as for debts due to laborers, or servants for service, although not manual labor.² One serving as shipper and receiver of goods, and collector and salesman, is a clerk.³ In Indiana the issue has been raised whether a corporation aggregate could be the "employee" of another corporation in the sense here used, but it was decided in the negative.⁴ Statutes imposing a personal liability upon

⁸⁸ *Ericsson v. Brown* (1862), 38 Barb. 390.

⁸⁹ *Brockway v. Innes* (1878), 39 Mich. 47. *Of. Peck v. Miller*, 39 Mich. 594 (1878).

⁹⁰ *Aikin v. Wasson* (1862), 24 N. Y. 482; *Balch v. New York, etc. R. Co.* (1871), 46 N. Y. 521; *Atcherson v. Troy, etc. R. Co.*, 6 Abb. Pr. (N. S.) 329; *Boutwell v. Townsend* (1860), 37 Barb. 205. *Of. Kent v. New York, etc. R. Co.* (1855), 12 N. Y. 628; *McClusky v. Cromwell* (1854), 11 N. Y. 593. Thus, a stockholder is not liable as for a labor debt for money due under a contract with the corporation, whereby a contractor is to carry on certain quarrying operations at his own expense and for a period of years, in a quarry owned by the corporation, and deliver rock to the corporation at certain rates. *Taylor v. Manwaring* (1882), 48 Mich. 171; *Moyer v. Pennsylvania Slate Co.* (1872), 71 Pa. St. 293; *Rogers v. Dexter R. R.*, 85 Me. 372, 21 L. R. A. 528.

⁹¹ *Jones v. Avery* (1882), 50 Mich. 326. But see *Williamson v. Wadsworth*, 49 Barb. 294.

⁹² *Louisville, etc. R. R. v. Wilsson* (1891), 138 U. S. 581; *Latta v. Louisdale* (1901), 107 Fed. 585.

⁹³ *Matter of Stryker* (1893), 158 N. Y. 526.

⁹⁴ *In re Stryker*, 73 Hun, 327 (1893).

⁹⁵ *Cocking v. Ward*, 48 S. W. 287 (Tenn. 1898).

⁹⁶ *In re Grabbs-Wiley, etc. Co.* (1899), 96 Fed. 183.

⁹⁷ *People v. Beveridge, etc. Co.* (1895), 91 Hun, 313.

⁹⁸ *Weatherby v. Saxony, etc. Co.* (N. J. 1894), 29 Atl. 326.

⁹⁹ *Clark's Appeal* (1894), 100 Mich. 448.

¹ *Bristor v. Smith* (1899), 158 N. Y. 157, 22 App. Div. 624.

² *Sleeper v. Goodwin*, 67 Wis. 577.

³ *Hand v. Cole*, 88 Tenn. 400.

⁴ *Dukes v. Love* (1884), 97 Ind. 341. *Of. Beecher v. Dacey* (1882), 45 Mich. 92. In this case a mer-

stockholders for labor performed for the corporation, are construed as creating a liability in addition to what remains unpaid on their subscriptions,⁵ and as imposing a personal obligation to pay for services rendered while the stockholder was a member of the company, of which he is not relieved by a transfer of his shares.⁶ It attaches to municipal corporations holding shares, as well as to natural persons.⁷ The remedy is not exclusive of the common law right of such creditors to enforce the liability of shareholders upon their unpaid subscriptions.⁸ The right of action conferred, is assignable and not a mere personal privilege.⁹ It is not necessary to prove a judgment against the corporation in order to maintain an action against shareholders under these statutes, but the plaintiff may prove on the trial, the nature and amount of his claim, independent of any judgment.¹⁰ An employee is not to be regarded as having waived his right of action against the shareholders individually by the mere act of presenting his claim for wages in order to be entitled to a dividend from the assignee;¹¹ nor by taking a note and obtaining judgment against the corporation and receiving a *pro rata* payment out of the corporate assets.¹² The mere dissolution of a corporation by suspension of business, or by an assignment for the benefit of creditors, does not destroy the right of a servant to enforce the personal liability of stockholders for wages.¹³ In actions

cantile firm delivered goods to the laborers of a mining corporation upon orders drawn in this form: "Due A. for labor from the M. & P. Rolling Mill Co. \$—, in goods, at the store of C. E., treasurer, by G.;" and on delivery of goods to the amount so called for, the firm stamped each order "paid." It was apparently understood that the firm should receive and honor the orders of the corporation and that the latter should settle with it every month, and pay the amount of the orders taken by it. The firm became insolvent, and had among its assets a large number of these orders, on which suits were brought as for labor debts, and for the use of the persons to whom the orders were drawn, against one of the stockholders of the corporation; and it was held that the action would

not lie, and that the use of the words "for labor" in the orders, was simply to indicate the nature of the service for which they were given and not to keep them alive as against stockholders.

⁵ *Milroy v. Spur Mountain, etc. Mining Co.*, 43 Mich. 231.

⁶ *Jackson v. Meek* (1888), 87 Tenn. 69, 10 Am. St. Rep. 620.

⁷ *Shipley v. Terre Haute* (1882), 74 Ind. 297.

⁸ *Lane's Appeal* (1885), 105 Pa. St. 49.

⁹ *Krauser v. Ruckel*, 17 Hun, 463.

¹⁰ *Sleeper v. Goodwin* (1887), 67 Wis. 579.

¹¹ *Sleeper v. Goodwin* (1887), 67 Wis. 579.

¹² *Jackson v. Meek* (1888), 87 Tenn. 69, 10 Am. St. Rep. 620.

¹³ *Sleeper v. Goodwin*, 67 Wis. 579.

under these statutes brought in a foreign State, they will be construed in accordance with the construction given them in the courts of the State that enacted them.¹⁴

§ 591. **Creditors first to exhaust remedy against the corporation.**—The personal liability of stockholders for the debts of the company is secondary to that of the company itself, and does not accrue until the corporate assets have been exhausted, or clearly shown to be insufficient to meet the demands of creditors.¹⁵ This is the rule, both in respect of their liability upon the unpaid balance of their subscriptions, and as to any additional individual liability which may be imposed upon them by charter or statute.¹⁶ The best evidence of the insufficiency of the corporate assets, being an execution upon judgment against the company, with a return of *nulla bona*, it has been frequently held that such a return is an essential pre-requisite to an action against the shareholders personally.¹⁷ The return of an execution unsatisfied, is

¹⁴ *Viele v. Wells* (1882), 9 Abb. N. Cas. 277, a case arising under the Michigan statute.

¹⁵ *Harper v. Union Manuf. Co.* (1882), 100 Ill. 225; *Garrettsville Bank v. Greene* (1885), 64 Iowa, 445; *Wright v. McCormack*, 17 Ohio St. 86 (1866); *Stewart v. Lay* (1877), 45 Iowa, 604; *Toucey v. Bowen* (1855), 1 Biss. 81; *Lane v. Harris* (1854), 16 Ga. 217; *Drinkwater v. Portland, etc. R. Co.*, 18 Me. 35; *Cambridge Water Works v. Somerville Dyeing Co.* (1862), 4 Allen, 239. *Of Patterson v. Wyomissing Manuf. Co.* (1861), 40 Pa. St. 117; *Harper v. Union Manuf. Co.*, 100 Ill. 225; *Hatch v. Burroughs*, 1 Woods, 439; *Mean's Appeal* (1877), 85 Pa. St. 75; *Bayliss v. Swift*, 40 Iowa, 648 (1875); *McClaren v. Franciscus* (1869), 43 Mo. 452; *Wehrman v. Reakirt* (1871), 1 Cin. Super. Ct. 230.

¹⁶ *Jackson v. Meek* (1888), 87 Tenn. 69, 10 Am. St. Rep. 620; *Nimick v. Mingo Iron Co.* (1885), 25 W. Va. 184; *Dauchy v. Brown* (1852), 24 Vt. 197, 209, where it was said: "The reason and propriety of this is apparent. The

indebtedness of the corporation must exist before such liability [of the stockholders] can arise, and that indebtedness can only be tried in suit against the corporation in such a way that those upon whom execution may be levied shall be thereby concluded. If a judgment is obtained against the corporation not only is the corporation, but all its members are concluded on the question of indebtedness."

¹⁷ *Terry v. Anderson*, 95 U. S. 636; *Walser v. Seligman* (1882), 21 Blatchf. 130; *Handy v. Draper*, 89 N. Y. 334; *Shellington v. Howland*, 53 N. Y. 371; *Freeland v. McCullough* (1845), 1 Denio, 414, 43 Am. Dec. 685; *Andrew v. Vanderbilt*, 37 Hun, 468; *Lindsley v. Simonds*, 2 Abb. Pr. (N. S.) 69; *Drinkwater v. Portland Marine Ry.* (1841), 18 Me. 35; *New England, etc. Bank v. Newport Steam Factory*, 6 R. I. 154, 75 Am. Dec. 688; *Wetherbee v. Baker* (1882), 35 N. J. Eq. 501; *Wehrman v. Reakirt*, 1 Cin. Super. Ct. 230; *Munger v. Jacobson* (1881), 99 Ill. 349; *Cutright v. Stanford* (1876), 81 Ill. 240; *Lane v. Harris* (1854),

conclusive evidence against the stockholder, of the insolvency of the corporation, and that it has no property subject to execution;¹⁸ and a judgment by default and execution returned unsatisfied, is sufficient evidence of insolvency.¹⁹ As the phrase goes, the creditor must first exhaust his remedy against the corporation,²⁰ by recovery of judgment against it, and return of execution

16 Ga. 217; *Thornton v. Lane*, 11 Ga. 459 (1852); *Blake v. Hinkle*, 10 Yerg. 218; *Terry v. Anderson* (1877), 95 U. S. 628, 636, where Chief Justice Waite said; "Ordinarily, a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions, and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee. But here there was a trustee." *McClaren v. Franciscus*, 43 Mo. 452 (1869); *Remington v. Samana Bay Co.*, 140 Mass. 494; *Priest v. Essex Manuf. Co.*, 115 Mass. 380; *Cambridge Water Works v. Somerville Dyeing, etc. Co.*, 4 Allen, 239; *Dauchy v. Brown*, 24 Vt. 197; *Perkins v. Church*, 31 Barb. 84; *Baxter v. Moses* (1885), 77 Me. 465; *Cleveland v. Burnham* (1885), 55 Wis. 598; *Bank of the United States v. Dallam* (1836), 4 Dana, 574; 2 *Lindley on Partnership*, 520; *Bartlett v. Pentland* (1831), 1 Barn. & Ad. 704; *Clowes v. Brettell*, 10 Mees. & W. 506 (1842); *Winfield v. Barton* (1872), 2 Dowl. (N. S.) 355; *Wingfield v. Peel* (1842), 12 L. J. Q. B. (N. S.) 102.

¹⁸ *Hawthorn v. Calef*, 53 Me. 471. *Ripley v. Evans*, 87 Mich. 217.

¹⁹ *Voight v. Dregge*, 97 Mich. 322.

²⁰ *Andrew v. Vanderbilt* (1885), 37 Hun, 468; *Blake v. Hinkle*, 10 Yerg. 218 (1836); *Shellington v. Howland* (1873), 53 N. Y. 371; *Wehrman v. Reakirt* (1871), 1 Cin. Super. Ct. 230; *Dauchy v. Brown*, 24 Vt. 197; *Drinkwater v. Portland Marine Ry.* (1841), 18 Me. 35; *Handy v. Draper* (1882), 89 N. Y. 334; *Thornton v. Lane* (1852), 11 Ga. 459; *Lane v. Harris* (1854), 16 Ga. 217; *McClaren v. Franciscus* (1869), 43 Mo. 452; *New England, etc. Bank v. Newport Steam Factory* (1859), 6 R. I. 154; *Priest v. Essex Manuf. Co.* (1874), 115 Mass. 380; *Cambridge Water Works v. Somerville Dyeing, etc. Co.* (1862), 4 Allen, 239; *Lindsley v. Simonds* (1866), 2 Abb. Prac. (N. S.) 69; *Stone v. Wiggin* (1842), 5 Metc. 316; *Stedman v. Eveleth* (1843), 6 Metc. 114; *Leland v. Marsh*, 16 Mass. 389 (1820); *Marcy v. Clark* (1821), 17 Mass. 330. *Cf. Perkins v. Church* (1859), 31 Barb. 84. It is no excuse that the corporate charter has expired by limitation, especially when, notwithstanding, the statute gives the creditor the remedy. *Andrew v. Vanderbilt*, 37 Hun, 468. It is sufficient that the petition allege that no property of the corporation could be found whereon to levy execution and that the execution remains unsatisfied, with the sheriff's return to that effect attached. *Head v. Daniels* (1888), 38 Kan. 1.

unsatisfied, at least in part, or must show that recovery of judgment was either useless or impossible.²¹ But proceedings *in rem* and execution against the property of the company, is not sufficient. Neither is a return of *nulla bona* in a State other than that of the company's origin, considered to exhaust the creditor's remedy.²² Statutory requirement, that the creditor shall first exhaust his remedy against the corporation before procedure against the stockholder, contemplates that judgment and execution was obtained and issued within the state.²³ Where the corporation is doing business in two or more counties, execution issued and returned unsatisfied in one county is sufficient,²⁴ and is sufficient if that be the county in which the principal office is situated.²⁵ Judgment must be obtained in the State where enforcement is sought. Even a judgment in the federal circuit court for the district will not suffice.²⁶ It is sometimes provided by statute, as under the General Manufacturing Act of New York, that the creditors shall first obtain judgment and return of execution against the corporation, wholly or partly unsatisfied, before proceeding against the members personally;²⁷ and in other States,

²¹ Fourth Nat. Bank of New York v. Francklyn, 120 U. S. 707; Remington & Sons v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292; Ball v. Wicks, 45 Neb. 367; Freeland v. McCullough, 1 Denio (N. Y.) 414, 43 Am. Dec. 685; Craig's Appeal, 92 Pa. St. 396; Harper v. Union Manuf. Co., 100 Ill. 225.

²² Rocky Mountain Nat. Bank v. Bliss (1882), 89 N. Y. 338; Brice v. Munro (Ontario, Q. B. Div. 1885), 5 Can. L. T. 130; Dean v. Mace (1879), 19 Hun, 391; Patterson v. Lynde, 112 Ill. 196.

²³ Boutwell v. Townsend, 37 Barb. (N. Y.) 205; Rocky Mountain Nat. Bank v. Bliss, 89 N. Y. 338; Dean v. Mace, 19 Hun (N. Y.) 391.

²⁴ Bagley v. Tyler, 43 Mo. App. 195; Maher v. Carman, 38 N. Y. 25.

²⁵ Ripley v. Evans, 87 Mich. 217.

²⁶ Patterson v. Lynde (1884), 112 Ill. 196; Steere v. Hoagland, 39 Ill. 264; McLune v. Benceni, 2 Ired. Eq. 513. *Contra*, Sickles v.

Watts (1888), 94 Mo. 410, holding that judgment and a return of execution unsatisfied against a corporation in another state is sufficient basis for a bill in a Missouri court of equity to enforce a stockholder's liability to corporate creditors on unpaid stock. And in Persch v. Simmons (1889), 3 N. Y. Supp. 783, under N. Y. Code Civ. Proc., § 1871, which provides that when execution has been returned unsatisfied the creditor may maintain an action against the debtor or any other person to compel the discovery of property or money due the debtor, and to procure satisfaction of his demand, it was held that a judgment creditor of a foreign corporation, after the return of execution unsatisfied, may sue a stockholder indebted to the corporation for unpaid subscription for stock.

²⁷ N. Y. Laws of 1848, ch. 40, § 24; Dean v. Mace (1879), 19 Hun, 391; Rocky Mountain Nat.

that a specified demand shall have been made.²⁸ While, as will appear in the following section, there are exceptions to the general rule here laid down, and judgment against the corporation may, in certain cases, be unnecessary as a pre-requisite to instituting suit against the shareholder personally, it may, nevertheless, be necessary in the course of the action against the shareholder, to show a judgment against the company as evidence of the measure of damages.²⁹

§ 592. **Exceptions to the foregoing rule.**—In actions by creditors to enforce the personal liability of stockholders, if it be clearly shown that the corporation has no property with which to satisfy the plaintiff's demands;³⁰ that it is notoriously insol-

Bank v. Bliss (1882), 89 N. Y. 338; Handy v. Draper (1882), 89 N. Y. 334, reversing 23 Hun, 256; Southworth & Jones on Manufacturing & Business Corporations, §§ 91, 121; Taylor on Corporations, §§ 713, 724. A provision in the charter of a foreign corporation that judgment against the corporation must be obtained before proceedings can be instituted against the shareholders for the corporate debts, makes such a judgment an essential pre-requisite to a suit in equity to enforce the liability of a shareholder. Remington v. Samana Bay Co. (1886), 140 Mass. 494.

²⁸ Haynes v. Brown (1858), 36 N. H. 545; Connecticut River Savings Bank v. Fiske (1885), 60 N. H. 363, holding that the statutory requirement to make stockholders liable personally that a demand shall be made on the corporation to pay the debt or expose property to attachment, was met by a demand by letter on the treasurer, who told the creditors he could not pay the debt and did not expose any property.

²⁹ First Nat. Bank of Garrettsville v. Greene (1884), 64 Iowa, 445. Cf. Cleveland v. Marine Bank (1863), 17 Wis. 545. Section 25 of the New York business corporations act (chapter 611, Laws 1875) is identical with sec-

tion 24, of the act of 1848, for organizing manufacturing corporations, which exempts stockholders from liability for corporate debts in certain cases, except that the act of 1875 omits a clause of the earlier act to the effect that stockholders shall not be liable "until an execution against the company shall have been returned unsatisfied." But it is held that an action may be maintained against a stockholder in a limited liability company, organized under the act of 1875, for a corporate debt, pending an action against the company and before judgment therein, although section 37 of the act provides that "no execution shall issue against any stockholder individually until execution has been issued against the company and returned unsatisfied." Walton v. Coe (1888), 110 N. Y. 109.

³⁰ Garrettsville Bank v. Greene, 64 Iowa, 445 (1885), where it was held that the right of action by a corporation creditor against a stockholder to the extent of the unpaid balance due on his stock, accrues when it is clear that the corporation has no property from which the claim may be collected and not from the time of recovery of judgment against the corporation. So in Knight v. Frost (1885), 14 Mo. App. 331, where a

ent,³¹ that it has made an assignment for the benefit of creditors,³² or has been adjudged a bankrupt,³³ or has been dissolved,³⁴ that it has ceased to exercise its functions and is without funds and in debt,³⁵ it is not necessary further to allege that the plaintiffs have recovered judgment against the corporation upon which an execution has been returned unsatisfied.³⁶ In such cases, creditors

statute provided for proceedings against stockholders when property of the corporation on which to levy an execution could not be found, it was held that proceedings could be had upon evidence that there was no property to levy on, without waiting till the return day of the execution.

³¹ *Latimer v. Citizens' State Bank*, 102 Iowa, 162; *Parker v. Carolina, etc. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888; *Guerney v. Moore*, 131 Mo. 650; *Salt Lake, etc. Co. v. Tintic Milling Co.*, 13 Utah, 423, 45 Pac. 200; *Terry v. Tubman* (1875), 92 U. S. 156; *Flash v. Conn* (1883), 109 U. S. 371; *Camden v. Doremus* (1845), 3 How. 533; *Reynolds v. Douglas* (1836), 12 Pet. 497; *Kimber v. Bank of Fulton*, 49 Ga. 419; *Hodges v. Silver Hill Mining Co.* (1881), 9 Oreg. 200. *Cf. Toucey v. Bowen* (1855), 1 Biss. 81.

³² *Chamberlain v. Brownberg*, 83 Ala. 576.

³³ *Moosbrugger v. Walsh*, 89 Hun (N. Y.), 564; *Spence v. Shapard*, 57 Ala. 598; *Flash v. Conn*, 109 U. S. 371; *Hirshfeld v. Bopp*, 145 N. Y. 34; *Shellington v. Howland* (1873), 53 N. Y. 371; *State Savings Assn. v. Kellogg*, 52 Mo. 583 (1873); *Dryden v. Kellogg* (1876), 2 Mo. App. 87. *Cf. Ansonia Brass & Copper Co. v. New Lamp Chimney Co.* (1873), 53 N. Y. 123, (1875) 91 U. S. 656; *Lovett v. Cornwell* (1831), 6 Wend. 369; *People v. Bartlett*, 3 Hill, 570 (1842); *Loomis v. Tifft* (1853), 16 Barb. 541; *Walser v. Seligman* (1881), 21 Blatchf. 130. *Contra, Birmingham Nat. Bank v. Mosser* (1878), 14 Hun, 605.

³⁴ *Terry v. Tubman* (1875), 92 U. S. 156; *Terry v. Anderson*, 95 U. S. 628, 636 (1887); *Kincaid v. Dwinelle* (1875), 59 N. Y. 548; *Patterson v. Lynde* (1884), 112 Ill. 196; *Kimber v. Bank of Fulton*, 49 Ga. 419. *Cf. McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401 (1889), where it is held that neither the constitution nor the statute of Alabama, relating to the liability of stockholders for the debts of the corporation, limits the remedy to judgment creditors, and it enures to all creditors alike, upon the dissolution of the corporation. *Cf. Hollingshead v. Woodward* (1885), 35 Hun, 410. For the sake of the remedy against the stockholders and in favor of creditors, a virtual surrender of the corporate rights and a dissolution of the corporation may be presumed from a transfer of all the corporate assets, and from other circumstances which would not ordinarily create a dissolution *per se*. Under the Missouri statute, creditors may, in such cases, bring their suits against any persons who were stockholders at the time of the dissolution of the corporation. *Kehlor v. Lademann*, 11 Mo. App. 550 (1883).

³⁵ *Penniman v. Briggs* (1824), 1 Hopk. Ch. (N. Y.) 343; *Slee v. Bloom* (1822), 19 Johns. 456; *Bank of Poughkeepsie v. Ibbotson* (1840), 24 Wend. 479. *Cf. Terry v. Anderson* (1877), 95 U. S. 628; *Remington v. Samana Bay Co.* (1886), 140 Mass. 494.

³⁶ *Morgan v. Lewis* (1888), 46 Ohio St. 1, where it was alleged that the company was insolvent;

will not be required to await the collection of doubtful claims or claims in litigation. The stockholders must pay promptly, and take upon themselves the *onus* of delay and risk, as to all such cases.³⁷ Even where the statute requires it, a suit to enforce a statutory liability, need not be delayed until all the corporate property has been applied to the payment of debts, if it be clear that such property will be sufficient to pay everything.³⁸ And there are cases holding that the shareholder's liability under particular statutes is "unconditional, original and immediate, not dependent on the insufficiency of corporate assets, and not collateral to that of the corporation, upon the event of its insolvency."³⁹ Under

that it had entirely ceased to do business; and that it had made an assignment for the benefit of creditors, having neither money, credit nor materials with which to transact business. *Acc. Shel-lington v. Howland* (1873), 53 N. Y. 371; *State Savings Assn. v. Kellogg* (1873), 52 Mo. 583; *Dryden v. Kellogg*, 2 Mo. App. 87. *Cf. Ansonia Brass & Copper Co. v. New Lamp Chimney Co.* (1873), 53 N. Y. 123, affirmed (1875) 91 U. S. 656; *Kincaid v. Dwinelle*, 59 N. Y. 548 (1875); *Birmingham Nat. Bank v. Mosser* (1878), 14 Hun, 605; *Hollingshead v. Woodward* (1885), 35 Hun, 410; *Paine v. Stewart* (1886), 33 Conn. 516; *Chamberlain v. Huguenot Manuf. Co.* (1875), 118 Mass. 532. *Laws N. Y.* 1875, ch. 611, § 25, exempting the stockholders of business corporations organized under that act from liability in certain cases, is identical with section 24 of the act of 1848, except that it omits the provision of the act of 1848 that the stockholders shall not be liable "until an execution issued against the company shall have been returned unsatisfied." Accordingly, an action can be maintained against the stockholders of a corporation organized under the act of 1875, though no execution had been issued against the company. *Richards v. Beach* (1889), 5 N. Y. Supp. 574, 12 N. Y.

St. Rep. 136; and pending an action against the corporation, before judgment therein. *Young v. Brice* (1889), 18 N. Y. St. Rep. 945, 3 N. Y. Supp. 123; *Walton v. Coe*, 110 N. Y. 109.

³⁷ *Moses v. Ocoee Bank* (1878), 1 Lea, 398, 414; *Stark v. Burke*, 9 La. Ann. 341.

³⁸ *Munger v. Jacobson* (1881), 99 Ill. 349.

³⁹ *Manufacturing Co. v. Bradley* (1881), 105 U. S. 175, 181, per Matthews, J., who continuing said: "It is, in one aspect, a suretyship for the corporation, for by section 37 of the act, any stockholder paying a debt of the company for which he is personally liable, is entitled to an action against it for indemnity, in which he may take the corporate assets, but is without recourse upon the property of any other stockholder. The jurisdiction in equity, then, cannot rest upon the administration of a trust fund, as in cases where delinquent stockholders are charged with the obligation to make good their subscriptions to unpaid capital stock, or in those where a constitutional or statutory liability is imposed beyond the amount of the subscription, to a fixed sum, but on each in proportion to his share in the capital stock." *Perkins v. Church* (1859), 31 Barb. 84; *Southmayd v. Russ* (1819), 3 Conn. 52; *Culver v.*

the New Hampshire statute, it is sufficient to render the stockholders personally liable, that a demand be made upon the corporation to pay the debt or to expose property to attachment.⁴⁰ In Missouri it is held that where judgments obtained in a foreign jurisdiction against a corporation of that jurisdiction, prove unavailing by reason of the insolvency of the corporation, it is not necessary, in a proceeding in a court of equity in Missouri against a holder of unpaid stock, to obtain judgment of dissolution of the corporation, that fact appearing sufficiently *aliunde*. The statute requiring judgment does not apply in such a case.⁴¹ And in South Carolina it has been held that where the charter of a corporation made each shareholder liable to creditors for five per cent. on his stock, judgment need not be taken against the corporation, before action brought to enforce the liability of a shareholder.⁴² In California, before the adoption of the present constitution, under a statute of that State declaring each stockholder of a life insurance company individually liable for such proportion of its debts as the amount of his stock bore to the whole stock, a creditor could sue a stockholder at law, without first bringing an action against the company.⁴³

§ 593. **Liability of one holding stock as trustee.**—To make one answerable as a stockholder to creditors of a corporation, he must be shown to be a stockholder as between himself and the company.⁴⁴ If he hold it merely as collateral security,⁴⁵

Third Nat. Bank (1871), 64 Ill. 528; Davidson v. Rankin (1868), 34 Cal. 503; Young v. Rosenbaum (1870), 39 Cal. 646; Witherhead v. Allen (1867), 4 Abb. App. Dec. 628; Morrow v. Superior Court (1883), 64 Cal. 383; Bird & Co. v. Calvert (1884), 22 S. C. 292, 297, saying: "The obligation in one sense may possibly be termed collateral, but we cannot see that in any sense it is secondary and enforceable only after judgment and a return of *nulla bona* against the corporation."

⁴⁰ Connecticut River Savings Bank v. Fiske (1885), 60 N. H. 363.

⁴¹ Shickle v. Watts (1888), 94 Mo. 410.

⁴² Bird & Co. v. Calvert (1884), 22 S. C. 292.

⁴³ Morrow v. San Francisco Superior Court (1885), 64 Cal. 383.

⁴⁴ Union Savings Assn. v. Seligman, 92 Mo. 635, 1 Am. St. Rep. 776. "If a person is a member of a company, as between himself and the company, then, whether he is so by reason of his having become a member by complying with all requisite formalities, or by reason of the doctrine of estoppel, he ought upon principle to be deemed a member to all intents and purposes." Lindley on Partnership, 12, quoted with approval in Griswold v. Seligman, 72 Mo. 110, and in Union Savings Assn. v. Seligman, 92 Mo.

⁴⁵ Union Savings Assn. v. Seligman, 92 Mo. 635, 1 Am. St. Rep. 776. *Vide infra*, § 594.

or in a representative capacity, he is not to be held personally liable.⁴⁶

§ 594. Liability of pledgee of stock as collateral security.—Voting as a stockholder at an election, will not estop one from showing in an action against him by the creditors of the cor-

635, 1 Am. St. Rep. 776, 779. "The cases cited in the opinion delivered by this court, in the case of *Griswold v. Seligman*, 72 Mo. 110, are all cases in which the facts were such that the persons sought to be charged as stockholders were held to be stockholders as betwixt themselves and the corporation. In many of the cases suits were instituted by the corporation against individuals alleging that they were, and seeking to charge them as, stockholders. In none of these cases cited in that opinion was there, as in this, a special agreement showing exactly what relation the parties alleged to be stockholders bore to the corporation. The cases of *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; and *Webster v. Upton*, 91 U. S. 65, are all cases in which the corporation, or its assignees, asserted the liability of the defendant as a stockholder; and no cases cited in the opinion delivered in *Griswold v. Seligman*, 72 Mo. 110, in which one was held liable as a stockholder, at the suit of a creditor of the corporation, who was not, as between himself and the corporation, held to be a stockholder." *Union Savings Assn. v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 778, 779.

⁴⁶ Where the deed of settlement of a company required certain formalities before legatees should become shareholders, and the name of the husband of a legatee was written in pencil in the register of shareholders, but subsequently dividends were paid to the executor, he was put on the list of contributories in his rep-

resentative character. *In re Vale of Neath Brewery Co. v. Keene's Executors' Case*, 3 D. M. & G. 272, 22 L. J. Ch. 365. A testatrix, who held shares in a company, by her will gave her residuary estate, which included them, to A. B., whom she appointed executrix. The deed of settlement of the company provided that executory legatees should become shareholders and receive dividends only upon executing a deed making themselves personally liable. A. B. did not execute any deed. She received six dividends, for the first four of which she signed receipts as executrix. The company, without the knowledge of A. B., returned her name to the stamp office as a shareholder, and about four years after the death of the testatrix entered it on the dividend list in lieu of that of the testatrix. Upon the company being wound up she was made a contributory only in her representative character. *In re Herefordshire Banking Co. ex parte Bulmer*, 33 L. J. Ch. 609, 33 Beav. 438. The deed of settlement prescribed certain preliminaries which were to be observed for the purpose of making the husband of a female shareholder a proprietor in the company, and it was held that a husband who had not complied with these requirements was liable in respect of losses incurred during the coverture only. *In re Vale of Neath Brewery Co., ex parte Kluht*, 3 De G. & Sm. 210, 19 L. J. Ch. 385; but *Shelford (Joint Stock Companies, 123)* questions the authority of this case.

poration, that he held the stock merely as collateral security for a loan.⁴⁷ If one, in whose name the stock stands on the company's books, appears to be the owner of shares in a corporation, this will be taken as a fact in favor of the corporate creditors. One who takes stock as collateral security for a debt, and has the stock transferred to him on the corporate books, is liable to the creditors as a stockholder.⁴⁸ As this liability is based upon estoppel, it exists only when the facts constitute an estoppel.⁴⁹ A pledgee of shares, is not liable as a stockholder, if the shares have not been transferred to him, or if the corporate books show that he holds the stock as collateral security.⁵⁰ The liability of trustees,⁵¹ and of executors, is governed by the same rule.⁵² The estate of a deceased shareholder is liable for his proportion of the corporate liabilities, the same as is any other stockholder.⁵³ After judgment the liability may be proved against the estate,⁵⁴ but before judgment it is a contingent claim and cannot be thus proved.⁵⁵ It has been argued that there is a distinction in this respect between the position of one receiving stock in pledge from a shareholder, and one who receives it from the company itself as security for money which it has borrowed; that it is against public policy to permit a corporation to place its unissued stock to an amount sufficient to control the corporate affairs, in the hands of a person who is in no event to incur any responsibility as a stockholder to the creditors of the company; and that there should always be some person or estate to respond for the stock in the event of corporate insolvency.⁵⁶ The distinction, how-

⁴⁷ Union Savings Assn. v. Seligman, 92 Mo. 635, *per* Henry, J., Sherwood, J., dissenting, 1 Am. St. Rep. 776, annotated.

⁴⁸ Pauly v. State Loan, etc. Co., 165 U. S. 606; State v. Bank of New England, 70 Minn. 398, 68 Am. St. Rep. 538; National Bank v. Case, 99 U. S. 628; Goodwin v. Sleeper, 67 Wis. 577.

⁴⁹ Wells v. Larrabee, 36 Fed. 866.

⁵⁰ Anderson v. Warehouse Co., 111 U. S. 479; Pauly v. State Loan, etc. Co., 165 U. S. 606.

⁵¹ Kerr v. Urie, 86 Md. 72, 38 L. R. A. 119.

⁵² Wells v. Larrabee, 36 Fed. 866.

⁵³ Cochran v. Wiechers, 119 N. Y. 399, 7 L. R. A. 553; Bank v. Newport Steam Factory, 61 R. I. 154, 75 Am. Dec. 688.

⁵⁴ Nolan v. Hazen, 44 Minn. 478, 47 N. W. 155.

⁵⁵ Hospes v. Northern, etc. Co., 48 Minn. 174, 15 L. R. A. 470.

⁵⁶ In a proceeding by a judgment creditor of a corporation, seeking to hold defendant liable as a stockholder, it appeared that the firm of which defendant was a member acted as the financial agents of the company for the purpose of negotiating its bonds, agreeing to make certain advances in cash to enable the company to complete its road, and that in ac-

ever, has been declared unsound, and it is held to be immaterial so far as the pledgee's liability is concerned, whether the stock was hypothecated by a shareholder or by the company itself.⁵⁷ A

cordance with a resolution of the board of directors, the majority of the stock was issued to them to hold in trust for a year. By this means the firm controlled the management of the company, and continued to vote on the stock after the expiration of the year, and it was held, that the defendant was liable and not protected by Wag. Mo. St. 301, § 9, providing that no executor, administrator, guardian, trustee or pledgee shall be liable as stockholder, but that the estate represented by such person—or in case of the pledgee, the pledgor—shall be liable. *Fisher v. Seligman*, 75 Mo. 13; *Norton, J.*, dissenting. *Cf.* *Bray v. Seligman*, 75 Mo. 31. "I am still of opinion that section 9, article 11, *Wagner's Statutes*, page 301, is not applicable to this case. That section provides that the person holding stock as collateral security shall not be liable as a stockholder, 'but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly.' This statute, I think, clearly applies to stock which has been regularly issued by the company, and which has been pledged by the holder thereof; for I cannot imagine that the legislature ever contemplated that the corporation itself should be held 'liable as a stockholder' of its unissued stock. Undoubtedly if all the stockholders of a corporation consent, the unissued stock may be sold for a nominal consideration, or be given away to any one they may select as the object of their bounty, and the person receiving such stock could not be made liable to the corporation for the full value thereof, but such person might neverthe-

less be held liable by creditors of the corporation for such proportion of the value thereof as remained unpaid. I conceive it to be against public policy to permit a corporation to put its unissued stock, to an amount sufficient to control the affairs of the corporation, in the hands of a person who is in no event to incur any responsibility as a stockholder to creditors by holding and voting the same, and thus managing and controlling the affairs of the corporation." Dissenting opinion of *Hough, C. J.*, in *Union Savings Assn. v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 782, 783.

⁵⁷ *Burgess v. Seligman* (1882), 107 U. S. 20, where the court declared that the argument that the exemption from liability in cases of stock held as collateral security applies only to those who have received it from third persons who were stockholders, and who can be proceeded against as such, to be unsound, and contrary both to the words and the reason of the law. "It takes for granted that stock cannot be received as collateral security from the corporation itself, and still belong to the corporation; and yet we know that such transactions are very common in the business of this country. . . . The words of the statute (*Wag. Mo. Stat.* 301, § 9) are positive, and relate to all holders of stock for collateral security. They are as follows: 'No person holding stock in any such company as executor, administrator, guardian, or trustee, and no person holding such stocks as collateral security, shall be personally subject to any liability as stockholder of such company.' . . . The reason of this law is derived from the gross injustice

pledgee of bank stock by transfer of the bank books, is not liable for the bank's indebtedness created after re-transfer made on the books of the pledgor, after payment of the loan, notwithstanding pledgee's failure to give the statutory notice of re-transfer.⁵⁸ The Missouri statute recognizes the justice of making a discrimination between those who hold stock in their own right and those who hold it merely in a representative capacity, or as trustees, or by way of collateral security. Under the statute stock may be so held in trust or as collateral security, without personal liability to corporate creditors. The reason of the law is derived from the gross injustice of making a person liable as owner of stock when he only holds it in trust, or by way of security.⁵⁹ Similar thereto is the Maryland statute, from which

of making a person liable as the owner of stock when he only holds it in trust or by way of security, and from the inexpediency of putting a clog upon this species of property which will have the effect of making it unavailable to the owner, or of deterring prudent and responsible men from accepting positions when any such property is concerned. It seems to us that not only the law, but the reason upon which it is founded, applies to the holders of stock as collateral security, whether received from an individual or from the corporation itself. . . . It is argued, however, that the remaining words are repugnant to this view. They are as follows: 'But the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in such fund would have been if he had been living and competent to act, and held the stock in his own name.' . . . The argument is, that these words imply that there must always be some person or

estate to respond for the stock, or else the exemption cannot take effect. . . . The obvious answer to this is, that the clause fixes the liability upon the pledgor as a stockholder, where there is a pledgor who can be made liable in that character. When the corporation, however, pledges its own stock as collateral security, it cannot be proceeded against as a stockholder *eo nomine*, because it is primarily liable, before all stockholders, for all its debts. In such a case the clause last quoted would not strictly apply to it, but the holder of its stock as collateral security would be both within the letter and the spirit of the first clause. If the stock had not been issued as collateral security it would not have been issued at all; it would not have been in existence. Would the creditors have been any better off in such case? They are better off by the issue of the stock as collateral, because the general assets of the company have received the benefits of the moneys obtained by means of the pledge."

⁵⁸ Brunswick, etc. Co. v. National Bank, etc. (Md. 1904), 192 U. S. 386.

⁵⁹ Burgess v. Seligman (1882), 107 U. S. 20.

that of Missouri was copied, so far as relates to the exception of those holding stock in trust or as collateral security.⁶⁰ A similar decision that the pledgee of stock transferred as collateral security for a loan, is protected from any liability as stockholder, was made under a like statute of New York. "It is always competent to show that an assignment or conveyance absolute in form was only intended as a security. There is nothing in any statute which makes the books of the company incontrovertible evidence of ownership of stock. A person may be the absolute legal and equitable owner of stock, without any transfer appearing on the books."⁶¹ Under such statute, stock may be received as collateral security from the corporation itself, and still belong to the corporation. Its pledgee is entitled to the same exemption from personal liability, which is extended to third persons.⁶²

§ 595. **Priority among creditors.**—The personal liability of shareholders enures for the benefit of all the creditors alike.⁶³ The unpaid subscription to the capital stock being subject to the payment of the debts of the corporation, all the creditors of the corporation are entitled to share in it ratably.⁶⁴ A judgment creditor has no priority over others,⁶⁵ and can not by motion under the statute against a stockholder, deprive a creditor at large of the benefit of an action begun against the same stockholder.⁶⁶ Nor can one creditor gain any priority by filing his motion for execution against a stockholder, before the return day of the execution against the corporation.⁶⁷ Neither have mortgagees of all the property and effects of the company, any priority over unsecured creditors in the uncalled balance due from the stockholders upon their shares.⁶⁸ But in jurisdictions

⁶⁰ *Matthias v. Albert*, 24 Md. 527.

⁶¹ *MacMahon v. Macy*, 51 N. Y. 155.

⁶² *Burgess v. Seligman* (1882), 107 U. S. 20.

⁶³ *McDonnell v. Alabama Gold Life Ins. Co.* (1889), 35 Ala. 401.

⁶⁴ *Wetherbee v. Baker* (1882), 35 N. J. Eq. 501.

⁶⁵ *McDonnell v. Alabama Gold Life Ins. Co.* (1889), 35 Ala. 401.

⁶⁶ *Donnelly v. Mulhall* (1884), 12 Mo. App. 139.

⁶⁷ *Marks v. Hardy* (1886), 86 Mo. 232.

⁶⁸ *Dean v. Biggs* (1881), 25 Hun, 122; *Hill v. Reid*, 16 Barb. 280; *Hurlbert v. Root*, 12 How. Pr. 511; *Hurbert v. Carter*, 21 Barb. 221; *New Jersey Midland Ry. Co. v. Strait*, 35 N. J. 322; *Miller v. Maloney*, 3 B. Mon. 105; *Hill v. Rogers*, 50 Mich. 294; *Pickering v. Ilfracombe Ry. Co.*, 37 L. J. E. P. 118; *King v. Marshall*, 33 Beav. 565; *Lishman's Claim*, 23 L. T. Rep. N. S. 759; *Downie v. Hoover*, 12 Wis. 174; 78 Am. Dec. 730; *Ex parte Stanley*, 33 L. J. Ch. 535. *Cf. Morris v. Cheney*, 51 Ill. 451.

where creditors may bring separate actions against individual shareholders to enforce their statutory liability, priority with respect to the shareholder sued, may be acquired by the creditor who first institutes proceedings,⁶⁹ and he cannot be defeated by the stockholder's paying the claims of other creditors to the extent of his liability,⁷⁰ whether the latter are resident, or non-resident.⁷¹

§ 596. **Contribution among shareholders.**—Shareholders who have been required to pay to creditors of the company more than their *pro rata* of the corporate indebtedness, are entitled to contribution from the other shareholders, and may recover from them either by a bill in equity filed for that purpose,⁷² or by a

⁶⁹ See note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 869; *Cole v. Butler*, 43 Me. 401; *Ingalls v. Cole*, 47 Me. 530, 541; *Jones v. Weltberger*, 52 Ga. 575; *Lowry v. Parsons*, 52 Ga. 356; *Thebus v. Smiley*, 110 Ill. 316. But in *Chicago v. Hall* (1883), 103 Ill. 342, where certain creditors of a bank instituted suits at law against stockholders on their liability, it was held that the mere institution of such suits gave to the plaintiffs therein no prior lien on funds which came afterwards to the possession of the court, although the reason why judgments were not recovered was that the plaintiffs were enjoined from prosecuting their suits to judgment.

⁷⁰ *Thebus v. Smiley*, 110 Ill. 316. *Lowry v. Parsons*, 52 Ga. 356; *Ingalls v. Cole*, 47 Me. 530.

⁷¹ *Allen v. Fairbanks*, 40 Fed. 188, 45 Fed. 445; *O'Reilly v. Bard*, 105 Pa. St. 569; *Bennison v. McConnell*, 56 Neb. 46, 76 N. W. 412; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133; *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133.

⁷² *Thompson v. Meisser* (1884), 108 Ill. 359; 9 Bradw. 368; *Matchez v. Neiding*, 72 N. Y. 100; *Garrison v. Howe*, 17 N. Y. 458, 463; *Stover v. Flack* (1864), 30 N. Y. 64; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Aspinwall v. Torrance* (1870), 1 Lans. 381; *Slee v. Bloom* (1822), 19 Johns. 456; *Marsh v. Burroughs*

(1871), 1 Woods, 463; *Holmes v. Sherwood* (1881), 3 McCrary, 405; *Wincock v. Turpin* (1880), 96 Ill. 135; *Polk v. Reynolds*, 54 Ind. 449; *Ward v. Polk*, 70 Ind. 309; *O'Reilly v. Bard* (1884), 105 Pa. St. 569, holding that a stockholder who pays a judgment against the corporation, as provided by the Pennsylvania Act of April 7, 1849, and its supplements, is entitled to take an assignment of the judgment and to enforce execution against stockholders who were parties defendant in the action; but that he can not bring *assumpsit* against stockholders not parties to enforce contribution; *Millandon v. New Orleans R., etc. Co.* (1843), 3 Rob. (La.) 488; *Judson v. Rossie Galena Co.*, 9 Paige, 598, 603; 38 Am. Dec. 569; *Farrow v. Bivings* (1866), 13 Rich. Eq. 25; *Matthews v. Albert* (1866), 24 Md. 527; *Perkins v. Sanders*, 56 Miss. 733; *Stewart v. Lay* (1877), 45 Iowa, 604; *Hadley v. Russel* (1860), 40 N. H. 109; *Erickson v. Nesmith* (1886), 46 N. H. 371; *Masters v. Rossie Lead Mining Co.* (1845), 2 Sandf. Ch. 301; *Beers v. Waterbury*, 8 Bosw. 396; *Middletown Bank v. Magill* (1823), 5 Conn. 28, 61; *Brinham v. Wellersburg Coal Co.* (1864), 47 Pa. St. 43; *Clark v. Meyers*, 11 Bosw. 396; *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133; *Fiery v. Emmert*, 36 Md. 464.

cross-bill in the creditors' suit itself.⁷³ The right to contribution may be enforced against the estate of a decedent stockholder, as his liability survives.⁷⁴ The liability of stockholders is several and not joint. Each is liable for the balance due on his own stock, as far as is required to satisfy claims of corporate creditors.⁷⁵ His liability is independent of that of any other stockholder, and whether or not one or all of them are insolvent;⁷⁶ and he may be proceeded against, in equity, without making party to the suit, any other stockholder who is also liable.⁷⁷ The question of contribution seldom arises, under a statute making each stockholder liable severally for his proportionate share of the debt; more than this, the corporate creditors cannot recover from him, whether or not they recover anything from any other stockholder. When he has so paid his proportion of the debt, he can claim no contribution from any other stockholder.⁷⁸

Voluntary payment. Subrogation.—If one stockholder voluntarily pays a corporate debt, for which all the others are individually liable, he cannot enforce them to any contribution,⁷⁹ nor can he take assignment of the creditors' claim so paid, and share *pro rata* with other creditors, in distribution of the assets of an insolvent corporation.⁸⁰ Contribution may be enforced as well where the amount paid was in discharge of a statutory liability, as where it was upon the balance due for the unpaid subscription.⁸¹ And in suits for contribution brought within the State, it is immaterial whether the statutory liability be contractual or penal.⁸² But

⁷³ *Coleman v. How*, 154 Ill. 458, 45 Am. St. Rep. 133; *Hatch v. Dana*, 101 U. S. 205; *Holmes v. Sherwood* (1881), 3 McCrary, 405; *Wood v. Dummer*, 3 Mason, 307; *Marsh v. Burroughs*, 1 Woods, 463; *Masters v. Rossie Lead Mining Co.* (1845), 2 Sandf. Ch. 301; *Hodges v. Silver Hill Mining Co.* (1881), 9 Oregon, 200; *Hadley v. Russell* (1860), 40 N. H. 109; *Umsted v. Buskirk* (1866), 17 Ohio St. 113. See also New York Code of Civil Procedure, §§ 1791, 1794. *Cf. Andrews v. Collender* (1883), 13 Pick. 484.; *Gray v. Coffin* (1852), 9 Cush. 192; *Sutton's Case* (1850), 3 De G. & Sm. 262.

⁷⁴ *Allen v. Fairbanks*, 40 Fed. 188.

⁷⁵ *Siegel v. Andrews & Co.*, 181

Ill. 350; *Singer v. Hutchinson*, 83 Ill. 606, 75 Am. St. Rep. 133.

⁷⁶ *Haslett v. Witherspoon* (S. C.) 1 Strob Eq. 209.

⁷⁷ *Siegel v. Andrews & Co.*, 181 Ill. 350.

⁷⁸ *Savage v. Miller*, 56 N. J. Eq. 432; *Rickerson, etc. Co. v. Farrell, etc. Co.*, 23 C. C. A. 302, 75 Fed. 554.

⁷⁹ *Mueller v. Monongahela, etc. Co.*, 183 Pa. St. 450.

⁸⁰ *Mallory v. Kirkpatrick*, 54 N. J. Eq. 50; *Mayor v. Hodge, etc. Co.*, 78 Ill. App. 556.

⁸¹ *American File Co. v. Garrett*, 110 U. S. 288; *Garrett v. Sayles*, 1 Fed. Rep. 375, and cases cited *supra*, notes 72 and 73.

⁸² *Sayles v. Brown* (1889), 40 Fed. Rep. 8; 7 Ry. & Corp. L. J. 2. *Cf. Flash v. Conn*, 109 U. S. 371.

non-resident shareholders can not be called upon to contribute on the ground of having been relieved of a common burden, when the liability discharged is in the nature of a penalty, statutes of that character having no extra-territorial effect.⁸³ In fixing the liability of a defendant stockholder in an action or contribution, by a stockholder of an insolvent corporation, the computation should be made only between solvent resident stockholders.⁸⁴

§ 597. **Effect of increase or reduction of the capital stock.**—A reduction of the capital stock of a company, does not relieve the shareholders from liability to prior corporate creditors, whether the reduction be made by decreasing the par value of the shares, or by a diminution of their number.⁸⁵ Credit extended to a corporation after a reduction, however, is presumed to have been given upon the faith of the capital so reduced.⁸⁶ A statute imposing a liability upon shareholders to an amount equal to their stock, over and above what they owe upon their subscriptions, until the whole amount of the capital stock of the company shall have been paid in, applies as well to cases where the capital stock has been increased as where it is the original capital that remains unpaid.⁸⁷ But where the original capital is fully paid in and the certificate recorded, the liability is ended thus far, and is not revived as to stockholders to the original stock by reason of delinquency on the part of holders of the increased stock.⁸⁸ The

⁸³ *Sayles v. Brown* (1889), 40 Fed. Rep. 8; 7 Ry. & Corp. L. J. 2. *Video infra*, § 150.

⁸⁴ *Merrill v. Prescott*, 74 Pac. 259 (Kan. 1903).

⁸⁵ *In re State Ins. Co.* (1883), 11 Biss. 301, 14 Fed. Rep. 28; N. Y. Laws of 1878, ch. 264, § 1; *Dane v. Young* (1872), 61 Me. 160; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29.

⁸⁶ *Cooper v. Frederick*, 9 Ala. 742; *Palfrey v. Paulding*, 7 La. Ann. 363; *Hepburn v. Exchange, etc. Co.*, 4 La. Ann. 87. In the case of *In re State Ins. Co.* (1883), 14 Fed. Rep. 28, it appeared that the corporation reduced its capital stock, of which twenty-four per cent. only had been paid in, and issued paid up certificates based upon the new valuation. Afterwards the corporation became bankrupt and the assignee paid a forty per cent. dividend to credi-

tors generally, from assets realized upon without calling on the stockholders. It was held that as to debts contracted before the reduction of the capital stock, those who were stockholders at that time were liable beyond the amount of their twenty-four per cent. payment; while as to debts afterwards contracted, those stockholders were to be considered as having paid up their subscriptions, but that they should take no benefit from the forty per cent. payment by the assignee, as this should have been made primarily to creditors who could not resort to the liability of the stockholders.

⁸⁷ *Chubb v. Upton* (1877), 95 U. S. 665; *Veeder v. Mudgett* (1884), 95 N. Y. 295; *Delano v. Butler* (1886), 118 U. S. 634.

⁸⁸ *Veeder v. Mudgett*, 95 N. Y. 295; *Ruger, C. J., and Andrews, J.,*

takers of the new stock can not avoid liability by pleading that the whole amount of the increase has not been subscribed for, as one may do in case of a subscription to the original stock.⁸⁹ Technical objections to the validity of the contract of subscription, are regarded in such cases unfavorably.⁹⁰ It is idle to deny that the company has taken the measures required by law to complete its increase of capital, where the holder of the shares by receiving his certificates and entering into engagements with the company, waived the right to object to any such irregularity.⁹¹ If it be conceded that its increased stock was but *de facto*, and that it could have been annulled or suppressed by the attorney-general, the defendant derives no aid from the admission. He

dissenting. See also Sayles v. Brown (1889), 40 Fed. Rep. 8; 7 Ry. & Corp. L. J. 2, construing R. I. Rev. Stat. ch. 128, § 1, which is similar to the New York Act of 1848, the court saying: "The filing of the certificate in the township of North Providence on July 19, 1864, ended the contractual individual liability of the stockholders under the first section of the law as to the debts thereafter contracted; and one question in this case is whether as to those who never took the new stock their individual liability was revived by the issuing of the new stock, supposing its issue to have been valid, and as to which no certificate was or could be filed. In construing a statute so harsh and so destructive of the very purposes of incorporation, it does not seem to us we should, if avoidable, give it a construction which would put it in the power of those holding a majority of the stock, many of them, perhaps, as was the fact in this case, themselves personally responsible by indorsement and otherwise for the bulk of the company's large indebtedness, by voting an increase of capital by the issue of partially paid up stock, to impose a ruinous burden upon stockholders whose individual liability had once ended. The reasoning of the opinion of the court of appeals of New

York in Veeder v. Mudgett, 95 N. Y. 295, is to us very convincing, and the judgment of that court upon a similar statute, but under which the stockholders could only be held to an amount equal to the par value of each one's stock, was that holders of the original stock were not liable, and that the liability rested solely upon the holders of the new stock, and only to the extent of their holdings of that new stock."

⁸⁹ Nutter v. Lexington, etc. R. Co., 6 Gray, 85; Clarke v. Thomas, 34 Ohio St. 46. Cf. Beach on Railways, §§ 105, 106, 107; Belton Compress Co. v. Sanders, 70 Tex. 699.

⁹⁰ Kansas City Hotel Co. v. Hunt, 57 Mo. 126.

⁹¹ Pullman v. Upton, 96 U. S. 329; Chubb v. Upton (1887), 95 U. S. 665, 668; Veeder v. Mudgett, 95 N. Y. 295; Sheldon, etc. Co. v. Eickemeyer, etc. Co., 90 N. Y. 607, 612; Kent v. Quicksilver Mining Co., 78 N. Y. 159, 187; Aspinwall v. Sacchi, 57 N. Y. 321; Buffalo, etc. R. Co. v. Cary, 26 N. Y. 75; Eaton v. Aspinwall, 19 N. Y. 119; Upton v. Jackson, 1 Flip. 413; *In re Miller's Dale Co.*, 31 Ch. Div. 211. Cf. Morawetz on Corporations, (2d ed.), §§ 761, 767; Thompson on Liability of Stockholders, §§ 160 *et seq.*, 407 *et seq.* But see 1 Lindley on Partnership, (4th ed.), 134; and 2 *Ibid.* 1349.

must perform the engagements he has made.⁹² In case of authorized increase of the capital stock, and of simple irregularities in its issue, any holder of new shares is estopped to deny their validity, as against a corporate creditor who became such in reliance upon their validity,⁹³ unless such creditor, as corporate manager and stockholder, participated in such increase.⁹⁴ If a corporation reduces the capital stock, and attempts to retire shares by purchase and payment for them out of corporate assets, or otherwise, it cannot, as against existing creditors, release the subscribers from liability thereon for amount of the unpaid subscriptions.⁹⁵ Persons who become creditors, after authorized reduction of the capital stock and filing of required certificate and notice, cannot collect their debts out of subscriptions to the capital stock.⁹⁶ Under a statute prohibiting the payment of any part of the capital stock of the company to a stockholder, he is liable to an action by the receiver to recover the proceeds of stock sold by him to the company, in attempt to cancel and retire it, and to reduce its capital stock, the corporation being insolvent at the time.⁹⁷

§ 598. Partnership liability of stockholders in case of unauthorized or defective incorporation.⁹⁸—By the weight of authority, the rule in *de facto* corporations, is that the stockholders are not liable as partners in case of mistakes, omissions and irregularities in incorporation, where they have in good faith undertaken to incorporate under a valid law, authorizing incorporation for the purposes declared and pursued by the company.⁹⁹ The

⁹² Pullman v. Upton, 96 U. S. 329; Chubb v. Upton, 95 U. S. 665, 668; *In re* Reciprocity Bank, 22 N. Y. 9; Kansas City Hotel Co. v. Harris, 51 Mo. 464.

⁹³ Handley v. Stutz, 139 U. S. 417; Peck v. Elliott, (C. C. A.) 79 Fed. 10; Pullman v. Upton, 96 U. S. 328.

⁹⁴ Sayles v. Brown, 40 Fed. 8.

⁹⁵ *In re* Telegraph Construction Co. L. R. 10 Eq. 384; Bedford R. Co. v. Bowser, 48 Pa. St. 29; *In re* St. Ins. Co., 14 Fed. 28; Dane v. Young, 61 Me. 160.

⁹⁶ Gade v. Forest, etc. Co., 165 Ill. 367.

⁹⁷ Tait v. Pigott (Wash. 1903), 73 Pac. 365.

⁹⁸ *Vide supra*, CHAPTER VIII, PARTNERSHIP LIABILITY, and see 17 L. R. A. 549.

⁹⁹ Doty v. Patterson (1900), 155 Ind. 60; First National Bank v. Dovetail, etc. Co. (1896), 143 Ind. 534; Whitney v. Wymann (1879), 101 U. S. 392; Welch v. Importers Bank (1890), 122 N. Y. 177; Reinhard v. Virginia, etc. Co. (1891), 107 Md. 616, 28 Am. St. Rep. 441; Halsted v. Coleman (1891), 143 Pa. St. 352; Pierce v. Hocke (1892), 1 Pa. Dist. Rep. 517; Owensboro, etc. Co. v. Bliss (Ala. 1901), 31 So. 81; Cory v. Lee (1891), 93 Ala. 468, 8 So. 694; Kleckner v. Turk (1895), 45 Neb. 176, 63 N. W. 469; Nebraska Nat. Bank v. Ferguson

mere assumption of corporate powers, without attempt to comply with the substantial requirements of the statute, will render the corporators liable.¹ The stockholders of an insolvent corporation, though its charter is not annulled, are liable as partners to a creditor of the corporation who contracted with the corporation relying upon its solvency, whereas the stock had never been paid for.² The fact that the corporation is engaged in business it is unauthorized to engage in, will not make the stockholders liable as partners for torts committed by its servants, or agents, in the prosecution of such business.³ The sale of stock in an unincorporated company, both parties believing it is incorporated, and without knowledge or belief that a partnership would be thereby created but, who upon discovery that the company was not incorporated, demanded a rescission of the sale and return of the price paid, does not render them liable as partners.⁴

Estoppel.—One who contracts with a *de facto* corporation is estopped to deny its legal existence, and from holding the incorporators liable as partners on the contract.⁵ A promoter and organizer of a corporation is estopped to deny its legal existence, and to set up that it is a partnership.⁶ Creditors who are incorporators are estopped to enforce personal liability upon the stockholders, for informalities in incorporation.⁷ The corporation can not set up its defective corporation as defense to its lia-

(1896), 49 Neb. 109, 59 Am. St. Rep. 522; *Hogue v. Capital Nat. Bank* (1896), 47 Neb. 929; *Carpenter v. Frazer* (1891), 102 Tenn. 462, 52 S. W. 858; *Finnegan v. Noerenberg* (1893), 52 Minn. 239; *Demarest v. Flack* (1891), 128 N. Y. 205; *Young, etc. Co. v. Young, etc. Co.* (1896), 72 Fed. 62; *Wilson Cotton Mills v. Randleman, etc. Mills* (1894), 115 N. C. 475; *Lancaster v. Amsterdam, etc. Co.* (1894), 140 N. Y. 576.

¹ *Owen v. Shepard* (1894), 59 Fed. Rep. 746; *Forbes v. Whittemore* (1896), 62 Ark. 229, 35 S. W. 223; *McLennan v. Hopkins* (1895), 2 Kan. App. 260; *Queen, etc. Co. v. Crawford* (1895), 127 Mo. 356; *In re Browne, etc. Co.* (1901), 106 La. 486.

² *Hyatt v. Van Riper* (Mo. App. 1904), 78 S. W. 1043.

³ *Mandeville v. Courtwright* (Pa.

1903), 126 Fed. 1007, (U. S., C. C. A.)

⁴ *Bolton v. Prather* (Tex. Civ. App. 1904), 80 S. W. 666.

⁵ *Tennessee, etc. Co. v. Massey* (Tenn. 1899), 56 S. W. 35; *Clausen v. Head* (1901), 110 Wis. 405; *Cole v. Great Bend, etc. Co.* (Kan. 1898), 54 Pac. 920; *American, etc. Co. v. Bulkey* (1895), 107 Mich. 447; *Gon v. Colin, etc. Co.* (1896), 109 Mich. 45; *Richards v. Minnesota Sav. Bank* (1899), 75 Minn. 196; *Building, etc. Association v. Chamberlain* (1893), 4 S. D. 271; *Cunningham v. City of Cleveland* (1899), 98 Fed. 657.

⁶ *Anderson v. Thompson* (1899), 51 La. Ann. 727.

⁷ *Allegheny Nat. Bank v. Bailey* (1892), 147 Pa. St. 111; *Seaton v. Grimm* (1899), 110 Iowa 145, 81 N. W. 225; *Marsh v. Matthias* (1899), 19 Utah 350, 56 Pac. 1074.

bility, although it be a foreign corporation.⁸ Failure to record the articles of incorporation is ground for liability,⁹ as also is failure to publish the articles as required by statute;¹⁰ or failure to file a copy of the constitution of a society as required by statute, although the articles of incorporation are filed.¹¹ Where partners incorporate their business and it becomes insolvent, they will not be allowed to escape personal liability as partners.¹² One becoming a member or stockholder can not be held to partnership liability upon a debt contracted prior to his becoming a stockholder.¹³ If the business undertaken by the corporation is not specified among the purposes authorized by the general incorporation law, the members of the company which undertakes any other business are liable upon a contract as partners.

*Illustrations of unauthorized incorporation.*¹⁴—Thus, a bank cannot incorporate under a statute which does not provide for banking.¹⁵ A trust company cannot incorporate under authority to incorporate a bank.¹⁶ A corporation, organized to deal in railroad stocks, bonds, and to buy and sell, and operate railroads is void, where the incorporation act does not provide for incorporation of banks or railroads.¹⁷ Rifle clubs cannot incorporate under statute for "literary, scientific and charitable purposes."¹⁸ A laundry business is not a mechanical pursuit.¹⁹ A corporation to deal in bonds, is not authorized under authority for mercantile pursuits.²⁰ Where corporations are authorized "for any legal purpose," "or other lawful business," a corporation may be organized to buy and sell lands or stocks,²¹ or to engage in log

⁸ *Liter v. Ozokerite Mining Co.* (1891), 7 Utah 487 27 Pac. 690.

⁹ *New York, etc. Bank v. Crowell* (1896), 177 Pa. St. 313; *Guckert v. Hacke* (1893), 159 Pa. St. 303; *In re Gibbs Estate* (1893), 157 Pa. St. 59.

¹⁰ *Berkson v. Anderson* (Iowa, 1901), 87 N. W. 402; *Seaton v. Grinom*, 110 Iowa, 145; *Porter v. Sherman, etc. Co.* (1890), 36 Neb. 271, 54 N. W. 474; *Loverin v. McLaughlin* (1896), 161 Ill. 417; *Edwards v. Armour, etc. Co.* (1901), 190 Ill. 407.

¹¹ *Bergeron v. Hobbs* (1897), 96 Wis. 641; *Kruse v. Humpert* (Ky. 1899), 53 S. W. 657.

¹² *Samuel, etc. Co. v. Illinois, etc.* (1898), 51 La. Ann. 64.

¹³ *Fuller v. Rowe* (1874), 57 N. Y. 23.

¹⁴ *Vide supra*. CHAPTER VIII. PARTNERSHIP LIABILITY.

¹⁵ *Davis v. Stevens* (1900), 104 Fed. 235.

¹⁶ *State v. Reid* (1894), 125 Mo. 43.

¹⁷ *Clarke v. Central R. R.* (1892), 50 Fed. 338, (1894) 62 Fed. 328.

¹⁸ *Vredenberg v. Behan* (1881), 33 La. Ann. 627.

¹⁹ *In re Fuller Co.* (1900), 79 Minn. 414.

²⁰ *Indiana, etc. Co. v. Ogle* (1900), 22 Ind. App. 593.

²¹ *Market St. Ry. v. Hellman* (1895), 109 Cal. 571.

booming,²² or to guarantee the bonds of an educational institution.²³ A corporation may be organized for metal working under an act for "trade and commerce."²⁴ A corporation to deal in real estate is one for "profit."²⁵ A corporation may sell liquor, though the incorporation for manufacturing liquor is prohibited.²⁶ Where the act authorizes incorporation of railroad companies for carriage of freight and passengers, a company can not be organized to carry passengers only.²⁷ In Mississippi a corporation cannot be organized to deal in the stock of other corporations.²⁸ "Mercantile" business is authorized under a statute providing for "industrial business."²⁹ Though the charter includes purposes unauthorized, it is not void if other purposes are included, which are authorized by the statute.³⁰ Under authority to incorporate for purpose other than profit, a cemetery company selling lots, must invest the proceeds of sale to improve the property.³¹ Under statute authorizing incorporation for "trade," the corporation may engage in the business of buying and selling land.³²

Liability for illegal incorporation.—The charter is no protection against partnership liability, if the business undertaken is in itself illegal, as for bookmaking, or gambling on races, although the statute may regulate race-tracks.³³ And where the business is grain gambling, the corporation is no protection against the liability for money obtained from a customer.³⁴ If the general incorporation act is unconstitutional, any company attempting incorporation under it, is only a partnership, and the members are liable as partners.³⁵ All persons acting as agents for a corporation that does not legally exist, are personally liable as partners.³⁶

²² Lindsley, etc. Co. v. Mullen (1900), 176 U. S. 126.

²³ Maxwell v. Atkin (1898), 89 Fed. 178.

²⁴ *In re Roofing, etc. Assn.*, 200 Pa. St. 111, (1901).

²⁵ State v. Home, etc. Union (1900), 63 Ohio, St. 547.

²⁶ Enterprise, etc. Co. v. Grimes (1899), 173 Mass. 252.

²⁷ Chicago, etc. Ry. v. Oshkosh, etc. Ry. (1900), 107 Wis. 192.

²⁸ Woodbury v. McClurg (1901), 78 Miss. 831, 29 South. 514.

²⁹ Bashford, etc. Co. v. Agua, etc. Co. (Ariz. 1894), 35 Pac. 983.

³⁰ Tennessee, etc. Co. v. Massey (Tenn. 1899), 56 S. W. 35.

³¹ Brown v. Maplewood, etc. Assn. (Minn. 1902), 89 N. W. 872.

³² Finnegan v. Noerenberg, 52 Minn. 239 (1893), 18 L. R. A. 878.

³³ *In re* New York Booking Co. (Apr. 29, 1892), N. Y. L. J.; Augir v. Ryan (1896), 63 Minn. 373.

³⁴ McGrew v. City Produce Exchange (1887), 85 Tenn. 572, 4 S. W. 38.

³⁵ Eaton v. Walker (1889), 76 Mich. 579, 6 L. R. A. 102.

³⁶ Lagrone v. Timmermann (1895), 46 S. C. 372, 24 S. E. 290.

Though a corporation has no legal existence except in the State where it was created, it may, by comity between States, transact business in another State, without making its stockholders liable as partners.³⁷ Though a company is only a pretended corporation in furtherance of a fraudulent scheme, and in fact is only a partnership,—if it has a charter, the federal courts may assume jurisdiction of a case.³⁸ Incorporation in one State, with intent to transact all its business in another, is a fraud, and will subject all parties to it to personal liability as partners.³⁹ For misrepresentations as to solvency of the corporation, a stockholder is not liable as partner, though he may be held liable in damages for false representation. Where part of the incorporators incur debts, all are liable as partners, where articles are filed, and no capital stock is subscribed for, and the undertaking is abandoned.⁴⁰ Where one deals with a corporation, supposing it to be a partnership, he may repudiate the contract on discovery of the fact, there being no meeting of the minds of the parties.⁴¹ Stockholders are not personally liable where the articles of incorporation are regularly filed and the corporation is acting as such, notwithstanding its failure to organize.⁴² In case of *ultra vires* acts of the corporation, the stockholders are sometimes liable as partners.⁴³

"*Limited.*"—Where the statute provides that the word "limited" shall be used as part of the name of the corporation, omis-

³⁷ Demarest v. Flack (1891), 128 N. Y. 205; Lancaster v. Amsterdam (1894), 140 N. Y. 576; Missouri, etc. Co. v. Reinhard (1893), 114 Mo. 218; Oakdale Manufacturing Co. v. Garst (1894), 18 R. I. 484, 23 L. R. A. 639.

³⁸ Empire Coal, etc. Co. v. Empire Min. Co. (1893), 150 U. S. 159.

³⁹ Wonderly v. Booth (1873), 36 N. J. L. 250; Kruse v. Dusenbury (1888), 19 N. Y. Week Dig., N. Y. Com. Pleas, 201; Coler v. Tacoma (N. J. 1902), 53 Atl. 680; Duke v. Taylor (1896), 37 Fla. 64, 31 L. R. A. 484, 53 Am. St. Rep. 232; State v. Park, etc. Co. (1894), 58 Minn. 330, 49 Am. St. Rep. 516.

⁴⁰ Weckselberg v. Flour City, etc. Bank (1894), 64 Fed. 90; Walton

v. Oliver (1892), 49 Kan. 107; Consolidated, etc. Co. v. Kansas City, etc. Co. (1891), 45 Fed. 7; Whetstone v. Crane, etc. Co. (1895), 1 Kan. App. 320; Card v. Moore (1902), 68 N. Y. App. Div. 327; Reid v. Kreling Sons (1899), 125 Cal. 117; Vliet v. Simanton, 63 N. J. L. 458 (1899); Perkins v. Rouss (1901), 78 Miss. 343; Slocum v. Head (1900), 105 Wis. 431.

⁴¹ Consumers Ice Co. v. Webster, etc. Co. (1898), 32 N. Y. App. Div. 592; Rust-Owen L. Co. v. Wellman (1897), 10 S. Dak. 122.

⁴² Cory v. Lee (1891), 93 Ala. 468; Badger, etc. Co. v. Rose (1897), 95 Wis. 145.

⁴³ Tennessee, etc. Co. v. Massey (Tenn. 1899), 56 S. W. 35.

sion to use it may make the stockholders liable as partners;⁴⁴ but failure to use it in a single instance will not render them so liable.⁴⁵ For the issue of "watered" stock, stockholders are not liable as partners.⁴⁶ Where the corporate name is changed, without compliance with the statute, the stockholders are liable as partners, in the use of the new and unauthorized name.⁴⁷

§ 599. Liability to corporate creditors on unpaid subscriptions.—The capital stock is the fund depended upon for carrying on the business of the corporation and is the basis of its credit. Creditors assume that the corporate capital in money or money's worth, is equivalent to the capital stock, and that if that is not paid up, it is secured to be paid whenever necessary for payment of the liabilities of the corporation. Courts of equity, accordingly, hold subscribers liable to the full payment of their unpaid subscriptions, upon the insolvency of the corporation.⁴⁸ The liability of the subscriber is determined by the laws and decisions of the State which created the corporation,⁴⁹ and not of the State where the subscriber resides,⁵⁰ though he may be sued in the courts of the State where he resides, on his liability upon a foreign unpaid subscription.⁵¹ The creditor, before proceeding in equity to enforce payment by the delinquent stockholder, must first have exhausted his remedy against the corporation by having obtained judgment at law, and return of *nulla bona* upon an execution against the corporation;⁵² except in case of its hopeless insolvency,⁵³ or in case of its dissolution.⁵⁴ A stockholder is bound by any judgment against the corporation.⁵⁵

⁴⁴ *Lehmann v. Knapp* (1896), 48 La. Ann. 1148.

⁴⁵ *Staver, etc. Co. v. Blake* (1896), 111 Mich. 282.

⁴⁶ *Louisville, etc. Co. v. Eisenman* (1893), 94 Ky. 83.

⁴⁷ *Cincinnati, etc. Co. v. Bate* (1893), 96 Ky. 83.

⁴⁸ *Tichenor v. Williams, etc. Co.* (Ga. 1902), 42 S. E. 505.

⁴⁹ *Bank of China v. Morse* (1901), 168 N. Y. 458, 61 N. E. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676.

⁵⁰ *Glenn v. Garth* (1893), 147 U. S. 360.

⁵¹ *Mandel v. Swan, etc. Co.* (1895), 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124; *Anglo-Amer-*

ican, etc. Co. v. Dyer (Mass. 1902), 64 N. E. 416.

⁵² *Baines v. Babcock* (1891), 95 Cal. 581, 29 Am. St. Rep. 658; *Albright v. Texas* (1896), 8 New Mex. 110, 422, 42 Pac. 73, 46 Pac. 448; *Hollins v. Brierfield, etc. Co* (1893), 150 U. S. 371.

⁵³ *Salt Lake, etc. Co. v. Tintic, etc. Co.* (1896), 13 Utah, 423, 45 Pac. 200; *Fletcher v. Bank of Lono* (Ark. 1902), 69 S. W. 580.

⁵⁴ *Slee v. Bloom* (1822), 19 Johns, 456; *Latimer v. Citizens State Bank* (1897), 102 Iowa, 162. *State Bank* (1897), 102 Iowa, 162, 71 N. W. 225.

⁵⁵ *Verner v. Simpson* (S. C. 1904), 47 S. E. 729.

§ 600. **Effect of transfer of shares. Liability of transferrer at common law.**—A transfer of stock, consummated in good faith upon the books of the corporation, relieves the transferrer from all liability to the corporation or its creditors, thereafter becoming due upon his subscription,⁵⁶ except where personal liability is imposed by statute. But the transferrer will not be thus relieved unless the transaction is registered on the company's books, notwithstanding the fact that the transfer is in writing, and the assignee has drawn dividends on the stock.⁵⁷ A transfer to

⁵⁶ *Allen v. Montgomery R. Co.*, 11 Ala. 457; *Billings v. Robinson* (1882), 94 N. Y. 415; *Bowden v. Johnson* (1882), 107 U. S. 251; *Davis v. Stevens* (1879), 17 Blatchf. 259. *Cf. Sawyer v. Hoag*, 17 Wall. 610; *Johnson v. Southwestern R. Bank*, 3 Strobb. Eq. (S. C.) 263; *Melvin v. Lamar Ins. Co.* (1875), 80 Ill. 446; *Zirkel v. Joliet Opera House Co.* (1875), 79 Ill. 334; *Adderly v. Storm*, 6 Hill, 624.

⁵⁷ *Cutting v. Damerel* (1882), 88 N. Y. 410; *Isham v. Buckingham*, 49 N. Y. 216; *Strange v. Houston & T. C. R. Co.* (1880), 53 Tex. 162; *Upton v. Burnham* (1873), 3 Biss. 431, 520; *McEuen v. West London Wharves, etc. Co.* (1871), L. R. 6 Ch. 655; *Midland, etc. Ry. Co. v. Gordon* (1847), 16 Mees. & W. 804; *Sayles v. Blane* (1849), 19 L. J. Q. B. 19; *Cartmell's Case* (1874), L. R. 9 Ch. 691; *Heritage's Case* (1869), L. R. 9 Eq. 5; *Hennessey's Executor's Case* (1850), 3 De G. & Sm. 191; *Ex parte Henderson* (1854), 19 Beav. 107; *Bank v. Lanier* (1870), 11 Wall. 369. *Contra*, *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Evans v. Smallcombe* (1868), L. R. 3 House of Lords, 249; *In re Bachman* (1875), 12 Nat. Bank Reg. 223. *Cf. Head's Case*, L. R. 3 Eq. 84; *White's Case*, L. R. 3 Eq. 86; *Shepherd's Case*, L. R. 2 Ch. 16; *Straffon's Executor's Case*, 1 De G., M. & G. 576. Va. Code of 1860, ch. 57, § 24, relating to assignments of stock, provides that in any assignment the assignee

and assignor shall each be liable for any unpaid instalments which may have accrued or may thereafter accrue. Va. Acts of 1883-84, p. 654, ch. 472, authorizing compromises to be made by fiduciaries with debtors of the company, provides that the compromise made with any person claimed to be liable to the company shall not impair the liability to the company of any other person, on account of the cause of liability, but the amount so received shall be credited on the same, except, when the liability is joint, it shall be credited with the full share of the person released. And it was held that a release of the assignor of stock by the trustee of an insolvent corporation, on payment of a certain amount on account of unpaid instalments, does not discharge the assignee, the liability not being joint. *Glenn v. Foote*, 36 Fed. Rep. 824. And where certificates of stock issued by the directors provide that the shares shall be transferred only on the books of the corporation, it was held, in an action by the receiver, that one in whose name the shares stood on the books, but who had sold and delivered his certificate to another, was not liable as a "stockholder" for debts, within New York Laws, 1867, ch. 474. *Cutting v. Damerel*, 88 N. Y. 410. Where a shareholder of a national bank makes a *bona fide* sale of his stock, and goes with the purchaser to the bank, indorses the certificate

have such an effect, however, must be made in good faith, and not to an irresponsible person to escape liability, in harmony with the principle that the capital stock, including both paid and unpaid subscriptions, is a trust fund for the benefit of creditors, and that it is inconsistent with the nature of such a trust to permit a transfer of stock to be made to one who is insolvent, for the purpose of escaping liability.⁵⁸ And this rule also applies to cases where stockholders are made personally liable by statute.⁵⁹

and delivers it to the cashier of the bank, with directions to make the transfer on the books, he has done all that is incumbent upon him to discharge his liability, and he is not liable, although the cashier failed to make the transfer, upon the subsequent suspension of the bank, for an assessment made by the comptroller of the currency, under U. S. Rev. Stat., § 5151, to pay the bank's debts. *Hayes v. Shoemaker*, 39 Fed. Rep. 319. Under Rev. Stat. Me., ch. 46 §§ 45-47, making stockholders liable to judgment creditors of a corporation to the extent of their unpaid subscriptions, where defendant transferred all the stock subscribed for by him, except four hundred shares, prior to the date when the judgment creditor's original cause of action against the corporation was contracted, defendant is liable only for the balance remaining unpaid upon those four hundred shares, and not upon the additional one thousand shares which he purchased in open market, and which were issued by the corporation as fully paid stock. *Libby v. Tobey* (1890), 82 Me. 397, 19 Atlan. Rep. 904.

⁵⁸ *Rider v. Morrison*, 54 Md. 429; *Thompson's Liability of Stockholders*, §§ 211; *Morawetz on Corporations*, § 858; *Nathan v. Whitlock*, 3 Edw. Ch. 215 (1841), 9 Paige, 152; *Veiller v. Brown* (1879), 18 Hun, 571; *Miller v. Great Republic Ins. Co.* (1872), 50 Mo. 55; *McLaren v. Franciscus*, 43 Mo. 452; *Mandion v. Fireman's*

Ins. Co., 11 Rob. (La) 177; *In re Bachman* (1875), 12 Nat. Bank. Reg. 223; *Central Agric., etc. Assn. v. Alabama Gold Life Ins. Co.* (1881), 70 Ala. 120; *Gaff v. Flesher* (1877), 33 Ohio St. 107; *Union Mut. Ins. Co. v. Frear Stone Manuf. Co.* (1881), 97 Ill. 537, 549; *Douchy v. Brown*, 24 Vt. 197; *Aultman's Appeal* (1881), 98 Pa. St. 505; *Everhart v. West Chester, etc. R. Co.* (1857), 28 Pa. St. 339; *Paine v. Stewart* (1866), 33 Conn. 516; *Bowden v. Santos* (1877), 1 Hughes, (U. S.) 158; *Johnston v. Laffin* (1878), 5 Dill. 65; 6 Cent. L. J. 124; *Wehrman v. Reakirt* (1871), 1 Cin. Super. Ct. Rep. 230; *National Bank v. Case* (1878), 99 U. S. 628, 632; *Provident Springs Savings Inst. v. Jackson Place Skating, etc. Rink* (1873), 52 Mo. 557; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Roman v. Fry*, 5 J. J. Marsh. 634; *Allibone v. Hager*, 46 Pa. St. 48; *Marcy v. Clark*, 17 Mass. 330. He may, however, transfer to an irresponsible person upon guarantying the payment of calls about to be made. *William's Case* (1875), 1 Ch. Div. 576; *King's Case* (1871), L. R. 6 Ch. 197; *Chynoweth's Case* (1880), 15 Ch. Div. 13. *Vide supra*, §§ 419, 561, 47 L. R. A. 246.

⁵⁹ *Magruder v. Colston* (1875), 44 Md. 349; *Paine v. Stewart*, 33 Conn. 516; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Chapman v. Shepherd* (1867), L. R. 2 C. P. 228; *Miller v. Great Republic Ins. Co.* (1872), 50 Mo. 55; *Billings v. Robinson* (1884), 94 N. Y. 415,

§ 600a. **Liability of original subscribers for stock, distinguished.**—The corporation is an indispensable party to a stockholder to pay for subscription, a distinction is drawn between one who holds his stock by transfer, and an original subscriber. The former may, in the absence of any fraudulent purpose, discharge himself from liability for unpaid instalments by due transfer of his shares, while the latter cannot obtain immunity in that way. The original subscriber's contract with the company is to pay the remaining instalments on demand of the company. From this agreement he can not recede without consent of the company. He may transfer his stock without its consent, for example, transfer to an irresponsible and insolvent person, a mere "dummy," and thereby vest in the purchaser his right to the shares, and, as between himself and the purchaser, cast upon the latter the obligation to pay him such instalments as are called upon the stock, but he cannot thereby impair or affect the contract rights of the company. His liability to the company cannot thereby become extinguished. If the subscriber, without consent of the company, could divest himself of his shares and of his entire obligation as a stockholder, corporations might in all cases be deprived of their only available means of satisfying debts, by transfer to irresponsible parties.⁶⁰

§ 601. (a) **Statutory liability of transferrer.**—The rule that a transferrer of stock is not relieved of his liability, until the transfer has been made upon the books of the company, applies equally to the common law liability and to the personal liability created by statute, when the statute relieves him of liability upon his transfer of his stock.⁶¹ And in order to hold a stockholder

(1882) 28 Hun 122; Mann's Case (1868), L. R. 3 Ch. 459, n.; Mitchell's Case (1870), L. R. 9 Eq. 363; *Ex parte* Hatton (1862), 31 L. J. Ch. 340; Pugh & Sharman's Case (1872), L. R. 13 Eq. 566; Lankester's Case (1871), L. R. 6 Ch. 905, n.; Gilbert's Case (1870), L. R. 5 Ch. 559. *Of* Castellan v. Hobson (1870), L. R. 10 Eq. 47; Maynard v. Eaton (1874), L. R. 9 Ch. 414; Colquhoun v. Courtenay (1874), 43 L. J. Ch. 338; Richardson's Case (1875), L. R. 19 Eq. 588.

⁶⁰ Hood v. McNaughton (1892), 24 N. J. L. 425; Young v. McKay, 50 Fed. 394.

⁶¹ Johnston v. Laffin (1878), 5 Dill. 65; Crease v. Babcock, 51 Mass. 525; Grew v. Breed, 10 Metc. 569; Holyoke Bank v. Burnham, 11 Cush. 183; Shellington v. Howland (1873), 53 N. Y. 371; Johnson v. Underhill (1873), 52 N. Y. 203; *In re* Empire Bank, 18 N. Y. 200; Veiler v. Brown (1879), 18 Hun, 571; Richardson v. Abendroth, 43 Barb. 162; Worrall v. Judson, 5 Barb. 210; Adderly v. Storm, 6 Hill, 624; Dane v. Young (1872), 61 Me. 160; Skowegan Bank v. Cutler (1860), 49 Me. 315; Fowler v. Ludwig, 34 Me. 455; Stanley v.

liable, personally, under the statute it is not necessary that any certificates should have been issued to him.⁶² According to the rule laid down in the construction of statutes making "the stockholders" liable for debts, that the term refers only to those who were stockholders at the time the debt was contracted, a stockholder can not, of course, relieve himself of liability by transferring his stock.⁶³ Under some statutes, as was seen in the preceding section, a stockholder may be relieved of liability on a debt when he ceases to be a stockholder before it becomes due, or before an action is brought for its collection.⁶⁴ He can not be released from liability, however, by means of an agreement with the directors.⁶⁵ A vendor of stock may compel his vendee to do everything necessary to be done by the latter to consummate the transfer of the stock, and to indemnify him on account of his liability as a stockholder.⁶⁶ Where stockholders of a bank, in

Stanley, 26 Me. 191; *State v. Ferris* (1875), 42 Conn. 560. See also cases cited *supra*, § 600.

⁶² *Chaffin v. Cummings*, 37 Me. 76; *Burr v. Wilcox*, 22 N. Y. 551; *Wheeler v. Miller*, 90 N. Y. 353; *Mokelumne Hill Canal, etc. Co. v. Woodbury*, 14 Cal. 265; *Moss v. Oakley*, 2 Hill, 265; *Judson v. Rossie-Galena Co.*, 9 Paige, 598; *McCullough v. Moss*, 5 Denio, 567; *Chesley v. Pierce*, 32 N. H. 388; *Castleman v. Holmes*, 4 J. J. Marsh. 1; *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Southmayd v. Russ*, 3 Conn. 52; *Williams v. Hanna* (1872), 40 Ind. 535; *Larrabee v. Baldwin*, 35 Cal. 155. *Cf. Roosevelt v. Brown*, 11 N. Y. 148; *Cutting v. Damerel* (1882), 88 N. Y. 410.

⁶³ *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. Rep. 230; *Mitchell's Case* (1879), L. R. 4 App. Cas. 548; *Weston's Case* (1868), L. R. 4 Ch. 20, 30; *Ex parte Parker* (1867), L. R. 2 Ch. 685; *Chappell's Case* (1871), L. R. 6 Ch. 902.

⁶⁴ *Bond v. Appleton*, 8 Mass. 472; *Longley v. Little*, 26 Me. 162; *Nixon v. Green*, 25 L. T. Ex. 209; *Dodgson v. Scott*, 2 Ex. 457; *Mc-*

Claren v. Franciscus, 43 Mo. 452; *Douchy v. Brown*, 24 Vt. 197. *Cf. Deming v. Bufl*, 10 Conn. 40; *Middletown Bank v. Magill*, 5 Conn. 28; *Child v. Coffin*, 17 Mass. 64; *Curtis v. Harlow*, 12 Mete. 3; *Southmayd v. Russ*, 3 Conn. 52; *Kickalls v. Eaton* (1871), 23 L. T. (N. S.) 689; *Hawkins v. Maltby* (1867), L. R. 3 Ch. 188.

⁶⁵ *Ex parte Parker* (1867), L. R. 2 Ch. 685; *Gilbert's Case* (1870), L. R. 5 Ch. 559; *Allen's Case* (1873), 16 Eq. 449; *Ex parte Brown*, 19 Beav. 97; *Nickalls v. Merry* (1875), L. R. 7 H. L. 530; *Brown v. Black* (1873), L. R. 8 Ch. 939; *Mann's Case*, L. R. 3 Ch. 458, n.; *Eyre's Case*, 31 Beav. 177; *Bennett's Case*, 5 De G., M. & G. 284; *Munt's Case*, 22 Beav. 55. *Cf. Johnston v. Laffin* (1878), 5 Dill. 65, 81; *Case of the Reciprocity Bank*, 22 N. Y. 9; *Symon's Case* (1870), L. R. 5 Ch. 298; *Weston's Case* (1870), L. R. 5 Ch. 614; *Curtis' Case*, L. R. 6 Eq. 455; *Castello's Case*, L. R. 8 Eq. 504; *Walsh v. Union Bank* (1879), 5 Quebec L. R. 289.

⁶⁶ *Johnson v. Underhill* (1873), 52 N. Y. 203; *Kellogg v. Stockwell*, 75 Ill. 68; *Wheeler v. Faurot*

good faith, for value transferred the stock to the cashier, and instructed him to transfer it upon the stock-books, which he failed to do, they are, under the statutes of South Carolina held, nevertheless liable to creditors of the bank in case of its insolvency.⁶⁷

§ 602. (b) *Liability of transferee at common law.*—A person may become a stockholder in a corporation, either by original subscription, by direct purchase from the corporation, or by subsequent transfer from the original holders, and stockholders are equally liable for unpaid subscriptions, whether they become owners of shares by original subscription, or by subsequent transfer,⁶⁸ it being well settled that an express promise to pay the

(1881), 37 Ohio St. 26; *Brown v. Hitchcock* (1881), 36 Ohio St. 667; *Paine v. Hutchinson* (1866), L. R. 3 Eq. 257; *Shaw v. Fisher*, 5 De G., M. & G. 596; *Cheale v. Kenward*, 3 De G. & J. 27; *Cape's Case* (1852), 2 De G., M. & G. 562; *Grissell v. Bristowe*, L. R. 3 C. P. 112; *Kellock v. Enthoren* (1873), L. R. 9 Q. B. 241; *Bowring v. Shepherd* (1871), L. R. 6 Q. B. 309; *Allen v. Graves* (1870), L. R. 5 Q. B. 478; *Shaw v. Rowley*, 16 Mees. & W. 810; *Sayles v. Blayne*, 14 Q. B. 205; *Coles v. Bristowe* (1868), L. R. 4 Ch. 3; *Humble v. Langston*, 7 Mees. & W. 517; *Wynne v. Price*, 3 De G. & Sm. 310; *Morris v. Cannan*, 4 De G., F. & J. 581; *Hawkins v. Maltby*, L. R. 4 Ch. 200; *Butler v. Cumpston*, L. R. 7 Eq. 16; *Evans v. Wood*, L. R. 5 Eq. 9; *Cruse v. Paine*, L. R. 6 Eq. 641; 4 Eq. 441; *James v. May*, L. R. 6 House of Lords, 328; *Webster v. Upton* (1875), 91 U. S. 65; *Castellan v. Hobson* (1870), L. R. 10 Eq. Cas. 47. For further information on this subject see the following: *Brewster v. Hartley*, 37 Cal. 15; *Jackson v. Sligo Manuf. Co.* (1878) 1 Lea, 210; *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Graff v. Pittsburgh, etc. R. Co.* (1858), 31 Pa. St. 489; *Chubb v. Upton* (1877), 95 U. S. 665; *Mann v. Currie*, 2 Barb. 294; *Isham v. Buckingham* (1872), 49 N. Y. 216; *Chambers-*

burg Ins. Co. v. Smith, 11 Pa. St. 120; *Murray v. Bush* (1873), L. R. 6 H. of L. 37; *Taylor v. Hughes*, 2 Jones & Lat. (Irish Ch.) 24; *Upham v. Burnham* (1873), 3 Biss. 431; *Bernard's Case*, 5 De G. & Sm. 283; *Pittsburgh, etc. R. Co. v. Clarke* (1875), 29 Pa. St. 146; *Messersmith v. Sharon Savings Bank* (1880), 96 Pa. St. 440; *Palmer v. Ridge Mining Co.*, 34 Pa. St. 288; *Frank's Oil Co. v. McCleary*, 63 Pa. St. 317; *Pittsburgh Iron Co. v. Otterson* (1878), 4 Week. Notes Cas. 545; *Delaware Canal Co. v. Sansom*, 1 Binn. 70. *Cf. West Philadelphia Canal Co. v. Innes*, 3 Whart. 198; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *Agricultural Bank v. Wilson* (1844), 24 Me. 273; *Merrimac Mining Co. v. Levy*, 54 Pa. St. 227; *Aultman's Appeal* (1881), 98 Pa. St. 505; *Marlborough Manuf. Co. v. Smith*, 2 Conn. 579; *Louisiana Ins. Co. v. Gordon*, 8 La. Rep. 174; *Midland, etc. Ry. Co. v. Gordon*, 16 Mees. & W. 804; *Brigham v. Mead*, 10 Allen, 245; *Walker v. Bartlett*, 18 C. B. 845; *Watson v. Eales*, 23 Beav. 294; *McCready v. Rumsey*, 6 Duer, 574; *In re Bachman* (1875), 12 Bankr. Reg. 223.

⁶⁷ *White v. Commercial, etc. Bank* (1903), 45 S. E. 94, 66 A. C. 491.

⁶⁸ *Webster v. Upton* (1875), 91 U. S. 65; *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 593.

unpaid balance of the subscription, is not necessary to hold the original subscriber or the subsequent transferee liable thereon.⁶⁹ For the acceptance and holding of shares in a corporation makes the holder liable to the responsibilities of a shareholder. So, "if the law implies a promise by the original subscribers to pay the full par value when it may be called, it follows that an assignee of the stock, when he has come into privy with the company, by having stock transferred to him on the company's books, is equally liable."⁷⁰ Accordingly, where stock has been transferred and the transferee has been accepted as a stockholder and entered as such upon the books of the company, he becomes liable for the unpaid balance upon the stock, whether or not he assented to the registration or knew of it;⁷¹ and he is sometimes made liable by statute for the debts of the corporation, even before his transfer is recorded.⁷² But if the name of an individual wrongly appears upon the books of a corporation as a stockholder, he is entitled to show that it is there without right.⁷³

⁶⁹ *Upton v. Tribilcock*, 91 U. S. 45.

⁷⁰ *Story, J.*, in *Webster v. Upton*, 91 U. S. 65; *Cole v. Ryan*, 52 Barb. 168; *Isham v. Buckingham* (1872), 49 N. Y. 216; *Burke v. Smith* (1872), 16 Wall. 390; *Brigham v. Meade*, 10 Allen, 245; *Thorp v. Woodhull*, 1 Sandf. Ch. 411; *Upton v. Burnham* (1873), 3 Biss. 431, 520; *First Nat. Bank v. Gifford*, 47 Iowa, 575, 583; *Johnston v. Laffin* (1878), 5 Dill. 65; *Huddersfield Canal Co. v. Buckley* (1796), 7 Term Rep. 96; *Executors of Gilmore v. Bank of Cincinnati*, 8 Ohio, 62, 71; *Billings v. Robinson* (1884), 94 N. Y. 415; *Wakefield v. Fargo* (1882), 90 N. Y. 213; *Cowle v. Cromwell*, 25 Barb. 413; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Miller v. Great Republic Ins. Co.*, 50 Mo. 55; *Allen v. Montgomery R. Co.*, 11 Ala. 437, 451; *Haynes v. Palmer*, 13 La. Ann. 240; *Hartford, etc. R. Co. v. Boorman*, 12 Conn. 530; *Bend v. Susquehanna Bridge, etc. Co.*, 6 Harr. & J. 128; *Hall v. United States Ins. Co.*, 5 Gill (Md.), 484; *Aylesbury Ry. Co. v. Mount* (1842), *Scott's New Rep.* 127

⁷¹ *Webster v. Upton* (1875), 91 U. S. 65; *Upton v. Burnham* (1873), 3 Biss. 520; *London, etc. Ry. Co. v. Fairclough*, 3 Man. & G. 674, 706.

⁷² Thus in New York, "no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, according to the provisions of this act, until it shall have been entered therein (*i. e.*, in the corporate stock book) as required by this section, by an entry showing to and from whom transferred." *New York Laws of 1848*, ch. 40, § 25; *Herries v. Platt* (1878), 13 Hun, 492; *Johnson v. Underhill* (1873), 52 N. Y. 203; *Shellington v. Howland*, 53 N. Y. 371; *Rosevelt v. Brown*, 11 N. Y. 148; *Worrall v. Judson*, 5 Barb. 210; *Dane v. Young*, 61 Me. 160; *Davis v. Essex, etc. Society* (1877), 44 Conn. 582; *Kellogg v. Stockwell*, 75 Ill. 68; *London, etc. Ry. Co. v. Fairclough* (1841), 2 Man. & G. 674.

⁷³ *Webster v. Upton*, 91 U. S. 65; *In re Reciprocity Bank*, 22 N. Y. 9; *Birch's Case*, 2 De G. & J.

"Fully-paid up, and non-assessable."—Recital in a stock certificate that it is a "fully-paid up and non-assessable" is no protection to the assignee as against corporate creditors, where the assignment was from an original subscriber to whom the stock was issued for fraudulently overvalued property, of which the assignee had notice.⁷⁴

§ 603. (c) **Statutory liability of transferee.**—It is well settled that the registration of a transfer upon the books of the company, imposes upon the transferee the obligation to pay any sum due upon the stock, even though he hold the stock as trustee for another, or as collateral security, for the books of the corporation are *prima facie* evidence of the ownership of the stock;⁷⁵ and this is also the case where stockholders are made personally liable by statutory provisions.⁷⁶ Inasmuch as the personal liability of stockholders exists only by statute, and is a contract liability, the extent to which a transferee of stock is bound for corporate debts must be determined by reference to the particular statutes governing corporations. Where the charter or statute simply provides that "the stockholders" shall be personally liable for the debts of the corporation, it has been construed to mean that the liability attaches only to those who held that position at the time the debt was contracted, and not to those who subsequently became stockholders.⁷⁷ In other cases, where charters or statutes

10; Fox's Case, 3 De G., J. & S. 465.

⁷⁴ Garden City, etc. Co. v. American, etc. Co. (Ill. 1903), 68 N. E. 724.

⁷⁵ Turnbull v. Payson, 95 U. S. 418; Franklin Glass Co. v. Alexander, 2 N. H. 380, 9 Am. Dec. 92; Bend v. Susquehanna Bridge Co., 6 Harr. & J. 128; Merrimac Mining Co. v. Bagley, 14 Mich. 501; Brigham v. Mead, 10 Allen, 245; Seymour v. Sturges, 26 N. Y. 134; Webster v. Upton, 95 U. S. 65; Pullman v. Upton, 96 U. S. 328; Upton v. Hansbrough (1873), 3 Biss. 417; Foreman v. Bigelow (1878), 4 Cliff. 508; Cole v. Ryan (1868), 52 Barb. 168; Mann v. Currie, 2 Barb. 294; Hall v. United States Ins. Co., 5 Gill (Md.), 484; Hartford, etc. R. Co. v. Boorman, 12 Conn. 520; Moore

v. Jones (1877), 3 Woods, 53; *In re* South Mountain, etc. Mining Co. (1881), 7 Sawy. 30; Merrimac Mining Co. v. Levy (1867), 54 Pa. St. 227; Huddersfield Canal Co. v. Buckley, 7 Term Rep. 96; Evans v. Wood (1868), 37 L. T. Ch. 159.

⁷⁶ Irons v. Manufacturers' Nat. Bank, 27 Fed. Rep. 591; Price v. Whitney (1886), 28 Fed. Rep. 297; Magruder v. Colston (1875), 44 Md. 349, 356; Fisher v. Seligman (1881), 75 Mo. 13; Adderley v. Storm, 6 Hill, 624; Crease v. Babcock, 51 Mass. 525; *In re* Empire City Bank, 18 N. Y. 200, 224; Holyoke Bank v. Burnham, 11 Cush. 183, 187.

⁷⁷ Mokelumne Hill Canal Co. v. Woodbury, 14 Cal. 265; Davidson v. Rankin, 34 Cal. 503; Larrabee v. Baldwin, 35 Cal. 155; Williams v. Hanna (1872), 40 Ind. 535;

provide that upon the return, unsatisfied, of an execution against the property of the corporation, the stockholders shall be liable, it has been held that the liability attached to those who were members of the corporation at the time of the commencement of the action.⁷⁸ In another class of cases it is held that where the statute provides that "all members," or "all stockholders" shall be individually liable, the term includes not only those who were such when the debt is contracted but also those claiming to be stockholders at the time the action upon the debt is commenced.⁷⁹

Brown v. Hitchcock (1881), 36 Ohio St. 667; *Wheeler v. Faurot* (1881), 37 Ohio, 26; *Milliken v. Whitehouse*, 49 Me. 527; *Moss v. Oakley*, 2 Hill, 265; *Judson v. Rossie-Galena Co.*, 9 Paige, 598; *McCullough v. Moss*, 5 Denio, 567; *Tracy v. Yates*, 18 Barb. 152; *Adderly v. Storm*, 6 Hill, 624; *Freeland v. McCullough*, 1 Denio, 414; *Harger v. McCullough*, 2 Denio, 119; *Byers v. Franklin Coal Co.* (1870), 106 Mass. 131. *Cf. Castleman v. Holmes* (1839), 4 J. J. Marsh. 1; *Mill Dam Foundry v. Hovey* (1839), 21 Pick. 417; *Holyoke Bank v. Burnham* (1853), 11 Cush. 183; *Garrison v. Howe* (1858), 17 N. Y. 458, 464. *Bronson, J.*, in explanation of this rule, said in *Moss v. Oakley*, 2 Hill, 265: "A man who purchases stock and comes into a corporation after it has been engaged in business, may often be deceived in relation to the number and magnitude of its debts. But while he is a stockholder he can know something about the extent of obligations contracted by the company, and is not wholly without the means of exerting an influence over those who manage its concerns."

⁷⁸ *Johnson v. Underhill* (1873), 52 N. Y. 203; *Middletown Bank v. Magill*, 5 Conn. 28; *Johnston v. Laffin* (1878), 5 Dill. 65; *Moss v. Oakley* (1842), 2 Hill, 265; *Cowles v. Cromwell* (1857), 25 Barb. 413; *Cole v. Ryan* (1868), 52 Barb. 168; *Chouteau Spring Co. v. Har-*

ris (1855), 20 Mo. 382; *McClaren v. Franciscus* (1869), 43 Mo. 452; *Miller v. Great Republic Ins. Co.*, 50 Mo. 55; *Grissell v. Bristowe*, L. R. 3 C. P. 112; *Huddersfield Coal Co. v. Buckley*, 7 Term Rep. 36. *Cf. Williams v. Hanna* (1872), 40 Ind. 535; *Hager v. Cleveland* (1872), 36 Md. 476; *Holyoke Bank v. Burnham* (1853), 65 Mass. 183; *Bond v. Appleton*, 8 Mass. 472; *Marcy v. Clark*, 17 Mass. 330; *Curtis v. Harlow*, 53 Mass. 3.

⁷⁹ *Curtis v. Harlow*, 12 Met. 3; *Wheeler v. Faurot* (1881), 37 Ohio St. 26; *Brown v. Hitchcock* (1881), 36 Ohio St. 667. *Cf. Jackson v. Sligo Manuf. Co.* (1878), 1 Lea, 210. "No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder after he shall have ceased to be a stockholder in any such company, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder." N. Y. Laws 1890, ch. 564, § 58; *Handy v. Draper* (1882), 89 N. Y. 334; *Hastings v. Drew*, 76 N. Y. 9; *Shelington v. Howland*, 53 N. Y. 371; *Freeland v. McCullough*, 1 Denio, 414, 426; *Veiler v. Brown*, 18 Hun, 571; *Fisher v. Marvin* (1866), 47 Barb. 159. "The lia-

A stockholder is not liable for debts contracted before he became a member, if he ceases to be a member before the debt becomes due and action is brought for its collection.⁸⁰ So when stockholders are liable for debts of the corporation for which promissory notes were issued, they are discharged by the cancellation of the notes and the issue of new notes in payment of the debt after they ceased to be stockholders.⁸¹ These three classes of statutes and the decisions construing them, thus respectively, in effect, favor the subsequent transferee, the persons who are stockholders at the time the debt was contracted, and the creditor.

§ 604. (d) Liability of transferee as purchaser of forfeited stock.—Where stockholders of a bank, in good faith, for value transferred the stock to the cashier and instructed him to transfer it upon the stock-books, which he failed to do, they are under the statutes of South Carolina held, nevertheless, liable to creditors of the bank in case of its insolvency.⁸² If the stock has been only partially paid for, the purchaser at a forfeiture sale must pay the instalments due and to become due, and if he fails to do so the shares must be sold again.⁸³ A sale of stock pursuant to the authority contained in a pledge, is not open to the charge that it was done in fraud of creditors, even though the object of the pledgees was to avoid the liability imposed by the national banking act.⁸⁴

bility extends to all persons who were stockholders when the debt sought to be enforced was contracted, and also to all persons who were stockholders when the liability is sought to be enforced, although they may have become such since the debt was contracted, but it does not extend to persons who had become stockholders, after the debt was contracted, and had ceased to be such before the debt became payable and action was brought." *Sayles v. Bates* (1886), 15 R. I. 342; *In re South Mountain, etc. Mining Co.* (1881), 7 Sawy. 30; *Laing v. Burley* (1882), 101 Ill. 591; *Brown v. Hitchcock* (1881), 36 Ohio St. 667; *Cleveland v. Burnham*, 55 Wis. 598.

⁸⁰ *Holyoke Bank v. Burnham*, 65 Mass. 183; *Sayles v. Bates*, 15 R.

I. 342; *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 434, and note.

⁸¹ *Wheeler v. Faurot*, 37 Ohio St. 26.

⁸² *White v. Commercial, etc. Bank* (1903), 45 S. E. 94, 66 A. C. 491.

⁸³ *Sturges v. Stetson*, 1 Biss. 246, 251; "Contributories on Forfeited Shares," 43 L. T. 97. In England, however, it is enacted that the purchaser at a forfeiture sale holds the shares discharged of all calls due prior to purchase. He is not bound to see to the application of the purchase money, nor is his title to be affected by any irregularity in the proceedings in reference to the sale. 8 Vic., ch. 16, § 33.

⁸⁴ *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47.

§ 604a. Statutory and common law liability distinguished as to the effect of transfer.—There are three classes of cases, depending upon different statutory provisions, regulating the liability of stockholders where there has been a transfer of stock. It may be stated generally, with respect to the common law liability of a stockholder upon his unpaid subscription, as distinguished from statutory liability, that a stockholder who transfers his stock or surrenders it to the corporation before making payment thereon, is not liable to a creditor of the corporation whose demand comes into existence subsequently to the surrender.⁸⁵ As to statutory liability, if the charter or act under which the corporation is formed, provides simply that the stockholders shall be personally liable for the debts of the corporation, they are held to be liable only for those contracted at the time they were stockholders.⁸⁶ In other cases construing statutes imposing liability on the stockholders for “all the debts” of the corporation, the rule is that the liability attaches only to those who are stockholders at the time of the commencement of the action, and that those who have transferred their stock before that time, even though they held it at the time the indebtedness was contracted, are released.⁸⁷ Where, however, statutory liability is imposed upon all stockholders, the provision includes both those who were stockholders at the time the debt was incurred and those who are such at the commencement of the action for the collection of the debt.⁸⁸ So, in an action to enforce the liability under a charter provision that the stockholders of a bank shall be liable to the amount of their stock, it is sufficient if it appear that the defendant was a stockholder when the suit was brought, and it is not necessary that it appear that he was a stockholder also when the cause of action accrued.⁸⁹ And stockholders can not be released on the simple finding that they did not own stock when the indebtedness was incurred, without its being found that the stock had not been sold by the corporation prior to that time.⁹⁰ Even under such a statutory provision as this, how-

⁸⁵ Johnson v. Lullman, 15 Mo. App. 55; Billings v. Robinson, 94 N. Y. 415.

⁸⁶ Phillips v. Therasson, 11 Hun, 141; Tracy v. Yates, 18 Barb. 152; Judson v. Rossie-Galena Co., 9 Paige, 598.

⁸⁷ Child v. Coffin, 17 Mass. 64; Cleveland v. Burnham, 55 Wis.

598; Deming v. Bull, 10 Conn. 409.

⁸⁸ Brown v. Hitchcock, 36 Ohio St. 667; Curtis v. Harlow, 12 Met. 3.

⁸⁹ Root v. Sinnock (1887), 120 Ill. 350.

⁹⁰ Bonewitz v. Van Wert County Bank, 41 Ohio St. 78.

ever, one is not held liable for debts contracted before he became a member, where he has also disposed of his stock before action was commenced.⁹¹ So, a stockholder may escape personal liability on the plea that after he ceased to be a member of the corporation, the note sued on was extinguished by the giving of a new one, and that possession of the old note was obtained by fraud.⁹² In New York under the General Manufacturing Act of 1848,⁹³ relating to the liability of shareholders for the debts of manufacturing corporations, it is provided that they shall be liable until the whole amount of stock shall be paid in; and it further provides that the stock shall be paid in within two years; but it is held that a creditor having an unsatisfied execution against the corporation, is not obliged to wait until the expiration of the two years before proceeding against a shareholder.⁹⁴ The liability of a stockholder on unpaid stock of an insolvent company, remains unchanged, although the judgments against the corporation, sought to be enforced against him, were rendered after he became a stockholder.⁹⁵ A stockholder in a manufacturing corporation, the capital stock of which has not been paid in, can not escape liability for payments falling due after he became a stockholder, under a contract made before.⁹⁶

§ 604b. Stockholders' liability on stock issued below par.—

An active solvent corporation, a going concern, finding its original capital impaired by loss or misfortune, may issue new stock, and dispose of it upon the markets, for the best price that can be obtained, for the purpose of recuperating itself, and providing for the successful prosecution of its business, and such sale may be by way of issue of bonus stock thrown in with bonds as inducement to bond subscription, and so long as the transaction is *bona fide* and not a mere cover for watering stock, and the consideration obtained represents the actual value of the stock, the courts have shown no disposition to disturb it. Such a transaction is an exception to the general rule that holders of stock in favor of creditors must respond for its par value.⁹⁷

⁹¹ Holyoke Bank v. Burnham, 11 Cush. 183; Sayles v. Bates, 15 R. I. 342.

⁹² Wheeler v. Faurot, 37 Ohio St. 26.

⁹³ N. Y. Laws of 1848, ch. 40, § 10.

⁹⁴ King v. Duncan, 38 Hun, 461.

Cf. N. Y. Laws of 1890, ch. 564, §§ 57, 58.

⁹⁵ Shickle v. Watts (1888), 94 Mo. 410.

⁹⁶ McMaster v. Davidson, 29 Hun, 542.

⁹⁷ Handley v. Stutz (1890), 139 U. S. 417; New Albany v. Burke, 11 Wall. 97.

CHAPTER XXIII.

CREDITORS' SUITS AGAINST STOCKHOLDERS.

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| <p>§ 605. Corporate creditors only, can enforce statutory liability of shareholders.</p> <p>606. Remedies at law and in equity.</p> <p>607. Creditor's remedy by action at law.</p> <p>608. Creditor's remedy by bill in equity.</p> <p>609. Enforcement of the liability in equity.</p> <p>610. Whether the remedy in equity is exclusive.</p> <p>611. Enforcement of statutory liability created by laws of another state.</p> <p>612. Parties plaintiff.</p> <p>613. Parties defendant. The</p> | <p>corporation a necessary party.</p> <p>§ 614. (a) When all the stockholders must be made defendants.</p> <p>615. (b) When the bill is directly against the corporation.</p> <p>616. (c) When not necessary to make all stockholders parties defendant.</p> <p>617. Evidence. Bill of discovery.</p> <p>618. The decree in suits in equity.</p> <p>619. Interest and costs, when allowed against the stockholder.</p> |
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References:

Defenses of shareholders to creditors' suits. Sections 620-650.
 Forfeiture of shares for non-payment of subscription. Sections 320-326.

Calls and assessments upon shareholders. Sections 302-337e.

Execution, attachment and garnishment of shares. Sections 651-662a.

Suits by, and against, the corporation. Sections 982-1014.

§ 605. Corporate creditors only, can enforce statutory liability of shareholders.—The statutory liability of stockholders is to corporate creditors only, and not to the corporation. Neither the directors nor a receiver, nor an assignee of an insolvent corporation, can enforce the liability.¹ As to payment of creditors' claims, debts for unpaid subscriptions do not differ from other debts. All are equally assets of the corporation and equally subject

¹Church v. Ayer (1897), 80 Fed. 543; Runner v. Dwiggins (1897), 147 Ind. 238, 36 L. R. A. 645; Colton v. Mayer (1900), 90 Md. 711; Fidelity, etc. Co. v. Mechanics' Sav. Bank (1899), 97 Fed. 297;

Hamilton, etc. Bank v. American, etc. Co. (Neb. 1902), 92 N. W. 189; Evans v. Nellis (1902), 187 U. S. 271; Woodworth v. Bowles (1900), 61 Kan. 569, 60 Pac. 381.

to the payment of creditors' claims. As regards creditors, there is no distinction between a debt due for stock, and any other asset which may form a part of the property of the corporation.² A creditor, who is also a stockholder, cannot, at law, enforce the liability.³

§ 606. Remedies at law and in equity.—It has been held that, where stockholders are in default after calls regularly made, a judgment creditor of the corporation has a complete remedy at law, and therefore will not, in the absence of some special circumstance, be allowed to proceed in equity.⁴ So in the case of a bank whose stockholders are subject to a personal liability for losses. "As to the trust funds and saving funds deposited," individual creditors seeking to enforce this liability, at law, may be enjoined from prosecuting such suits at the instance of the whole body of creditors interested.⁵ Where the liability of stockholders is several, an action at law cannot be maintained, unless expressly provided by statute, to enforce the statutory liability of the stockholders, in which they are all joined, but each creditor has his remedy against each stockholder.⁶ Under the Manufacturing Company's Act of Illinois, the creditor's remedy is held to be clearly in equity,⁷ though there was some doubt as to whether the bill in equity would lie; yet in case the corporation is insolvent, and the corporate creditors numerous, a bill in equity is the proper remedy.⁸ In Minnesota an action to enforce the individual liability of a stockholder in a manufacturing corporation, in a case not falling within the provisions of the general statutes of that State relating to fraud, etc., must be in the nature of a suit in equity, prosecuted by, or in behalf of, all creditors, and against the corporation and all the stockholders upon whom the liability rests.⁹ Two or more creditors may join in an equitable action to en-

² Upton v. Tribilcock, 91 U. S. 45; Morgan County v. Allen, 103 U. S. 498.

³ Thayer v. Union Tool Co., 70 Mass. 75 (1855); Thompson v. Meisser (1884), 108 Ill. 359; Mathez v. Neides (1878), 72 N. Y. 100.

⁴ Allen v. Montgomery R. Co., 11 Ala. 437. *Of*. "Proceedings by *Scire Facias* Against Members of Corporations," 38 Leg. Obs. 117; "*Scire Facias* Against Railway

Shareholders," 12 Sol. J. & Rep. 92, 111.

⁵ Eames v. Doris, 102 Ill. 350.

⁶ Abbott v. Aspinwall, 26 Barb. 202; Morrow v. Superior Court, 64 Cal. 383.

⁷ Rounds v. McCormick, 114 Ill. 252; Harper v. Union Manuf. Co., 110 Ill. 222; Low v. Buchanan, 94 Ill. 76.

⁸ Tunesma v. Schuttler (1885), 114 Ill. 156.

⁹ Johnson v. Fischer, 30 Minn.

force the statutory liability of shareholders.¹⁰ Where, as by the laws of Ohio, the stockholders of a corporation organized thereunder, are individually liable to the amount of their stock, this liability is collateral, to be resorted to by creditors only in case of the insolvency of the corporation, or when payment can not be enforced against it by the ordinary process.¹¹ A joint action may be brought to recover from stockholders of an insolvent corporation the amount of a debt due from the corporation, and the judgment may be so framed as to apportion their liability;¹² but in a suit by a creditor to enforce a stockholder's individual liability for a corporate debt, it is not necessary to join all the creditors of the corporation, nor all the stockholders.¹³ A bill having been brought originally by one who, with the assistance of others, buys up the whole of the company's indebtedness, and has it assigned to himself in trust for himself and the others, an amendment joining the other purchasers as complainants was held to be allowable.¹⁴

§ 607. Creditors' remedy by action at law.—An action for recovery of debts due by stockholders upon subscription to the capital stock, may be at law, but the most favored remedy by creditors is by bill in equity, in the nature of a bill of discovery. It is the only remedy in case of stock issued as "full-paid up," where no money or property consideration has been paid for the stock. The creditor should file his bill also in the name of all other creditors who may wish to become parties plaintiff. Stockholders made defendants, are entitled to have all others made their co-defendants for the purpose of general account, and to enforce from them contribution in proportion to their shares of stock.¹⁵ It has been said that no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself.¹⁶ But the weight of authority appears to be that after unpaid subscriptions have been called, any one creditor may sue at law and recover

173, construing Minn. Gen. Stat., ch. 34, § 9.

¹⁰ *Hickling v. Wilson*, 104 Ill. 54 (1882).

¹¹ *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184.

¹² *Overmyer v. Cannon*, 82 Ind. 457.

¹³ *Brundage v. Monumental Gold & Mining Co.*, 12 Oreg. 322.

¹⁴ *Aultman's Appeal*, 98 Pa. St. 505.

¹⁵ *Calumet Paper Co. v. Stotts, etc. Co.* (1895), 96 Iowa, 147; *First Nat. Bank v. Peavey* (1896), 75 Fed. 154; *Handley v. Stutz*, 137 U. S. 366 (1890); *Umsted v. Buskirk* (1866), 17 Ohio St. 114.

¹⁶ *Lane's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166; *Patterson v. Lynde*, 106 U. S. 519. Cf. *Perry v. Little*, 101 U. S. 216.

the whole amount due from any one or more shareholders.¹⁷ He need not join all the creditors nor all the shareholders of the corporation as parties plaintiff and defendant to his action.¹⁸ A corporate creditor may attach so much of an unpaid subscription as has been called.¹⁹ And a sole corporate creditor in whose favor judgment has been rendered, may maintain an action against shareholders, who have in their possession the assets of the corporation, and may seek a discovery, as against the corporation, of the names of such shareholders as have been withheld from him.²⁰

§ 608. Creditors' remedy by bill in equity.—A bill in equity is the creditors' proper remedy,^{20a} and the only remedy in the federal courts.^{20b} It is settled in New York that no separate ac-

¹⁷ *Faull v. Alaska, etc. Mining Co.*, 8 Sawy. 420; *Wilbur v. Stockholders*, 18 Bankr. Reg. 178; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479; *Bank of the United States v. Dallam*, 4 Dana, 574; *Allen v. Montgomery, etc. R. Co.*, 11 Ala. 437; *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 83; *White v. Blum*, 4 Neb. 555. *Cf.* *Holmes v. Sherwood*, 3 McCrary, 405, 16 Fed. Rep. 725; *Corning v. Mohawk Valley Ins. Co.*, 11 How. Pr. 191. And see *Van Buren v. Chenango Ins. Co.*, 12 Barb. 675.

¹⁸ *Brundage v. Monumental, etc. Co.*, 12 Oreg. 322. "The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equity between its various stockholders or partners, corporators or debtors." *Ogilvie v. Knox Ins. Co.* (1859), 22 How. 380.

¹⁹ *Curry v. Woodward*, 53 Ala. 371; *Bingham v. Cushing*, 5 Ala. 403; *Brown v. Union Ins. Co.*, 3 La. Ann. 177; *Hannah v. Moberly Bank*, 67 Mo. 678; *Simpson v. Reynolds*, 71 Mo. 594; *Bunn's Appeal*, 105 Pa. St. 49; *Bank of the*

United States v. Dallam (1836), 4 Dana, 574; *Allen v. Montgomery, etc. R. Co.* (1847), 11 Ala. 437; *Faull v. Alaska, etc. Mining Co.* (1883), 8 Sawy. 420; *Wilbur v. Stockholders*, 18 Bankr. Reg. 178; *White v. Blum* (1876), 4 Neb. 555; *McCarty v. Lavasche*, 89 Ill. 270 (1878); *Hays v. Lycoming, etc. Co.*, 99 Pa. St. 621; *Meints v. East St. Louis, etc. Co.*, 89 Ill. 48. See, also, *Dean v. Biggs*, 25 Hun, 122; *Coalfield Coal Co. v. Peck*, 98 Ill. 139. *Cf.* *Rand v. White Mountain R. Co.*, 40 N. H. 79; *Hughes v. Oregonian Ry. Co.*, 11 Oreg. 158; *Peterson v. Sinclair*, 83 Pa. St. 250; *Langford v. Ottumwa Water Power Co.*, 59 Iowa, 283; *In re Glen Iron Works*, 20 Fed. Rep. 674, 17 Fed. Rep. 324; *Chandler v. Siddle*, 10 N. B. R. 236; *Bank of Poughkeepsie v. Ibbotson* (1840), 24 Wend. 479; *Holmes v. Sherwood* (1881), 3 McCrary, 405, 16 Fed. Rep. 725; *Corning v. Mohawk Valley Ins. Co.* (1855), 11 How. Pr. 191; *Van Buren v. Chenango Ins. Co.* (1852), 12 Barb. 675.

²⁰ *Brewer v. Michigan Salt Assn.*, 58 Mich. 351.

^{20a} *Johnston v. Markle, etc. Co.* (1893), 153 Pa. St. 189.

^{20b} *Brown v. Fisk* (1885), 23 Fed. 228.

tion by a creditor against a single stockholder to enforce the statutory liability can be maintained, but that the action must be in equity against all stockholders similarly situated.²¹ The proper form of action to enforce a statutory liability of stockholders for corporate debts is by bill in equity.²² The creditor of an insolvent corporation can sue only in equity for benefit of all the creditors and against all the stockholders.²³ If there are other creditors, they must be allowed to come in.²⁴ When the legal assets of a corporation are insufficient to meet the demands of its creditors, they may invoke the aid of a court of equity to compel the payment of the balance due upon subscriptions to the capital stock²⁵ by a bill making defendants the corporation and all the solvent stockholders, known to the plaintiff, within the jurisdiction of the court,²⁶ (except where this will be excused upon an

²¹ *Wellington v. Continental & Const. Imp. Co.* (1889), 52 Hun, 408.

²² *Andrews v. Bacon*, 38 Fed. Rep. 777.

²³ *Reed v. Burg* (Neb. 1903), 96 N. W. 414; *Fremont, etc. Co. v. Storey* (Neb. 1903), 96 N. W. 416.

²⁴ *Hallett v. Metropolitan, etc. Co.* (1902), 69 N. Y. App. Div. 258; *Welch v. Sargent* (1899), 127 Cal. 72; *Bailey v. Pittsburg, etc. R. R.* (1891), 139 Pa. St. 213; *Van Pelt v. Gardner* (1898), 54 Neb. 701.

²⁵ "Petition in Bankruptcy Against Officers and Stockholders," 11 Alb. L. J. 155; *Chandler v. Siddle*, 10 Bankr. Reg. 236; *Myers v. Seeley*, 10 Bankr. Reg. 411; *Ogilvie v. Knox Ins. Co.*, 22 How. 380 (1859); *Salman v. Ham-borough Co.*, 1 Cas. in Ch. (Eng.) 204; *Henry v. Vermillion, etc. Turnpike Co.* (1848), 17 Ohio, 187; *Miers v. Zanesville, etc. Turnpike Co.* (1842), 11 Ohio, 273; *Bank of Cincinnati*, 8 Ohio, 62, 71; *Judson v. Rossie-Galena Co.* (1842), 9 Paige, 598; *Van Pelt v. United States, etc. Co.* (1872), 13 Abb. Prac. (N. S.) 331; *Hammond v. Hudson River, etc. Co.* (1854), 11 How. Pr. 33; *Louisiana Paper Co. v. Waples* (1877), 3 Woods,

34; *Faull v. Alaska Mining, etc. Co.* (1883), 8 Sawy. 420; *Stephens v. Fox* (1881), 83 N. Y. 313; *Day-ton v. Borst* (1865), 31 N. Y. 435; *Gillet v. Moody*, 5 Barb. 179, 3 N. Y. 479; *Bank of the United States v. Dallam* (1836), 4 Dana, 574; *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. 534; *Crawford v. Rohrer* (1882), 59 Md. 599; *Stinson v. Williams*, 35 Ga. 170; *Adler v. Milwaukee, etc. Co.*, 13 Wis. 57 (1860); *Curry v. Woodward* (1875), 53 Ala. 371; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92, 94; *Wincock v. Turpin* (1880), 96 Ill. 135; *Bassett v. St. Alban's Hotel Co.*, 47 Vt. 313; *Ward v. Griswoldville Manuf. Co.* (1844), 16 Conn. 593; *Lane's Ap-peal*, 105 Pa. St. 49; and cases cited in the next note. A case for equitable relief is made out by a creditor's bill against the share-holders of a corporation, which alleges that the corporation is in-solvent, that the shareholders are subject to personal liability, and that the assets are being wasted by the institution of separate suits at law by many creditors. *Tunesma v. Schuttler*, 114 Ill. 156.

²⁶ *Morgan v. New York, etc. R. Co.*, 10 Paige, 290, 40 Am. Dec. 244; *Coleman v. White*, 14 Wis.

allegation that the number is too great,)²⁷ and so framed as to admit, as plaintiffs, all other creditors who may wish to come in.²⁸ If the other creditors do not elect to join, it is immaterial, for, although proper parties to the suit, they are not necessary parties.²⁹ When one such bill has been filed, the court will not allow other creditors to file similar bills, but will require them all to join in one proceeding.³⁰ The creditor of an insolvent corporation can sue to collect unpaid subscriptions, only in equity and for benefit

700, 80 Am. Dec. 797; *Ericson v. Nesmith*, 46 N. H. 371, 77 Am. Dec. 78; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; "Remedy in Equity of Creditor Against Shareholders of Foreign Corporation," by Gideon D. Bantz, 21 Cent. L. J. 90; *Germantown, etc. Ry. Co. v. Fittler*, 60 Pa. St. 124, 100 Am. Dec. 546; *Winclock v. Turpin*, 96 Ill. 135; *Harmon v. Page* (1882), 62 Cal. 448; *Sherwood v. Buffalo, etc. R. Co.*, 12 How. Pr. 137 (1855); *Hatch v. Dana* (1879), 101 U. S. 205; *Sanger v. Upton*, 91 U. S. 56, 60; *Marsh v. Burroughs* (1871), 1 Woods, 463; *Holmes v. Sherwood* (1881), 16 Fed. Rep. 725; *Stevens v. Fox* (1881), 83 N. Y. 313, 17 Hun, 435; *Pfohl v. Simpson*, 74 N. Y. 137 (1878); *Griffith v. Mangam*, 73 N. Y. 611; *Mathez v. Neidig*, 72 N. Y. 100; *Crease v. Babcock*, 10 Met. 525; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Umsted v. Buskirk*, 17 Ohio St. 113; *Carpenter v. Marine Bank*, 14 Wis. 705; *Mann v. Pentz*, 3 N. Y. 415; *Masters v. Rossie, etc. Mining Co.*, 2 Sandf. Ch. 301; *Walsh v. Memphis, etc. R. Co.*, 2 McCrary, 156; *Vick v. Lane*, 56 Miss. 681; *Hadley v. Russell*, 40 N. H. 109; *Pierce v. Milwaukee, etc. Co.*, 38 Wis. 250; *Dalton, etc. R. Co. v. McDaniell* (1876), 56 Ga. 191; *Hightower v. Thornton*, 8 Ga. 506; *Curry v. Woodward*, 33 Ala. 371; *Allen v. Montgomery, etc. R. Co.* (1847), 11 Ala. 437; *Crawford v. Rohrer*, 59 Md. 599; *Perry v. Little*, 101 U. S. 216; *Wilbur v.*

Stockholders, 18 Bankr. Reg. 178; *Pollard v. Bailey*, 20 Wall. 520; *Smith v. Huckabee*, 53 Ala. 191; *Jones v. Jarman*, 34 Ark. 323; *Harris v. First Parish in Dorchester*, 23 Pick. 112; *Knowlton v. Ackley*, 8 Cush. 93; *Spear v. Grant*, 16 Mass. 9; *Hodges v. Silver Hill Mining Co.*, 9 Ore. 200.

²⁷ *Vick v. Lane*, 56 Miss. 681, 684. *Cf. Bonewitz v. Van Wert Co. Bank*, 41 Ohio St. 78. A bill will not be held defective merely because it fails to make all the delinquent stockholders parties defendant. *Hatch v. Dana*, 10 U. S. 205; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Marsh v. Burroughs*, 1 Woods, 463; *Holmes v. Sherwood*, 3 McCrary, 405; *Griffith v. Mangam*, 73 N. Y. 611; *Bartlett v. Drew*, 37 N. Y. 587; *Glenn v. Williams*, 60 Md. 93; *Brundage v. Monumental, etc. Mining Co.*, 12 Ore. 322. *Cf. Von Schmidt v. Huntington*, 1 Cal. 55; *Lamar Ins. Co. v. Gulick*, 102 Ill. 41.

²⁸ *Patterson v. Lynde*, 106 U. S. 519; *Perry v. Lyttle*, 101 U. S. 216; *Brown v. Fiske*, 23 Fed. Rep. 228; *Holmes v. Sherwood*, 3 McCrary, 405; *Pollard v. Bailey*, 20 Wall. 520; *Sawyer v. Hoag*, 17 Wall. 610.

²⁹ *Hatch v. Dana*, 101 U. S. 205; *Marsh v. Burroughs*, 1 Woods, 463; *Crease v. Babcock*, 10 Met. 525. *Cf. Adler v. Milwaukee, etc. Co.*, 13 Wis. 57.

³⁰ *Crease v. Babcock*, 10 Met. 525. But see *Perry v. Turner*, 55 Mo. 418.

of all the creditors and against all the stockholders.³¹ Unsecured creditors of a corporation, having failed to collect their debts from the corporation, have their remedy against its stockholders, either by compelling the payment of the amount of the unpaid subscriptions to the capital stock; thus creating a fund for the satisfaction of all the corporate debts ratably, or by enforcing the liability imposed by the charter or other statutory provisions affecting the corporation.³² A creditor, however, can not maintain an action at law for the payment of subscriptions, because subscription to the capital stock is a contract between the corporation and the subscriber, and an amount due on the subscription is a debt due to the corporation and not to its creditors, between whom and the stockholders no privity exists as to the contract.³³ But equity, at the instance of creditors of an insolvent commercial corporation, will compel a subscriber to the stock to make payments according to his contract with the corporation.³⁴ And this liability for unpaid subscription, is several and not joint, there being no rule at common law imposing upon stockholders an individual liability for corporate debts.³⁵ Direct personal liability to the corporate creditors can attach to stockholders only by constitutional or statutory provision.³⁶ This obligation is not in the nature of a penalty, but is assumed to exist in the implied contract entered into by the individual in becoming a stockholder.³⁷

³¹ *Reed v. Burg* (Neb. 1903), 96 N. W. 414; *Fremont, etc. Co. v. Storey* (Neb. 1903), 96 N. W. 416.

³² *Halderman v. Ainslie*, 82 Ky. 395; "Bankruptcy & Winding Up," 67 L. T. 111; "Liability of Shareholders & Officers of Manufacturing Companies," 22 L. Rep. 736; "How to Become a Contributory," 8 L. J. 73; "Liquidators and Shareholders in Court," 22 Jour. Jur. 641; "Assignments by Corporation," by James L. High, 3 So. L. Rev. (N. S.) 553.

³³ *Patterson v. Lynde*, 106 U. S. 519; *Brown v. Fish*, 23 Fed. Rep. 228; *Spear v. Grant*, 16 Mass. 9. Cf. "Insolvency of Railway Companies," 9 Sol. J. & Rep. 301, and 11 Sol. J. & Rep. 44 and 374; "Law of Joint-stock Companies in Relation to Bankruptcy," 21 Leg. Obs.

3, 129, 450, and 22 Leg. Obs. 40, a series of articles; "Liability of Shareholders and Directors of Joint-stock Companies," 6 L. T. 138 and 552.

³⁴ *Harmon v. Page*, 62 Cal. 448. Cf. "Creditors and Shareholders," 11 Sol. J. & Rep. 170.

³⁵ *Seymour v. Sturgess*, 26 N. Y. 134; *Freeland v. McCullough*, 1 Denio, 414; *Gray v. Coffin*, 9 Cush. 192; *Thompson's Liability of Stockholders*, § 4; *Angell & Ames on Corp.*, §§ 591, 595.

³⁶ *Reid v. Eatonton Manuf. Co.*, 40 Ga. 98; *Vincent v. Chapman*, 10 Gill & J. 279; *Lowry v. Inman*, 46 N. Y. 119.

³⁷ *Flash v. Conn*, 109 U. S. 371; *Carrol v. Green*, 92 U. S. 509; *Blakeman v. Benton*, 9 Mo. App. 107.

§ 609. **Enforcement of the liability in equity.**—Of the delays and expense of proceedings in equity, the court said, in an Ohio case: "By reason of the great number of stockholders, the frequent transfer of stock, the decease of parties, and of other causes, delays—vexatious, expensive, and almost interminable—seem to be inevitable in all such proceedings; so much so, indeed, that such liability has grown to be looked upon as furnishing next to no security at all for the debts of corporations."³⁸ It is often held that proceedings can be brought only in equity, and that they are exclusive of all other remedies.³⁹ In case many suits are brought to enforce the statutory liability, the court in equity will enjoin all but one suit, and proceed in that one for the benefit of all.⁴⁰ As to the extent and character of the stockholder's statutory liability, the court will follow the laws and decisions of the State in which the corporation was created.⁴¹ A State may constitutionally provide by statute that the liability of stockholders of foreign corporations doing business in the State shall be the same as the liability of stockholders of its domestic corporations.⁴²

§ 610. **Whether the remedy in equity is exclusive.**—In several States it is held that the creditor's remedy on the statutory liability is in equity alone.⁴³ In New York there are cases seeming to hold that, where there is a remedy in equity, it is conclusive.⁴⁴ So where, in South Carolina, the charter of a bank pro-

³⁸ *Mason v. Alexander* (1886), 44 Ohio St. 318.

³⁹ *Waller v. Hamer* (Kan. 1902), 69 Pac. 185; *Foster v. Possum* (1899), 105 Wis. 99; *Marshall v. Sherman* (1895), 148 N. Y. 9; *Harper v. Carroll* (1896), 66 Minn. 487; *Western, etc. Bank v. Reckless* (1899), 96 Fed. 70.

⁴⁰ *American, etc. Co. v. Flint* (1896), 5 N. Y. App. Div. 263.

⁴¹ *Fowler v. Lamson* (1893), 146 Ill. 472, 37 Am. St. Rep. 163.

⁴² *Pinney v. Nelson* (1901), 183 U. S. 144.

⁴³ *Smith v. Huckabee* (1875), 53 Ala. 191; *Perkins v. Sanders*, 56 Miss. 733; *Eames v. Doris* (1882), 102 Ill. 350; *Patterson v. Lynde* (1882), 106 U. S. 519; *Garrison v. Howe* (1858), 17 N. Y. 458; *Brundage v. Monumental, etc. Mining Co.* (1885), 12 Oreg. 322. But in many states the action at

law upon the statutory liability is not exclusive of the equitable remedy. *Culver v. Third Nat. Bank* (1871), 64 Ill. 528; *Grund v. Tucker* (1869), 5 Kan. 70; *Perry v. Turner* (1874), 55 Mo. 418; *Norris v. Johnson* (1871), 34 Md. 485, 489; *Matthews v. Albert* (1866), 24 Md. 527. *Cf. Weeks v. Love* (1872), 50 N. Y. 568; *Story v. Furman* (1862), 25 N. Y. 214; *Garrison v. Howe* (1858), 17 N. Y. 458; *Bank of the United States v. Dallam* (1836), 4 Dana, 574; *Van Hook v. Whitlock*, 3 Paige, 409 (1832); *Bank of Poughkeepsie v. Ibbotson* (1840), 24 Wend. 473; *Masters v. Rossie Lead Mining Co.* (1845), 2 Sandf. Ch. 301; *Pfohl v. Simpson* (1878), 74 N. Y. 137; *Eames v. Doris* (1882), 102 Ill. 350.

⁴⁴ *Morgan v. New York etc. R. Co.* (1843), 10 Paige, 290; *Sher-*

vided that upon the failure of the bank each stockholder shall be liable and held bound for any sum not exceeding twice the amount of his shares, it was held by the Supreme Court of the United States that a suit in equity by or on behalf of all the creditors, is the only appropriate mode of enforcing the liability incurred by such a failure.⁴⁵ Accordingly, in the United States courts, under a statute making the persons and property of the stockholders liable for notes in proportion to the number of shares that each individual may hold, the remedy is exclusively in equity.⁴⁶ And a claim against stockholders upon a liability imposed by statute, can not be joined in one bill in equity with a claim against the directors of the company, although the two claims are derived from the same statute;⁴⁷ but an action to enforce statutory liability may be joined with an action to collect unpaid subscriptions.⁴⁸ An action by a creditor against the corporation and delinquent stockholders may be maintained in behalf of himself and all who wish to join him, even when a creditor's bill has been abolished.⁴⁹

§ 611. Enforcement of statutory liability created by laws of another State.—Formerly the state courts, following the lead of Massachusetts, refused to enforce a statutory liability of stockholders incurred in another State, and declined to aid the corporate creditors of the foreign corporation, as against resident

wood v. Buffalo, etc. R. Co. (1855), 12 How. Pr. 136; Hinds v. Canandaigua, etc. R. Co. (1855), 10 How. Pr. 487; Courtois v. Harrison (1856), 12 How. Pr. 359.

⁴⁵ Terry v. Little (1879), 101 U. S. 216.

⁴⁶ Mills v. Scott (1878), 99 U. S. 25; Terry v. Tubman (1875), 92 U. S. 156; Pollard v. Bailey, 20 Wall. 520 (1874); Cuykendall v. Miles (1882), 10 Fed. Rep. 342; Patterson v. Lynde (1882), 106 U. S. 519. Cf. Revised Statutes of the United States, § 737; Ogilvie v. Knox Insurance Co., 22 How. 380; Sawyer v. Hoag (1873), 17 Wall. 610; Terry v. Anderson (1877), 95 U. S. 628, 635; Hatch v. Dana (1879), 101 U. S. 275; Terry v. Little (1879), 101 U. S. 216; County of Morgan v. Allen (1880), 103 U. S. 498; Bullard v. Bell (1817), 1 Mason, 243; Wood v. Dummer, 3 Mason, 309; Marsh

v. Burroughs, 1 Woods, 463; Holmes v. Sherwood, 3 McCrary, 405, 16 Fed. Rep. 725.

⁴⁷ Cambridge Water Works v. Somerville Dyeing, etc. Co. (1859), 14 Gray, 193; Pope v. Leonard (1874), 115 Mass. 286. Cf. Wiles v. Suydam (1876), 64 N. Y. 173; Douglass v. Ireland (1878), 73 N. Y. 100.

⁴⁸ Warner v. Callender (1870), 20 Ohio St. 190.

⁴⁹ Adler v. Milwaukee, etc. Manuf. Co. (1860), 13 Wis. 57; Wilbur v. Stockholders, 18 Bankr. Reg. 178; Ogilvie v. Knox Ins. Co. (1859), 22 How. 380. A receiver may be appointed and the decree affords proportional relief to all the parties. Dalton, etc. R. Co. v. McDaniel (1876), 56 Ga. 191; Wilbur v. Stockholders, 18 Bankr. Reg. 178; Ogilvie v. Knox Ins. Co. (1859), 22 How. 380.

stockholders; also the lower federal courts, in some cases, held to the same effect, but latterly they have on the contrary sustained the right to maintain such suits; and the Supreme Court of the United States in 1900,⁵⁰ reversed the Rhode Island Supreme Court, and sustained the right of a creditor of a Kansas corporation to hold one of its stockholders, in a Rhode Island court, liable to the enforcement of the statutory liability under the Kansas statute; and the recent decisions of many States are to the same effect, though till recently they held the reverse.⁵¹ In cases where it is deemed necessary to obtain a judgment against the corporation before creditors can sue on the liability of stockholders upon their unpaid subscriptions, the judgment must be had in the State of the company's domicile.⁵² When the statutory liability of stockholders is an obligation in the nature of a contract, the remedy thereon may be pursued in a State other than that in which the corporation is created.⁵³ But when it is in the nature of a penalty, it can not be enforced in a foreign State.⁵⁴ Where judgment, and execution *nulla bona* are obtained in the domestic State, they need not be repeated upon bringing suit in another State to enforce the liability there.⁵⁵

§ 612. **Parties plaintiff.**—A debt due from the corporation is not a debt due from the stockholders. The contract of sub-

⁵⁰ *Hancock, etc. Bank v. Far-num*, 176 U. S. 640.

⁵¹ *Bell v. Farwell* (1898), 176 Ill. 489, 42 L. R. A. 804; *Pfaff v. Gruen* (Mo. 1902), 69 S. W. 405; *Love v. Pusey, etc. Co.* (Del. 1902), 52 Atl. 542; *Pulsifer v. Greene* (Me. 1902), 52 Atl. 921; *Aldrich v. Anchor, etc. Co.* (1903), 24 Ore. 32, 72 Pac. 756, 41 Am. St. Rep. 881; *Tompkins v. Blakey* (N. H. 1901), 49 Atl. 111; *Ferguson v. Sherman* (1897), 116 Cal. 169; *Howarth v. Lombard* (1900), 175 Mass. 570; *Guerney v. Moore* (1895), 131 Mo. 650; *Hancock National Bank v. Ellis* (1898), 172 Mass. 39, 55 Am. St. Rep. 414; *Childs v. Cleaves* (Me. 1901), 50 Atl. 714; *Howarth v. Angle* (1900), 162 N. Y. 179; *Western Nat. Bank v. Lawrence* (1898), 117 Mich. 669; *Kulp v. Fleming* (1901), 65 Ohio St. 321, 87 Am.

St. Rep. 611; *Sanigan v. North* (1901), 69 Ark. 62.

⁵² *Barclay v. Tallman*, 4 Edw. Chan. 128; *Murray v. Vanderbilt*, 39 Barb. 147; *Bank of Virginia v. Adams*, 1 Pars. Eq. 534; *Patterson v. Lynde* (1884), 112 Ill. 196; *Harris v. Pullman*, 84 Ill. 25. *Cf. Clafin v. McDermott* (1882), 12 Fed. Rep. 375; *McLune v. Benceni*, 2 Ired. Eq. 513; *Farned v. Harris*, 19 Miss. 366; *Bullitt v. Taylor*, 34 Miss. 708; *Verplanck v. Insurance Co.*, 6 Paige, 503; *Boswell's Lessees v. Otis* (1850), 9 How. 348. *Contra, Bird v. Calvert*, 22 S. C. 292.

⁵³ *Flash v. Conn*, 109 U. S. 371; *Aultman's Appeal*, 98 Pa. St. 505.

⁵⁴ *Vide supra*, § 583; and see 34 L. R. A. 737.

⁵⁵ *Rule v. Omega, etc. Co.* (1896), 64 Minn. 326.

scription is made with the corporation, and it, or its successors, only, can enforce the contract at law. There is no privity between the creditors of the corporation and its stockholders, and therefore no legal action can be maintained by the creditors to recover unpaid subscriptions.⁵⁶ A judgment creditor of a corporation, after execution returned unsatisfied, may sue in equity for himself and for such other creditors as may join him, making the corporation, and such of its delinquent stockholders, as are within the jurisdiction, defendants, and may have an account taken and an order compelling payment by such stockholders; notwithstanding that a State statute provides a remedy at law against an individual stockholder to enforce contribution. If the stockholders are liable to the full amount of their unpaid subscriptions, an assessment before suit is unnecessary.⁵⁷ And a suit by a judgment creditor against stockholders of a corporation to compel payment of their unpaid subscriptions to the capital stock, can only be prosecuted by a creditor suing in behalf of all the creditors, making the corporation a party, and having a full accounting of all the assets of the corporation.⁵⁸ A complaint filed by a creditor may be amended so that suit may be for the benefit of all the creditors who may choose to come in.⁵⁹ But a creditor of an insolvent corporation can not, under an attachment execution against the corporation, enforce the liability of a single stockholder for an unpaid subscription. Unpaid subscriptions constitute a fund to be administered in appropriate proceedings for the benefit of all the creditors generally.⁶⁰ Thus, creditors can bring their suit in equity against stockholders for unpaid amounts due on stock without attempting to procure a call to be made, and when the creditors are numerous and a court of

⁵⁶ Morawetz on Corporations, § 818; Cooper v. Frederick, 9 Ala. 739, 742; Patterson v. Lynde, 106 U. S. 519; Brown v. Fish, 23 Fed. Rep. 228; Jones v. Jarman, 34 Ark. 323, 328; Spear v. Grant, 16 Mass. 9, 15. Cf. "Creditors versus Shareholders," 1 L. J. 540.

⁵⁷ Holmes v. Sherwood, 3 McCrary C. Ct. 405, 16 Fed. Rep. 725. Cf. "Liabilities and Rights of Corporate Debtors and Creditors," by E. Powell, 28 L. T. 316, 331, and 29 L. T. 14.

⁵⁸ Wetherbee v. Baker, 35 N. J. Eq. 501. Under § 1077 of the Revised Statutes of Nevada, one or more may sue and defend for the benefit of all. Thompson v. Reno Savings Bank (1885), 19 Nev. 103; 3 Am. St. Rep. 797.

⁵⁹ Thompson v. Reno Savings Bank (1885), 19 Nev. 103, 3 Am. St. Rep. 797.

⁶⁰ Lane's Appeal, 105 Pa. St. 49, 51 Am. Rep. 166; Nimick v. Mingo Iron Works Co., 25 W. Va. 184.

law can not adjust the claims, equity alone will relieve.⁶¹ Under the General Manufacturing Act of New York the creditors of a corporation must exhaust their legal remedies against it before resorting to equity to enforce the payment of subscriptions.⁶² This was the rule also under the earlier statute of 1811;⁶³ and is re-enacted in the "Stock Corporation Law" of 1890.⁶⁴ Upon the question whether a stockholder, who is also a creditor of the corporation, has this remedy in equity, there is some conflict of authority. In Massachusetts it is held that the stockholder has no such right.⁶⁵ And in New York if the charter of the corporation makes the stockholders liable as partners, this rule is followed.⁶⁶ And it is also held in New York that a stockholder who is a creditor may maintain a suit for an accounting of the assets of the corporation,⁶⁷ and in the same State it seems that the assignee of a shareholder may bring the suit to enforce the statutory liability.⁶⁸ In Pennsylvania and Maine the right of defendant stockholders to compel contribution to the payment of debts on which their liability has been enforced, by stockholders who have not been joined in the action, is a right existing only by statute and not in equity.⁶⁹ "The first thing to be determined in all cases is, what liability has been created. There will always be difficulty in attempting to reconcile cases

⁶¹ *Thompson v. Reno Savings Bank* (1885), 19 Nev. 171, 3 Am. St. Rep. 883.

⁶² *Flash v. Conn* (1883), 109 U. S. 371, 380; *Rocky Mountain Nat. Bank v. Bliss* (1882), 89 N. Y. 338; *Mathez v. Neidig* (1878), 72 N. Y. 100; *Southworth and Jones on Manuf. and Business Corporations*, § 107; *Weeks v. Love* (1872), 50 N. Y. 568; *Abbott v. Aspinwall* (1857), 26 Barb. 202; *Wiles v. Suydam* (1876), 64 N. Y. 173; *Shellington v. Howland* (1873), 53 N. Y. 371; *Handy v. Draper* (1882), 89 N. Y. 334.

⁶³ *Bank of Poughkeepsie v. Ibbotson* (1840), 24 Wend. 473; *Van Hook v. Whitlock*, 3 Paige, 409; *Simonson v. Spencer* (1836), 15 Wend. 548; N. Y. Rev. Stat. 282, Act of March 22, 1811.

⁶⁴ N. Y. Laws of 1890, ch. 564, §§ 57, 58.

⁶⁵ *Thayer v. Union Tool Co.* (1855), 4 Gray, 75; *Potter v. Stevens Machine Co.* (1879), 127 Mass. 592.

⁶⁶ *Bailey v. Bancker* (1842), 3 Hill, 188, overruling upon this point *Simonson v. Spencer* (1836), 15 Wend. 548; *Beers v. Waterbury* (1861), 8 Bosw. 396; *Richardson v. Abendroth* (1864), 43 Barb. 162. *Contra*, *Sanborn v. Lefferts* (1874), 58 N. Y. 179.

⁶⁷ *Garrison v. Howe* (1858), 17 N. Y. 458. *Of*, *Slee v. Bloom* (1821), 5 Johns. Ch. 382.

⁶⁸ *Woodruff & Beach Iron Works v. Chittenden*, 4 Bosw. 406, to the point that an assignee in bankruptcy may maintain such a suit. See *Garrett v. Sayles* (1880), 1 Fed. Rep. 371.

⁶⁹ *Brinham v. Wellersburg Coal Co.* (1864), 47 Pa. St. 43; *Fowler v. Robinson* (1850), 31 Me. 189.

of this class, in which the general question of remedy has arisen, unless special attention is given to the precise language of the statute under consideration. The remedy must always be such as is appropriate to the liability to be enforced. The statute which creates the liability may declare the purposes of its creation, and provide directly or indirectly, a remedy for its enforcement."⁷⁰ Thus, under a charter provision that stockholders shall "be bound respectively for all debts of the bank in proportion to their stock holden therein," an action at law by a single creditor against a single stockholder will not lie;⁷¹ and this is the rule under a statute making the stockholders of a banking company "individually responsible to the amount of their respective share or shares of stock for all its indebtedness and liabilities of every description."⁷² Upon the ground that at law the indebtedness of the corporation and the several liabilities of the members could not be equitably adjusted,⁷³ no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law, so as to appropriate it exclusively to himself;⁷⁴ for a bill filed by the creditor against a corporation alleged to be insolvent; to compel the payment of unpaid capital stock, is an equitable proceeding to enforce the equitable obligations of stockholders.⁷⁵ Under such a bill there must be an account of debts, assets and unpaid capital stock, and the proper assessment made on each stockholder of the amount due from him.⁷⁶

§ 613. Parties defendant. The corporation a necessary party.—The corporation is an indispensable party to a stockholder's suit to set aside as fraudulent, and to cancel an instru-

⁷⁰ Chief Justice Waite, in *Terry v. Little* (1879), 101 U. S. 216.

⁷¹ *Hatch v. Dana* (1879), 101 U. S. 205; *Terry v. Little* (1879), 101 U. S. 216; *Pollard v. Bailey* (1874), 20 Wall. 520. *Cf. Wright v. McCormack* (1866), 17 Ohio St. 86; *Sands v. Kimbark* (1863), 37 Barb. 108, 120; *Cushman v. Shepard* (1848), 4 Barb. 113; *Smith v. Huckabee* (1875), 53 Ala. 191.

⁷² *Coleman v. White* (1862), 14 Wis. 700; *Carpenter v. Marine Bank* (1862), 14 Wis. 705, n.

⁷³ *Allen v. Walsh* (1879), 25 Minn. 543; *Jones v. Jarman* (1879), 34 Ark. 323; *Low v. Buchanan* (1879), 94 Ill. 76; *Flash*

v. Conn (1883), 109 U. S. 371; *Queenan v. Palmer* (1886), 117 Ill. 62, 34 Alb. L. J. 117. *Cf. Stewart v. Lay* (1877), 45 Iowa, 604; *Norris v. Johnson* (1871), 34 Md. 485; *Faymonville v. McCullough* (1881), 59 Cal. 285; *Garri-son v. Howe* (1858), 17 N. Y. 458; *Story v. Furman* (1862), 25 N. Y. 214.

⁷⁴ *Patterson v. Lynde* (1882), 106 U. S. 519. *Cf. Terry v. Little* (1879), 101 U. S. 216.

⁷⁵ *Cover v. Manaway* (1886), 115 Pa. St. 338, 2 Am. St. Rep. 552.

⁷⁶ *Cover v. Manaway* (1886), 115 Pa. St. 338, 2 Am. St. Rep. 552.

ment executed by the corporation. In its absence, the court will not entertain a motion for preliminary injunction.⁷⁷ In a stockholder's suit in behalf of the corporation against an individual, he must show its right of action against the defendant, and that the directors have refused to sue, and that the plaintiff stockholder has right to bring the suit.⁷⁸ In a suit to enforce the statutory liability, the corporation is a necessary party.⁷⁹ In a suit by the receiver of an insolvent corporation to recover an assessment upon its stock, ordered by the court by which the receiver was appointed, it is no defense that the defendant stockholder was not a party defendant in the proceedings for the appointment of a receiver; for the fact that the corporation of which the defendant was a member was a party to that suit binds him.⁸⁰ A bill against a stockholder of a corporation, to which the company is a necessary party, brought in a federal court for a district other than that of which the company was a resident, can not be amended so as to bring the company in as a defendant, and is fatally defective.⁸¹ So in an action against the stockholders of a certain corporation where complainant had purchased all the assets and properties of defendants' corporation under misrepresentations as to the value of the property, and the defendants, as stockholders, had received their proportionate shares of the proceeds of the sale, and the other assets of the company which came into their hands as a trust fund for the satisfaction of complainant's claims, it was held that as the action was primarily against the vendor corporation for damages for fraudulent representations, it was a necessary party.⁸² The corporation is a necessary party defendant in a suit in equity by creditors to compel payment of unpaid subscription, where the corporation fails or refuses to demand or sue for their payment.⁸³

§ 614. (a) When all the stockholders must be made defendants.—If the members are liable as principals, each is liable

⁷⁷ *Morehead v. Southern Pac. Co.* (1903), 123 Fed. 350.

⁷⁸ *Rosenbaum v. Rice* (1903), 83 N. Y. Supp. 494.

⁷⁹ *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184. *Cf.* "Remedies of Creditors against Companies apart from Provisions of the Winding-up Acts," by A. H. Marsh, 5 Can. L. T. 289, 352; *Mansfield Iron Works v. Willcox* (1866), 52 Pa.

St. 377. *Cf.* *Deming v. Bull* (1835), 10 Conn. 409; *Middletown Bank v. Magill* (1823), 5 Conn. 28.

⁸⁰ *Great Western Tel. Co. v. Gray* (1887), 122 Ill. 630.

⁸¹ *Swan Land & Cattle Co. v. Frank* (1889), 39 Fed. Rep. 456.

⁸² *Swan Land & Cattle Co. v. Frank* (1889), 39 Fed. Rep. 456.

⁸³ *Commercial Bank, etc. v. Warthen* (1904), 119 Ga. 990.

for the whole of the debts of the company to the amount of his statutory liability.⁸⁴ When the equitable remedy is pursued, the corporation, and all the solvent shareholders within the jurisdiction who are known, should be made defendants. Contribution among the shareholders, is of the essence of proceeding, and that is best effected when all are made parties.⁸⁵ And when the action is to enforce the statutory liability to employes, "laborers, servants, and apprentices," in New York, all the shareholders should be made parties.⁸⁶ But the joinder of all the shareholders may be dispensed with in a case where it is shown to be impracticable.⁸⁷ Accordingly, when the complaint avers that defendants and others, whose names were unknown, are stockholders, and that it is impracticable from their great number to bring them all before the court, it is not demurrable for defect of parties.⁸⁸ But in an action to enforce the individual liability of stockholders, some of whom, without any excuse therefor, are not served with process, it is error to assess those served, with the whole indebtedness.⁸⁹ It is sometimes held that a general statutory liability means a liability on the part of the stockholder only in the proportion which his interest bears to the total indebtedness of the corporation.⁹⁰ In such a case, where the shareholders are jointly and severally personally liable for debts contracted by the corporation, which it can not, or does not pay, in proportion to the number of shares they own, it seems to be settled that they are to be held principal debtors, and not mere sureties for the

⁸⁴ *Morley v. Thayer*, 3 Fed. Rep. 737; *Pollard v. Bailey*, 20 Wall. 520; *Lowry v. Inman*, 46 N. Y. 119; *Windham, etc. Sav. Inst. v. Sprague*, 43 Vt. 502; *Allen v. Walsh*, 25 Minn. 543.

⁸⁵ *Walsh v. Memphis, etc. R. Co.*, 2 McCrary, 156, 6 Fed. Rep. 797; *Erickson v. Nesmith* (1866), 46 N. H. 371; *Hadley v. Russell*, 40 N. H. 109; *Umsted v. Buskirk* (1866), 17 Ohio St. 113; *Mansfield Iron Works v. Willcox* (1866), 52 Pa. St. 377; *Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 43; *Hoard v. Wilcox*, 47 Pa. St. 51; *McHose v. Wheeler*, 45 Pa. St. 32.

⁸⁶ *Strong v. Wheaton*, 38 Barb. 616; "A Reporter of a Newspaper

a Laborer," 17 Am. L. Reg. N. S. 97.

⁸⁷ *Bronson v. Wilmington N. C. Life Ins. Co.* (1882), 85 N. C. 411; *Umsted v. Buskirk* (1866), 17 Ohio St. 113; *Pierce v. Milwaukee Construc. Co.* (1875), 38 Wis. 253; *Coleman v. White*, 14 Wis. 700; *Crease v. Babcock*, 51 Mass. 525; *Brundage v. Monumental, etc. Mining Co.* (1885), 12 Oreg. 322.

⁸⁸ *Bronson v. Wilmington, N. C., Life Ins. Co.*, 85 N. C. 411.

⁸⁹ *Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78.

⁹⁰ *Boyd v. Hall* (1876), 56 Ga. 563; *Reynolds v. Feliciana Steamboat Co.*, 17 La. Rep. 397. *Cf.* "Liability Laws," 5 Am. Jur. 52.

corporation.⁹¹ It is sometimes held, also, that stockholders are not sureties for each other.⁹² But in Michigan the contrary rule prevails.⁹³ Where an action at law can be brought, and the member's liability is limited and several, each being liable for a definite sum, a separate action may be brought against each.⁹⁴ In New York, under the Business Corporations Act of 1875,⁹⁵ providing that stockholders in "full liability companies" may be joined as defendants in any action against the company, it is held that it does not, by implication, prohibit separate and concurrent actions against a "limited liability company" and a stockholder therein.⁹⁶ In a case in the United States Supreme Court against a corporation, it was held that the shareholders might properly be made parties, in order to avoid a multiplicity of suits. But in this case they were immediately liable under that provision of their charter which made members of the company jointly and severally liable for all debts and contracts made by the company, until the whole amount of the capital stock, fixed and limited by the corporation, is paid in.⁹⁷ Where the shareholder's liability is held to be like that of a partner, then all must be joined as defendants, and the omission of any one, is ground for a plea in abatement.⁹⁸ In Massachusetts, stockholders in manufacturing

⁹¹ *Moss v. Averell* (1853), 10 N. Y. 450; *Corning v. McCullough* (1847), 1 N. Y. 47; *Simonson v. Spencer* (1836), 15 Wend. 548; *Bailey v. Bancker* (1842), 3 Hill, 188; *Harger v. McCullough*, 5 Denio, 119; *Southmayd v. Russ*, 3 Conn. 52; *Marcy v. Clark*, 17 Mass. 330.

⁹² *Taylor on Corporations*, §§ 714, 715; *Lane v. Harris*, 16 Ga. 217, 234; *Young v. Rosenbaum*, 39 Cal. 646; *Crease v. Babcock*, 10 Metc. 525.

⁹³ *Hanson v. Donkersley*, 37 Mich. 184. *Cf.* *Grand Rapids Savings Bank v. Warren*, 52 Mich. 157.

⁹⁴ *Terry v. Little* (1879), 101 U. S. 216; *Garrison v. Howe* (1858), 17 N. Y. 458; *Paine v. Stewart* (1866), 33 Conn. 516; *Culver v. Third National Bank* (1871), 64 Ill. 528; *Bank of Poughkeepsie v. Ibbotson* (1840), 24 Wend. 473; *Perry v. Turner*, 55 Mo. 418; *Boyd v. Hall* (1876), 56 Ga. 563; *Jones*

v. Wiltberger, 42 Ga. 575; *Lane v. Harris* (1854), 16 Ga. 217; *Abbott v. Aspinwall* (1857), 26 Barb. 202; *Pettibone v. McGraw* (1859), 6 Mich. 441; *In re Hollister Bank* (1863), 27 N. Y. 393. *Cf.* *Pratt v. Bacon* (1830), 10 Pick. 122; *Milroy v. Spurr Mountain Iron Mining Co.* (1880), 43 Mich. 231.

⁹⁵ N. Y. Laws of 1875, ch. 611.

⁹⁶ *Walton v. Coe* (1888), 110 N. Y. 109.

⁹⁷ *Manufacturing Co. v. Bradley* (1881), 105 U. S. 175.

⁹⁸ *Allen v. Sewall* (1829), 2 Wend. 327; *Strong v. Wheaton* (1861), 38 Barb. 616; *Reynolds v. Feliciano Steamboat Co.* (1841), 17 La. Rep. 397; *Bonewitz v. Bank* 41 Ohio St. 78. *Cf.* *Dodge v. Minnesota, etc. Slate Roofing Co.* (1871), 16 Minn. 368; *Culver v. Third National Bank* (1871), 64 Ill. 528; *Branson v. Oregonian Ry. Co.* (1882), 10 Oregon, 278.

corporations, are liable as tenants in common to creditors, to the extent of the capital stock, until it has been divided into shares;⁹⁹ but where some of the stock is held by the corporation itself, this will not compel the other shareholders to bear the statutory liability as to the stock so held by the corporation.¹ In Pennsylvania, under the Manufacturing Companies Act, the corporate creditor proceeds against the shareholders in an action at law, upon the original contract, making the corporation and all the shareholders parties defendant.² In Illinois, under the charter provision that "each stockholder shall be liable to double the amount of stock" owned, it is held that the stockholders are severally and individually liable; that is, that an action at law against one or all of them would lie.³ In Ohio, although the stated extent of the shareholder's liability, as provided by the statute, can not be exceeded, still, up to the full measure of his liability, he may be charged, although it be shown that if other solvent shareholders had contributed their full proportion, it would not be necessary for him to pay.⁴ In Wisconsin, stockholders in banking corporations are liable, by statute, as original and principal debtors, substantially as though they were partners, except as in Ohio, that the responsibility of each is limited to a sum equal to his shares of stock.⁵ In Vermont, a provision, that shareholders "shall be personally holden" is held to create only a joint liability.⁶

§ 615. (b) When the bill is directly against the corporation.—The liability of a subscriber for the capital stock of a company is several and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers, and in equity his liability does not

⁹⁹ Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, (1872), 111 Mass. 200.

¹ Crease v. Babcock, 51 Mass. 525.

² Brinham v. Wellersburg Coal Co. (1864), 47 Pa. St. 43; Mansfield Iron Works v. Willcox (1866), 52 Pa. St. 377; Hoard v. Wilcox, 47 Pa. St. 51; McHose v. Wheeler, 45 Pa. St. 32; Patterson v. Wyoming Manuf. Co., 40 Pa. St. 117.

³ Thebus v. Smiley, 110 Ill. 316; Hull v. Burtis, 90 Ill. 213; Mc-

Carthy v. Lavasche, 89 Ill. 270; Fuller v. Ledden, 87 Ill. 310; Jacobson v. Allen (1882), 12 Fed. Rep. 454.

⁴ Brown v. Hitchcock, 36 Ohio St. 678. Cf. Stewart v. Lay (1877), 45 Iowa, 604; "Individual Liability of Stockholders in Iowa Corporations," 14 West. Jur. 337, 385, 433.

⁵ Coleman v. White, 14 Wis. 700; Carpenter v. Marine Bank, 14 Wis. 705, n.

⁶ Windham Prov. Sav. Inst. v. Sprague (1871), 43 Vt. 502.

cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and attaches the debt due to the debtor corporation. It does not change the character of the debt attached. It may be that, if the object of the bill is to wind up the affairs of this company, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of one judgment against a corporation, out of its credits or intangible property, that is, out of its unpaid stock, there is no reason for requiring all the stockholders to be made defendants.⁷ But when an attempt is made to enforce payment of all the corporate liabilities, all the solvent stockholders within the jurisdiction must be joined, except where this will be excused upon an allegation that the number is too great.⁸ And defendant stockholders may file a cross-bill to bring in all other delinquent stockholders within the jurisdiction of the court.⁹ For, obviously, if all who are liable have not been made parties, those who have been, can not be charged with the full liability, unless it be shown that the absent ones are insolvent or beyond the jurisdiction of the court.¹⁰ Where a corporation's articles provide for a capital

⁷ Strong, J., in *Hatch v. Dana*, 101 U. S. 205. Cf. "Liabilities of Shareholders in Joint-stock Companies," by S. S. P. Patterson, 6 Va. L. J. 579.

⁸ *Vick v. Lane* (1879), 56 Miss. 681; *Walsh v. Memphis, etc. R. Co.*, 2 McCrary, 156; *Mann v. Pentz*, 3 N. Y. 415; *Hadley v. Russell*, 40 N. H. 109; *Umsted v. Buskirk*, 17 Ohio St. 113; *Erickson v. Nesmith*, 46 N. H. 371; *Pierce v. Milwaukee, etc. Co.* (1875), 38 Wis. 253; *Carpenter v. Marine Bank*, 14 Wis. 705; *Coleman v. White* (1862), 14 Wis. 700; *Bogardus v. Rosendale Manuf. Co.* (1852), 7 N. Y. 147.

⁹ *Hatch v. Dana* (1879), 101 U. S. 205; *Wood v. Dummer* (1824), 3 Mason, 307; *Marsh v. Burroughs* (1871), 4 Woods, 463; *Holmes v. Sherwood*, 3 McCrary, 405; *Masters v. Rossie, etc. Mining Co.*, 2

Sandf. Ch. 301; N. Y. Code of Civil Procedure, §§ 1791-1794; *Hadley v. Russell*, 40 N. H. 109; *Umsted v. Buskirk*, 17 Ohio St. 113; *Hodges v. Silver Hill Mining Co.*, 9 Ore. 200.

¹⁰ *Marsh v. Burroughs*, 1 Woods, 463; *Wood v. Dummer*, 3 Mason, 307; *Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78. Cf. *Erickson v. Nesmith*, 46 N. H. 371, 77 Am. Dec. 78; *Holmes v. Sherwood*, 3 McCrary, 405. But under the General Laws of Colorado, § 201, providing that a stockholder in a corporation shall be liable for its debts to the extent of his unpaid stock, and section 212, providing that a suit in equity may be brought against a stockholder of a corporation that has dissolved or ceased to do business, leaving debts unpaid, by joining the cor-

stock of a certain amount, the stockholders to give for their subscriptions their notes without interest, not to be liable at any time to an assessment for more than half of their face, in case of insolvency the whole capital subscribed is liable to creditors. Thus, if the corporation becomes bankrupt after a part is assessed and paid-in, the stockholders are liable for the whole unpaid amount; and the balance unpaid being collected by the assignee, the fund is, on intervention, liable to the lien of attachments made before the declaration of bankruptcy.¹¹

§ 616. (c) **When not necessary to make all stockholders parties defendant.**—In a suit in equity against stockholders who have not paid for their stock, where no evidence of the insolvency of any of them is presented, the decree should be against each of them in proportion to his unpaid stock. On proof that some are insolvent, the solvent must pay the proportion due from the insolvent.¹² There is a class of cases in which it is held that it is not necessary to join all the stockholders as parties defendant, and that the suit may be instituted against any or all, leaving them to seek their remedy against those not joined by compelling them to contribute.¹³ Some of these cases adopt a distinction between suits brought to wind up the corporation, and suits for the

poration and the stockholders in such suit, a complaint in an action on an insurance policy joining the company and several stockholders as defendants, and alleging that the company had ceased to do business leaving debts unpaid, does not misjoin the parties, and a separate judgment may be rendered against a stockholder in the same suit. *Tabor v. Goss & Phillips Manuf. Co.* (1888), 11 Colo. 419, holding also that under General Laws, § 212, requiring such joinder in case the corporation had ceased to do business leaving debts unpaid, the jurisdiction of the court to render judgment against the company and a separate judgment against the stockholder in the same suit having been established, there was no error in the admission of the policy and of the judgment against the company as evidence of damages, nor in the

rendition of judgment against the stockholder.

¹¹ *In re Glen Iron Works*, 20 Fed. Rep. 674.

¹² *Hodges v. Silver Hill Mining Co.*, 9 Oregon, 200.

¹³ *Hatch v. Dana* (1879), 101 U. S. 205; *Griffith v. Mangam*, 57 N. Y. 611; *Bartlett v. Drew* (1874), 57 N. Y. 587; *Brundage v. Monumental, etc. Mining Co.* (1885), 12 Oregon, 322; *Marsh v. Burroughs* (1871), 1 Woods, 463; *Holmes v. Sherwood* (1881), 3 McCrary, 405; *Glenn v. Williams* (1882), 60 Md. 93. *Cf.* *Von Schmidt v. Huntington* (1850), 1 Cal. 55; *Lamar Ins. Co. v. Gulick* (1882), 102 Ill. 41; *Wood v. Dummer* (1824), 3 Mason, 307; *Bonevitz v. Van Wert Co. Bank* (1884), 41 Ohio St. 78. *Cf.* *Erickson v. Nesmith* (1860), 46 N. H. 371; *Ogilvie v. Knox Ins. Co.* (1859), 22 How. 380.

simple collection of a debt.¹⁴ The corporation itself should be made a party in these suits, if it is in existence.¹⁵ But a corporation which has sold everything except its right to exist, and has no officers or place of business, is not a necessary party to a suit against a stockholder to make him liable for his unpaid subscription, although having power to reorganize and collect the stockholder's dues.¹⁶

§ 617. **Evidence. Bill of discovery.**—The stock-books of a corporation, as a rule, constitute *prima facie* evidence that the stock is owned by the individuals named as stockholders in order to make them liable for corporate debts.¹⁷ And this is also sufficient evidence to make them chargeable for unpaid subscriptions.¹⁸ But a mere informal document not appearing to have been intended as a register, can not be received as the register.¹⁹ The liability imposed on the stockholders of a corporation organized under the New York act of 1848, is not taken away by the recording of the certificate that the stock is paid up, unless that be the fact, the certificate not being conclusive upon the fact of payments.²⁰ On the other hand the provision of that act that stockholders of a corporation shall be liable to its creditors to an amount equal to the amount of their stock until the entire capital stock is paid in, and a certificate thereof made and recorded, failure to make and record the certificate within the required time renders the stockholders individually liable, although the entire capital stock has been paid in.²¹ In an action by a

¹⁴ Hatch v. Dana (1879), 101 U. S. 205; Bartlett v. Drew (1874), 57 N. Y. 587, 589, 591; Bonewitz v. Van Wert Co. Bank, 41 Ohio St. 78.

¹⁵ Patterson v. Lynde, 112 Ill. 196; Coleman v. White, 14 Wis. 700; Perkins v. Sanders, 56 Miss. 733.

¹⁶ Wellman v. Howland Coal & Iron Works, 19 Fed. Rep. 51.

¹⁷ Hoagland v. Bell, 36 Barb. 57; Thornton v. Lane, 11 Ga. 459. Cf. Stanley v. Stanley, 26 Me. 191.

¹⁸ Turnbull v. Payson, 95 U. S. 418; Webster v. Upton, 91 U. S. 65; Glenn v. Springs, 26 Fed. Rep. 494; Glenn v. Orr, 96 N. C. 413. Errors in the register not relating to the matter in dispute are im-

material. Southampton Docks Co. v. Richards, 1 Mann. & Gr. 448, 461; London, etc. Ry. Co. v. Freeman, 2 Mann. & Gr. 606.

¹⁹ Wolverhampton, etc. Co. v. Hawkesford, 7 C. B. (N. S.) 795.

²⁰ Veeder v. Mudgett, 95 N. Y. 295, construing N. Y. Laws of 1848, ch. 40.

²¹ Plass v. Housman (1888), 2 N. Y. Supp. 235, construing N. Y. Laws of 1848, ch. 40, § 10. See, also, Barre Nat. Bank v. Hingham Manuf. Co. (1879), 127 Mass. 563; Wheeler v. Millar (1882), 90 N. Y. 358; Veeder v. Mudgett (1884), 95 N. Y. 295; Thompson v. Reno Savings Bank (1885), 19 Nev. 103, 3 Am. St. Rep. 797.

creditor of a corporation to enforce the statutory liability of a stockholder, on the ground that his subscription is unpaid, the burden of proof is on the creditor to show the fact of non-payment.²² In an action against a stockholder for his proportionate share of a debt of the corporation, testimony that would be competent in a suit upon the debt against the corporation to establish the demand against it, is competent to establish the same against the stockholder.²³ Parol evidence is not admissible to vary the terms of a subscription, or to show a discharge from liability other than as provided for by the by-laws and charter.²⁴ A bill may be maintained by creditors of a corporation for the discovery of its members upon whom a statutory liability for its debts is imposed.²⁵

§ 618. The decree, in suits in equity.—The prevailing rule in equitable actions against stockholders, is that the decree must be drawn so as to give an opportunity to all creditors to prove their claims,²⁶ and no creditor, no matter what may be his position in the litigation in point of time, is entitled to priority over the rest.²⁷ Nevertheless, it should be so framed as to give the stockholders all the privileges to which they are entitled under the fundamental law of the corporation, where the stock is called in by the officers.²⁸ And an equitable contribution among all the stockholders must be ordered by the court whenever it is possible.²⁹ Only so much of the capital as is necessary for the payment of the debts, will be called in where the court makes the assessment, and a proper apportionment is made among the stockholders.³⁰ But a stockholder can not enjoin a receiver from proceeding to enforce the balance due from him on his stock, on the ground that the whole amount due from stockholders may not

²² *Wellington v. Continental Const. & Ins. Co.* (1889), 52 Hun, 408.

²³ *Borland v. Haven* (1889), 37 Fed. Rep. 394.

²⁴ *Marshall Foundry Co. v. Kilian* (1888), 99 N. C. 501, 6 Am. St. Rep. 539.

²⁵ *Morgan v. New York, etc. R. Co.*, 10 Paige, 290, 40 Am. Dec. 244; *Middletown Bank v. Russ*, 3 Conn. 135; *Miers v. Zanesville, etc. Turnpike Co.*, 11 Ohio St. 273. *Cf. Bogardus v. Rosendale Manuf. Co.*, 7 N. Y. 147; *Monographic Note*, 3 Am. St. Rep. 867.

²⁶ *Erickson v. Nesmith*, 46 N. H. 371.

²⁷ *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532. *Cf. Hickling v. Wilson*, 104 Ill. 54.

²⁸ *Pentz v. Hawley*, 1 Barb. Ch. 122.

²⁹ *Morgan v. New York, etc. R. Co.*, 10 Paige, 490, 40 Am. Dec. 244.

³⁰ *Robinson v. Bank of Darien*, 18 Ga. 65, 108. *Cf. Miers v. Zanesville, etc. Turnpike Co.*, 13 Ohio, 197; *Jones v. Arkansas Mechanical, etc. Co.*, 38 Ark. 17.

be needed to pay the debts of the corporation, if all the other solvent stockholders pay the fair share of what remains due on their stock.³¹

§ 619. Interest and costs, when allowed against the stockholders.—When interest is recoverable upon contracts, debts and engagements of the corporation, it may be allowed thereon against the shareholder as part of his personal liability,³² provided the allowance thereof does not make the total amount greater than that for which the shareholder is liable under the statute.³³ Interest will run against the stockholder from the commencement of the suit against him, when he repudiates his liability, for that is the time at which the liability accrues; and this is so even if the principal with interest is in excess of the amount of his liability.³⁴ And under the national banking act, interest runs from the date of the comptroller's order.³⁵ But if a statute creates a proportionate liability for unpaid bills, interest will not be allowed, since no stockholder can tell what he is to pay until it is ascertained by suit.³⁶ Where stockholders are severally liable for corporate debts, they are also severally chargeable with the costs of a proceeding against them by creditors, even where the amount with costs exceeds their individual liability, for the reason that the creditor should not be put to the expense of a suit.³⁷ But it is said that a creditor is not entitled to include in his judgment against a stockholder the costs of his proceeding against the corporation.³⁸ Interest upon liability of a stockholder to a corporation, begins to run before the commencement of an action against him.³⁹

³¹ Hightower v. Thornton, 8 Ga. 486, 502, 52 Am. Dec. 412.

³² Richmond v. Irons (1887), 121 U. S. 27; Wheeler v. Millar (1882), 90 N. Y. 353.

³³ Wheeler v. Millar (1882), 90 N. Y. 353; Grund v. Tucker, 5 Kan. 70. Cf. "Payment of Interest on the Winding-up," 18 Sol. J. & Rep. 926.

³⁴ Handy v. Draper, 89 N. Y. 334; Burr v. Wilcox, 22 N. Y. 551; Mason v. Alexander, 44 Ohio St. 318; Wehrman v. Reakirt, 1 Cin. Sup. Ct. Rep. 230. Cf. Cleveland v. Burnham, 64 Wis. 347; Grand Rapids Savings Bank v. Warren, 52 Mich. 557. *Contra*, Sackett's

Harbor Bank v. Blake, 3 Rich. Eq. 225; Munger v. Jacobson, 99 Ill. 349; Cole v. Butler, 43 Me. 401.

³⁵ Carey v. Galli, 94 U. S. 673.

³⁶ Grew v. Breed, 10 Met. 569, 571; Crease v. Babcock, 10 Met. 524, 568.

³⁷ Cole v. Butler, 43 Me. 401; Grose v. Hilt, 36 Me. 22.

³⁸ Rorke v. Thomas, 56 N. Y. 559, 565; Bailey v. Baucker, 3 Hill, 188. But see Grand Rapids Savings Bank v. Warren, 52 Mich. 557, and Irons v. Manufacturers' Bank (1888), 36 Fed. Rep. 843.

³⁹ Manley v. Mayer (Kan. 1904), 75 Pac. 550.

CHAPTER XXIV.

DEFENSES OF STOCKHOLDERS TO CREDITORS' SUITS.

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| <p>§ 620. Defenses that are unavailable by stockholders.</p> <p>621. Conclusiveness of judgment against the corporation.</p> <p>622. Set-off and counterclaim by stockholder.</p> <p>623. (a) Buying up claims to set-off. Trust fund theory.</p> <p>624. Payment to another creditor.</p> <p>625. Release by creditors.</p> <p>626. <i>Nul tiel</i> corporation.</p> <p>627. Illegal issue of stock.</p> <p>628. Fraud in procuring subscription.</p> <p>629. (a) Insolvency of the corporation bars the defense.</p> <p>630. (b) Remedy by bill in equity.</p> <p>631. (c) Rescission of the contract.</p> <p>632. (d) Fraudulent intent need not be proved.</p> <p>633. (e) "Fraudulent representations," defined.</p> <p>634. (f) Necessary allegations in setting up fraud as defense.</p> | <p>§ 635. (g) Remedy by action for money had and received.</p> <p>635a. Irregular incorporation is no defense.</p> <p>636. Conditions unfulfilled.</p> <p>637. Forfeiture and cancellation of stock.</p> <p>638. Withdrawal of subscription.</p> <p>639. Rescission of contract.</p> <p>640. Compromise.</p> <p>641. Estoppel to deny liability.</p> <p>642. Laches, ratification. Waiver of defenses.</p> <p>643. Ignorance or mistake, no defense. Forfeiture of charter no defense.</p> <p>644. Statute of limitations as a bar to suit.</p> <p>645. <i>Ultra vires</i> acts. Mismanagement, delay.</p> <p>646. Secret agreements. Irregular incorporation.</p> <p>647. Failure of subscription to full capital stock.</p> <p>648. Material change of corporate enterprise.</p> <p>649. Failure of corporation to tender stock certificates.</p> <p>650. Discharge of stockholder in bankruptcy.</p> |
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§ 620. Defenses that are unavailable by stockholders.—Many defenses which the company might make to actions against it by corporate creditors, cease to be available after insolvency in actions against the members themselves to enforce their personal liability.¹ The courts disfavor defenses to subscriptions. Having taken the chance to make large gains, the subscriber also took the risk of total loss. Courts, as a rule, look with suspicion upon defenses to creditors' actions against stockholders, and are es-

¹ *Vide infra*, § 621.

pecially apt to regard with disfavor those interposed after corporate insolvency;² so that after a corporation has become insolvent, a creditor may readily enforce the payment of unpaid stock subscriptions by the subscriber; but in order to fasten the liability upon the defendant it must affirmatively appear that he is actually a stockholder, and that his stock is not full paid.³ It is no defense to a creditor's action against stockholders, that the officers of the corporation were guilty of fraud or neglect in the management of the company's affairs while it was in a solvent condition. Thus, where a part of the outstanding capital stock of the company was purchased by the authority of the board of directors, and was subsequently cancelled without the consent of the other stockholders, the stock so cancelled not being available to pay the debts of the company upon its insolvency, the action of the board was held not to be a defense in an action against a stockholder.⁴ A stockholder, liable for corporate debts, as to that portion of his stock subscription remaining unpaid, can not evade his liability upon the insolvency of the company or in contemplation thereof. Thus, where the directors of a company took a majority of the shares, giving notes therefor, secured by the stock, and upon the failure of the company one of them agreed to pay the president a certain sum to substitute his note for that of the former and take his stock, it was held that the transaction was a fraud upon the creditors of the corporation in impairing the available assets of the corporation, and therefore not a defense in an action against the director.⁵

§ 621. Conclusiveness of judgment against the corporation.

—The judgment against the corporation can be impeached only for fraud and collusion, or for want of jurisdiction.⁶ The share-

² *Keystone Bridge Co. v. Barstow* (1880), 8 Mo. App. 494; *Henry v. Vermillion & Ashland R. Co.* (1848), 17 Ohio, 187.

³ *Lathrop v. Kneeland* (1866), 46 Barb. 432. *Cf. Mackley's Case* (1875), L. R. 1 Ch. Div. 247. As to what constitutes a stockholder, *Wheeler v. Millar* (1882), 90 N. Y. 353; 8 Vic. ch. 16, §§ 8, 21.

⁴ *In re Republican Insurance Co.* (1873), 3 Biss. 452, where it was further held that although the charter of an insurance company gives the right to assess unpaid

stock for the payment of losses exceeding the means of the corporation, this does not limit the court to assessments for the payment of losses only, but the stock may be assessed for the payment of other liabilities.

⁵ *Nathan v. Whitlock* (1841), 9 Paige Ch. 152. *Cf. Schley v. Dixon* (1858), 24 Ga. 273.

⁶ See *Monographic Notes*, 3 Am. St. Rep. 858; Annotations by J. C. Harper, 15 Fed. Rep. 360. See 49 L. R. A. 353.

holder can not set up by way of defense in the action against him, matters which the corporation might have pleaded, but which it failed to avail itself of.⁷ A judgment against a corporation is really a judgment against the stockholders in their corporate capacity, and is obtained, therefore, in an action in which they are sufficiently represented.⁸ Accordingly, a shareholder is bound by a decree against the corporation, even though he failed to receive personal service, unless fraud be proven.⁹ So a judgment against a corporation for the recovery of money, is conclusive evidence in a suit against a stockholder for the collection of the judgment, of the existence of the corporation, and its liability to plaintiff therein, as thereby determined; and a judgment, whether given in an action *ex contractu* or *ex delicto*, is thereafter an indebtedness of the corporation for which a stockholder is liable to the amount due on his stock.¹⁰ In New York it is doubtful whether the judgment against the corporation is conclusive against the shareholder.¹¹ In another case it is held that

⁷ *Graham v. Boston, etc. R. Co.*, 118 U. S. 161; *Glenn v. Springs*, 26 Fed. Rep. 494; *Bissett v. Kentucky River Navigation Co.*, 15 Fed. Rep. 353; *Marsh v. Burroughs*, 1 Woods, 463; *Chaffin v. City of St. Louis*, 4 Dill. 24; *Sumner v. Marcy*, 3 Wood. & M. 105; *Milliken v. Whitehouse*, 49 Me. 527; *Merrill v. Suffolk Bank*, 31 Me. 57; *Wilson v. Pittsburgh, etc. Coal Co.*, 43 Pa. St. 424; *Conway v. Duncan*, 28 Ohio St. 102; *Bank of Wooster v. Stevens*, 1 Ohio St. 233; *Henry v. Vermillion, etc. R. Co.*, 17 Ohio, 187; *Hampson v. Weare*, 4 Iowa, 13, 66 Am. Dec. 116; *Grind v. Tucker*, 5 Kan. 70; *Bank of Australasia v. Nias*, 16 Q. B. 717; 20 L. J. (N. S.) Q. B. 284; *Morawetz on Corporations*, § 619; *Stephens v. Fox*, 83 N. Y. 313; *Slee v. Bloom*, 20 Johns. 669, 10 Am. Dec. 273; reversing 5 Johns. Ch. 366; *Hawes v. Petroleum Co.*, 101 Mass. 385. But see *Conant v. Van Schaick*, 24 Barb. 87; *Wilson v. Stockholders*, 43 Pa. St. 424; *Larabee v. Baldwin*, 35 Cal. 135. Cf. *Hudson v. Carman*, 41 Me. 84.

⁸ *Farnum v. Ballard, etc. Ma-*

chine Shop (1853), 12 Cush. 507; *Robbins v. Justices, etc.* (1858), 12 Gray, 225; *Handrahan v. Cheshire Iron Works* (1862), 4 Allen, 396; *Gaskill v. Dudley*, 6 Met. 546; *Hampson v. Weare* (1856), 4 Iowa, 13; *Bullock v. Kilgour* (1883), 39 Ohio St. 543; *Thayer v. New England Lithographic Co.*, 108 Mass. 523; *Milliken v. Whitehouse* (1860), 49 Me. 527; *Came v. Brigham*, 39 Me. 35; *Wilson v. Stockholders, etc.*, 43 Pa. St. 424; *Donworth v. Coolbaugh* (1857), 5 Iowa, 300. Cf. *Connecticut River Savings Bank v. Fiske*, 60 N. H. 363; *Chesnut v. Pennell*, 92 Ill. 55; *Merrill v. Suffolk Bank* (1849), 31 Me. 57; *Holyoke Bank v. Goodman, etc. Manuf. Co.* (1852), 9 Cush. 576; *Bank of Australasia v. Nias*, 16 Q. B. 717, 20 L. J. (C. B.) 284.

⁹ *Glenn v. Springs*, 26 Fed. Rep. 494.

¹⁰ *Powell v. Oregonian Ry. Co.* (1889), 38 Fed. Rep. 187. But see § 151.

¹¹ *Wheeler v. Millar*, 90 N. Y. 353, 24 Hun, 541; *Stephens v. Fox*, 83 N. Y. 313; *McMahon v.*

judgment against a private corporation is not conclusive proof of the debt in an action to recover it against the individual stockholders on the ground that the capital stock had not been fully paid in, nor a certificate of its payment filed as prescribed by law.¹² And in another case in the Court of Appeals, it is said that "the judgment against the corporation is of no virtue or effect in the action against the stockholders, and is only evidence as proving the performance of the condition."¹³ The judgment may avail, however, in these cases, to prevent the statute of limitations from barring the action.¹⁴ And in other States there are cases which hold that the judgment against the corporation is only *prima facie* conclusive against the individual shareholders.¹⁵

§ 622. **Set-off and counterclaim.**—A stockholder owing the corporation a debt for unpaid subscription to its capital stock, when sued thereon by the assignee in bankruptcy of the corporation, can not set-off an obligation of the corporation assigned to the stockholder. As soon as the company becomes insolvent, and the fact becomes known to the stockholder, the right of set-off for an ordinary debt to its full amount, ceases. The stock debt becomes a fund belonging equally in equity to all the creditors and cannot be appropriated by the stockholder debtor to the exclusive payment of his own claim.¹⁶

Rule of the United States Supreme Court.—The rule declared by the United States Supreme Court, as to allowance, by an assignee in bankruptcy, of a claim held by a stockholder against the corporation, on the amount due from him on a subscription of stock to the company, is that: "The debts must be mutual; must be in the same right; the case before us is not of that character.

Macy, 51 N. Y. 155; Miller v. White, 50 N. Y. 137; Moss v. Averell, 10 N. Y. 450; Strong v. Wheaton, 38 Barb. 616; Moss v. McCullough, 5 Hill, (N. Y.) 131, 7 Barb. 279; Moss v. Oakley, 2 Hill, (N. Y.) 265; Belmont v. Coleman, 1 Bosworth, 188, 21 N. Y. 96; Conklin v. Furman, 8 Abb. Pr. (N. S.) 161. *Cf.* Union Bank v. Wando Mining, etc. Co. (1881), 17 S. C. 339.

¹² Lawyer v. Rosebrook (1888), 48 Hun, 454.

¹³ Kincaid v. Dwinelle, 59 N. Y. 551.

¹⁴ Van Cott v. Van Brunt, 2 Abb. N. C. 283, 294; reversed on other points, 82 N. Y. 535.

¹⁵ Berger v. Williams, 4 McLean, 577; Stephens v. Fox, 83 N. Y. 313; Belmont v. Coleman, 1 Bosworth, 188, 21 N. Y. 96; Merchants' Bank v. Chandler, 19 Wis. 435; Grund v. Tucker, 5 Kan. 70. See also Bigelow on Estoppel, 89; Thompson on Liability of Stockholders, § 329, note. *Cf.* McMahon v. Macy, 51 N. Y. 155, 165.

¹⁶ Sawyer v. Hoag (1873), 17 Wall. 610.

The debt which the appellant owed for his stock was a trust-fund devoted to the payment of all the creditors of the company. As soon as it became insolvent and the fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors and could not be appropriated by the debtor to the exclusive payment of his own claim. It is unnecessary to go into the inquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or to the effect of the bankruptcy proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could be applied exclusively to the payment of one claim, though held by a stockholder who owed that amount on his subscription.¹⁷ A subscriber cannot set-off a debt due him from the corporation, in a suit to enforce payment of unpaid subscription, in behalf of creditors of an insolvent corporation.¹⁸ But the subscriber as to the corporate debt due him, has the same remedies as other creditors and the same right to share in the corporate assets.¹⁹ The subscriber may set-off money due him under the contract of subscription.²⁰ A subscriber cannot set-off a judgment lien, where there are prior liens.²¹ But in a suit by the corporation, not for corporate creditors, but on its own behalf and for its own benefit to enforce payment of unpaid subscription, the subscriber may in defense of the suit, set-off a debt due him from the corporation.²² When sued, the subscriber may set-off damages by reason of misrepresentation inducing the subscription.²³ Whether a shareholder may set-off against his liability to corporate creditors, claims which he himself holds against the company, depends upon the nature of the liability sought to be enforced, the distinction being between his liability at common

¹⁷ *Sawyer v. Hoag* (1873), 17 Wall. 610, affirmed in *Scammon v. Kimball*, 92 U. S. 367; *Scovill v. Thayer*, 105 U. S. 152; *Patterson v. Lynde*, 106 U. S. 519; *Gilchrist v. Helena, etc. Co.* (1892), 49 Fed. 395 (U. S., C. C. A.) (Mont. 1892).
¹⁸ *Wyman v. Williams* (1898), 53 Neb. 670; *Colorado, etc. Co. v. Sedalia, etc. Co.* (1899), 13 Colo. App. 474; *Welch v. Sargent* (1898), 127 Cal. 72; *Richardson v. Merritt* (1899), 74 Minn. 354; *Handley v. Stutz* (1891), 139 U. S.

417; *Killen v. Barnes* (1900), 106 Wis. 546; *Efird v. Piedmont, etc. Co.* (1899), 55 S. C. 78, 32 S. E. 758.

¹⁹ *Long v. Penn. Ins. Co.* (1847), 6 Pa. St. 421.

²⁰ *Indiana, etc. Co. v. McGill* (1896), 15 Ind. App. 1.

²¹ *Gilchrist v. Helena, etc. R. R.* (1892), 49 Fed. 519.

²² *Bausman v. Denny* (1896), 73 Fed. 69.

²³ *Owens v. Boyd, etc. Co.* (1898), 95 Va. 560, 28 S. E. 950.

law, and under statutes which are merely declaratory of the common law, on the one hand; and, on the other hand, the additional personal liability, over and above his subscription, imposed upon the shareholder in certain kinds of companies by our modern statutory law. In the former case counter-claims and offsets are not available in actions brought by or in behalf of corporate creditors.²⁴ In the latter case, the availability of the plea depends

²⁴ *In re Empire City Bank*, 18 N. Y. 199, 227; *Thompson v. Reno Savings Bank* (1885), 19 Nev. 103, 3 Am. St. Rep. 797, annotated at length; "Set-off in Winding-up of Joint-stock Companies," 7 Irish L. T. 405; *Mudford's Case*, 14 Ch. Div. 634; *Black's Case*, L. R. 8 Ch. 254; *Grissell's Case*, L. R. 1 Ch. 528. *Cf. Pellatt's Case*, 2 Ch. 527; *Wheeler v. Millar* (1882), 90 N. Y. 353; *Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 363. In this case the defendant corporation was indebted to plaintiff, who had exclusive control of the management of the corporation, and elected its board of directors. He brought a collusive suit, which was defended only formally by one of the directors of his creation, and obtained judgment for a large amount. He then sued a county in equity to have applied on his judgment the amount due from the county to the corporation on an unpaid subscription to its stock. And it was held that the county could be heard upon the question of the amount of the true indebtedness of the corporation to the plaintiff, notwithstanding the judgment, the county not having been a party to the first suit; and that plaintiff being himself a stockholder, must, in that capacity, contribute to the payment of the debt of the corporation to himself. *Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 363. Offsets and counter-claims are, however, available in actions brought by the company in its own behalf while it is yet a "going concern." *Barnett's Case*, L. R.

10 Eq. 449. And when the company while yet solvent has allowed an offset, it can not be questioned after insolvency by corporate creditors except on the ground of fraud. *Goodwin v. McGehee* (1849), 15 Ala. 232; *Thompson v. Meisser* (1884), 108 Ill. 359. *Cf. Paine v. Central Vermont R. Co.*, 118 U. S. 152. Thus where a corporation made a note to a stockholder for money advanced by him, with the agreement that assessments on his stock should be considered payments on the note, and assessments for more than the amount of the note became due and the difference only was paid by the stockholder, it was held that the note was paid as between the stockholder and the corporation and as against an indorsee taking the note when overdue. *Paine v. Central Vermont R. Co.* (1885), 118 U. S. 152. In a proceeding for the voluntary liquidation of a corporation, a stockholder, who had obtained shares under an agreement with the company for full-paid stock, was held to have a right of action for damages for breach of the agreement. *Mudford's Case* (1880), L. R. 14 Ch. Div. 634. *Cf. Pellat's Case* (1866), L. R. 2 Ch. 527. But where stock was subscribed for and taken under an agreement that the subscribers should sell certain engines to the corporation and subsequently they were unable to induce the corporation to take the engines, which were built in pursuance of the agreement, it was held that against corporate creditors the subscribers were not

upon the language and purpose of the statute creating the additional liability. If the language of the act be construed as indicating an intention on the part of the legislature to create a fund, to which all shareholders are to contribute and from which the creditors are to be paid ratably, the shareholder must contribute his proportion thereto, and then come in with other creditors in the distribution of the corporate assets.²⁵ But if the statute imposes upon shareholders a personal liability to creditors immediate and several, so that any creditor may institute an independent action against any shareholder for the enforcement of corporate debts, then a defendant shareholder may set-off debts due from the company to himself.²⁶ But of course a claim on

entitled to damages as set-off against their liability as stockholders. *Black's Case* (1872), L. R. 8 Ch. 254. A stockholder who is a creditor may sue a co-stockholder whose subscription is unpaid, but he must show that his own subscription is paid. *Weber v. Fickey* (1877), 47 Md. 196.

²⁵ *Weber v. Fickey*, 47 Md. 196; *Emmert v. Smith*, 40 Md. 123; *Witters v. Sowles* (1887), 32 Fed. Rep. 130; *Clapp v. Wright* (1880), 21 Hun, 240; *Buchanan v. Meisser* (1883), 105 Ill. 638; *Matthews v. Albert* (1866), 24 Md. 527; *Briggs v. Cornwall* (1881), 9 Daly, 436; *Hillier v. Allegheny Mutual Ins. Co.*, 3 Pa. St. 470; *Thebus v. Smiley* (1884), 110 Ill. 316; *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 777, holding that stockholders are denied the privilege of this defense in the case of a corporation formed under a statute imposing a liability, in case of insolvency, to the full amount of the stock although upon their contribution of their proportionate indebtedness to the common fund, they are permitted to participate upon the same terms as other creditors in the distribution of the assets. *Terry v. Bank of Cape Fear* (1884), 20 Fed. Rep. 777. So in a proceeding to wind up the affairs of the corporation in which an account

is taken of all assets and liabilities, including aggregate liabilities of stockholders, a stockholder who is also a creditor, must, in case of a deficiency, pay the amount required on his stock and take *pro rata* with other creditors. *In re Empire City Bank*, 18 N. Y. 199 (1858); *Lawrence v. Nelson* (1860), 21 N. Y. 158; *Matthews v. Albert* (1866), 24 Md. 527; *Emmert v. Smith* (1874), 40 Md. 123; *Hobart v. Gould* (1881), 8 Fed. Rep. 57; *Witters v. Sowles* (1887), 32 Fed. Rep. 130; *Buchanan v. Meisser* (1883), 105 Ill. 638; *Thebus v. Smiley* (1884), 110 Ill. 316. Where a stockholder has a claim against a corporation equal to the amount of his stock, and it is one for which the stockholders are all equally liable, another creditor cannot maintain an action at law against him; but as he is interested in the fund existing for the benefit of creditors, the proper relief is by an accounting in which all parties are brought in. *Mathez v. Neidig*, 72 N. Y. 100 (1878).

²⁶ *Wheeler v. Millar* (1882), 90 N. Y. 353; *Mathez v. Neidig*, 72 N. Y. 100 (1878); *Agate v. Sands* (1878), 73 N. Y. 620; *Richards v. Crocker* (1887), 19 Abb. N. Cas. 73; *Christensen v. Colby* (1887), 43 Hun, 362; *Tallmadge v. Fishkill* (1848), 4 Barb. 382; *Jarman*

which the corporation is not legally liable, is not available as a set-off.²⁷ And stockholders are not creditors in respect of sums paid by them to the company on their subscriptions.²⁸ In the federal court, a defendant stockholder can not set off a claim against the corporation, enforceable only in equity, upon a motion for execution against him, after recovery of a judgment at law against the corporation, and return of *nulla bona* as provided for by the statute.²⁹

§ 623. (a) Buying up claims to set-off. Trust-fund theory as to capital stock.—A stockholder who, under the charter of the corporation, is personally liable for its debts, can not, by buying up debts of the corporation, thus discharge his liability for more than the amount actually paid by him.³⁰ Where a stock-

v. Benton (1883), 79 Mo. 148; Boyd v. Hall (1876), 56 Ga. 563; Thompson v. Meisser, 108 Ill. 359; Buchanan v. Meisser (1883), 105 Ill. 638; Remington v. King, 11 Abb. Pr. 278 (1858); Briggs v. Penniman, 8 Cow. 387. Where a stockholder had been sued by the receiver of an insolvent bank to recover an assessment upon his stock, the defendant pleaded, by way of counter-claim and set-off, an interest in the balance of a trust fund previously created by the authority of the comptroller of the currency to retire certain worthless securities held by the bank, and the plaintiff demurred to the plea. The demurrer was overruled on the ground that the set-off was good if, as the defendant claimed, the fund to which he had contributed was a trust fund for a special purpose and not an asset of the bank. Welles v. Stout (1889), 38 Fed. Rep. 807; Belcher v. Willcox (1869), 40 Ga. 391; Garrison v. Howe (1858), 17 N. Y. 458.

²⁷ Hiller v. Allegheny Mut. Ins. Co. (1846), 3 Pa. St. 470.

²⁸ Stockholders who have paid sums for which they are liable on their stock, cannot participate in the division of the fund for creditors on the ground that they are

creditors. Hollister v. Hollister Bank (1865), 2 Abb. App. Dec. 367.

²⁹ Straine v. Bradford, etc. Co. (1898), 88 Fed. 571.

³⁰ Thompson v. Meisser (1884), 108 Ill. 359; Sawyer v. Hoag, 17 Wall. 610. It has been held in New York that a defendant stockholder, in an action to enforce his statutory liability, cannot avail himself, in defense, of the fact that he has purchased judgments against the corporation, unless it also appears that he paid the full amount of the judgments. Bulkley v. Whitcomb (1884), 49 Hun, 290. Likewise, where a stockholder in a joint-stock company has paid a claim against the company which was a first lien he has paid his own debt and cannot, by taking an assignment of it, keep it alive and thus take precedence of subsequent lienors; and his assignee with notice occupies the same position. Hardy v. Norfolk Manuf. Co. (1885), 80 Va. 404; Briggs v. Cornwell (1881), 9 Daly, 436. It has also been held that where, in a suit to wind up the affairs of a corporation, it had been decreed that certain securities delivered to the stockholders by a purchasing company were assets of the corporation, but that

holder of a bank, which had made an assignment for the benefit of creditors, had, after the assignment, purchased claims against the bank aggregating an amount equal to his stock, and had delivered them to the assignee, who accepted them as payment of the bank's indebtedness on the claims and marked them paid, it was held, in an action against him by a creditor, that he should be allowed the actual amount paid by him, but not the face value of the claims.³¹ If a stockholder, upon being sued by an admitted creditor of the corporation, enters into a collusive arrangement with a third party by which the latter obtains claims against the company, which are, by the arrangement, reduced to a judgment against the stockholder, the judgment and the satisfaction thereof can not be pleaded in bar to the first action.³² Where a stockholder in an insurance company, gave his note for eighty-five per cent. of his subscription to the capital stock of the corporation, and after it became insolvent and he knew the fact, he bought up a claim against the corporation for one-third its face, and being sued on his note by the assignee in bankruptcy of the corporation, set up the claim as an off-set,—this was an attempted fraud on the bankrupt act, independent of the trust-fund doctrine. The unpaid subscriptions to the capital stock of an insolvent corporation, are a trust fund for the benefit of the general creditors of the corporation. The governing officers cannot, by agreement or other transaction with the stockholder, release him from his obligation to pay, to the prejudice of the corporate creditors, ex-

a stockholder who was also a creditor of the company might elect to retain his share of the securities less the balance of the debt from him, the stockholder, by retaining the securities, had exercised his right of election. *Peters v. Ft. Madison Construction Co.*, 72 Iowa, 405; *Goodwin v. McGehee* (1849), 15 Ala. 232.

³¹ *Gauch v. Harrison* (1883), 12 Bradw. (Ill.) 457.

³² *Manville v. Karst* (1883), 16 Fed. Rep. 173. In Nevada stockholders are not liable under the constitution for debts of the corporation, but the capital stock, and especially the unpaid subscriptions, constitute a trust fund for the benefit of creditors;

and it has been held that where a stockholder of an insolvent bank was also a creditor, having his debt collaterally secured, he must, in order to share ratably with other creditors, first pay the amount of his unpaid subscription and surrender the collateral. *Thompson v. Reno Savings Bank* (1885), 19 Nev. 103, 3 Am. St. Rep. 797. Where the debtor of a bank, after the bank's insolvency and the appointment of a receiver, purchased notes of the bank, he cannot set off the amount of the notes as against his indebtedness, inasmuch as all the creditors are entitled to share equally in its assets. *Given v. Phelps* (1861), 34 Barb. 224.

cept by fair and honest dealing and for a valuable consideration. An undertaking by the corporation and the subscriber to convert his debt owed to the corporation for his stock, into a debt for the loan of money, whereby to extinguish the stock debt, is a fraud upon the public who are expected to deal with them. Where the method adopted is pretended payment for the stock by check, which is never paid, and immediate loan of the amount to the stockholder upon security, which is never paid to the corporation, no actual money being paid or received by either party to the transaction, the system of operation is to the injury of the corporate creditor and beneficial alone to the stockholder and the corporation. The result is that the capital stock is not paid up in actual money, nor does it exist in the form of instalments, properly secured.³³

§ 624. Payment to another creditor.—Payment in good faith by a stockholder to a corporate creditor of the entire amount of his statutory liability, is a perfect defense in an action brought by another creditor of the corporation, for it amounts to a discharge of the liability.³⁴ Whatever satisfies or extinguishes the debt, as against the corporation, extinguishes also the liability of the stockholders, because the creditor can claim only one satisfaction of the debt.³⁵ Thus, the payment of a judgment confessed by a stockholder in favor of a *bona fide* creditor of the corporation, is a good defense to an action against the stockholder by another creditor, if the payment exhausts the stockholder's liability.³⁶

³³ *Sawyer v. Hoag* (1873), 17 Wall. 610.

³⁴ *Garrison v. Howe* (1858), 17 N. Y. 458; *Mathez v. Neidig*, 72 N. Y. 100 (1878); *Lane v. Harris* (1854), 16 Ga. 217; *Belcher v. Willcox* (1869), 40 Ga. 391; *Robinson v. Bank of Darien* (1855), 18 Ga. 65, 109; *Woodruff & Beach Iron Works v. Chittenden* (1859), 4 Bosw. 406; *Richards v. Brice* (1889), 16 N. Y. St. Rep. 1018; *Boyd v. Hall* (1876), 56 Ga. 563; *San Jose Savings Bank v. Pharis*, 58 Cal. 380. *Cf. Thebus v. Smiley* (1884), 110 Ill. 316; *Delano v. Butler* (1886), 118 U. S. 634. *Contra, Fowler v. Robinson*, 31 Me. 189 (1850); *Grose v. Hilt*, 36 Me. 22; *Young v. Brice* (1889), 3

N. Y. Supp. 123; *Thompson v. Meisser*, 108 Ill. 359; *Buchanan v. Meisser*, 105 Ill. 638; *Tallmadge v. Fishkill Iron Co.* (1848), 4 Barb. 382.

³⁵ *Young v. Rosenbaum*, 39 Cal. 643, 654; *San Jose Savings Bank v. Pharis*, 58 Cal. 380.

³⁶ In such a case it is immaterial, in the absence of fraud, that the creditor last suing, with knowledge of the pending suit derived from the stockholder, purchased the claims sued on, at a discount, for the purpose of suing the stockholder. *Manville v. Roeder*, 11 Mo. App. 317; *Mitchell v. Beekman* (1885), 64 Cal. 117; *Patterson v. Lynde*, 106 U. S. 519; *Harmon v. Page*, 62 Cal. 448;

And a stockholder is entitled to be credited with such amounts as he has paid in order to satisfy corporate debts, even if the amounts so paid do not, in the aggregate, cover his liability.³⁷ So also, where the corporation becomes insolvent and its property has been disposed of, so that it can do no business, its officers also having been enjoined from the performance of their duties, the stockholders are released from their liabilities even though no judgment of dissolution is entered.³⁸ If, however, a creditor has actually begun a suit to enforce the statutory liability of any individual shareholder, it is too late then for that stockholder to plead in defense the payment, subsequent to the beginning of the suit of some other corporate creditor.³⁹ In order to avail himself of the defense of payment, the defendant must show that he has actually paid the full amount of his liability on the claims of actual creditors of the corporation. Thus, a shareholder can not buy in claims at a discount, and set them off at their face value, in an action by another creditor to enforce his statutory

Holmes v. Sherwood, 3 McCrary, 405; 1 Pomeroy's Eq. Jur., §§ 279, 281. The officers of a corporation contracted an indebtedness after the corporation had ceased to do business, and after their functions had practically ceased, and it was held that the stockholders could not be made liable for this indebtedness. Union Bank v. Wando Mining & Manuf. Co., 17 S. C. 339.

³⁷ Kunkleman v. Rentchler, 15 Bradw. 271 (1884); Bulkely v. Whitcomb (1888), 49 Hun, 290; Lingle v. National Ins. Co. (1869), 45 Mo. 109; Holland v. Heyman (1878), 60 Ga. 174; Branch v. Baker, 53 Ga. 502; Belcher v. Willcox, 40 Ga. 391; Marsh v. Burroughs 1 Woods, 463. A stockholder may not, however, mortgage all his property to a creditor of the corporation, for that amounts to a preference. Gatch v. Fitch (1888), 34 Fed. Rep. 566; Ingalls v. Cole, 47 Me. 530, 541.

³⁸ Hollingshead v. Woodward, 107 N. Y. 96 (1885).

³⁹ Jones v. Wiltberger (1871), 42 Ga. 575; Lane v. Harris, 16 Ga.

217; Thebus v. Smiley (1884), 110 Ill. 316. *Contra*, Richards v. Brice 3 N. Y. Supp. 941, in which it was held that payment in good faith by a stockholder of the entire amount of his statutory liability, under Laws N. Y. 1875, ch. 611, to a creditor of the company after action brought, is a good defense to an action by another creditor of the company to enforce the stockholder's liability, although the latter action was commenced before the payment was made, on the ground that the commencement of the action creates no lien on the stockholder's property. To the same effect is Young v. Brice, 3 N. Y. Supp. 123 (1889), where it was held that payment by the holder of fully paid-up stock of an amount equal to the par value of his stock, to a creditor of the company, although made before judgment in the action brought, is a good defense to actions subsequently brought against the same stockholder by other creditors of the company.

liability.⁴⁰ Nor will a shareholder who has employed an agent to buy up claims at a discount, and then confessed judgment in favor of that agent, be permitted to plead the judgment in bar of an action by other creditors.⁴¹ Payment by a stockholder, to a firm of which he was a member, of a sum equal to the amount of his stock, to satisfy a debt due from the corporation to the firm, will not extinguish his liability as stockholder to other creditors of the corporation.⁴²

§ 625. **Release by creditors.**—The release, by its creditors, of a debt due from a corporation, operates as a release, not only of the corporation, but of the stockholders from the liability imposed by statute.⁴³ So where property is conveyed by incorporators to a trustee and accepted by him in full payment of the stock of the company, and is subsequently reconveyed by him to the original owners, a creditor who is also a stockholder and consents to the reconveyance has no right of action against the other stockholders.⁴⁴ Likewise when a promissory note, signed with

⁴⁰ *Gauch v. Harrison*, 12 Bradw. (Ill.) 459; *Thompson v. Meisser*, 108 Ill. 359. *Cf. Diven v. Phelps*, 34 Barb. 224; *Balch v. Wilson*, 25 Minn. 299; *Smith v. Mosby*, 9 Heisk. (Tenn.) 501; *Lanier v. Gayoso Savings Institution*, 9 Heisk. (Tenn.) 506.

⁴¹ *Manville v. Karst*, 16 Fed. Rep. 173.

⁴² *Buchanan v. Meisser* 105 Ill. 638. Nor is the payment of the judgments at a discount an extinction of the liability, although the judgments at full value would have satisfied it. *Kunkleman v. Rentchler* (1884), 15 Bradw. (Ill.) 271. Where, at the request of the directors of a corporation, the creditors thereof grant an extension of time for the payment of their debts, the extension will not release the stockholders from a statutory personal liability for its debts. *Aultman's Appeal*, 98 Pa. St. 505.

⁴³ *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343; *Bank of Ft. Madison v. Alden* (1889), 129 U. S. 372; *Brown v. Eastern Slate Co.*, 134 Mass. 590; *Parrott v.*

Colby (1875), 6 Hun, 55, affirmed (1877), 71 N. Y. 597. *Cf. Aultman's Appeal* (1881), 98 Pa. St. 505; *Hanson v. Donkersley*, 37 Mich. 184; *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557; *Jagger Iron Co. v. Walker*, 76 N. Y. 521 (1879); *Stilphen v. Ware*, 45 Cal. 110; *Sutherland v. Olcott* (1884), 95 N. Y. 93, reversing 29 Hun, 161; *Jones v. Barlow* (1875), 62 N. Y. 292. The company may contract for the exemption of its members from statutory liability. *In re Athenæum, etc. Society* (1859), 3 De G. & J. 660; *Halket v. Merchant Traders, etc. Assn.* (1849), 13 Q. B. 960; *Durham's Case* (1858), 4 Kay & J. 517; *Shelford on Joint-stock Companies* (2d London ed.) 4. Where members are severally liable under the statute, the release of one does not of course, release others. *Bank of Poughkeepsie v. Ibbotson* (1843), 5 Hill, 561. *Cf. Herries v. Platt* (1880), 21 Hun, 132; *Jagger Iron Co. v. Walker* (1879), 76 N. Y. 521.

⁴⁴ A number of persons owning timber lands formed a corporation

the name of a corporation by its treasurer, and indorsed with its name by its directors, is delivered to a person under an agreement between him and the corporation "that there should be no personal liability on the note," and he afterwards recovered judgment against the corporation in an action at law upon the note, it was held, on a bill in equity against the stockholders of the corporation to enforce payment of the judgment, that it was meant that there should be no statutory liability on the part of the stockholders; and that this agreement was admissible in defense, and was not merged in the judgment.⁴⁵ It is also held that if a corporation issue new shares after the claim of a creditor arose, he, not having dealt with the company on the faith of any capital represented thereby, can not insist on the holders of the new shares contributing a greater amount of capital, than the corporation itself could claim from them as part of its assets.⁴⁶

for the manufacture and sale of lumber and the lands were conveyed to a trustee for the benefit of the corporation, according to an agreement by which each member was to receive stock in proportion to his individual interest in the lands, the trustee accepting the lands in full payment of the shares; and it was held that a creditor of the corporation having full knowledge of the facts could not enforce a liability against a stockholder on the ground that the land conveyed by him was worth much less than the stock received therefor, and that therefore he was indebted to the corporation. Where the lands conveyed to the trustee are subsequently reconveyed by him to the original owners, a creditor of the corporation, who was also a stockholder and consented thereto, has no right of action against a stockholder on the ground that the lands retained their trust character after such reconveyance. *Bank of Fort Madison v. Alden* (1889), 129 U. S. 372. Assuming that the general insolvency law of Minnesota applies to corporations, a release of a debt due from a corporation by its

creditor, and a judgment of a court discharging the debtor pursuant to the provisions of the insolvency law, releases and discharges the stockholders in the corporation from the personal liability imposed by Const., art. 10, § 3. *Mohr v. Minnesota Elevator Co.* (1889), 40 Minn. 343.

⁴⁵ *Brown v. Eastern Slate Co.*, 134 Mass. 570; *Parrott v. Colby*, 6 Hun, 65 (1875), affirmed 71 N. Y. 597; *Jagger Iron Co. v. Walker*, 76 N. Y. 521 (1879); *Hardman v. Sage* (1888), 47 Hun, 230; *Stilphen v. Ware* (1872), 45 Cal. 110; *Jones v. Barlow* (1875), 62 N. Y. 202; *Bolen v. Crosby* (1872), 49 N. Y. 183.

⁴⁶ *First Nat. Bank of Deadwood v. Gustin Minerva Con. Mining Co.* (1890), 8 Ry. & Corp. L. J. 175. In this case Mitchell, J., said: "If a corporation issue new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect of the new shares was a clear gain to the creditor's security. So, too, if a party deal with a corporation with full

Whether an extension given to the corporation by a creditor will discharge a shareholder as to his liability by statute seems uncertain. In a New York case it has been held that it would not.⁴⁷ But although it is binding as between themselves, stockholders can not limit their liability by agreement, as by undertaking to make their stock non-assessable.⁴⁸ And where two corporations make a valid agreement by which the indebtedness of one to the other is extinguished, it is competent for them to rescind the contract and restore the original indebtedness, and make the stockholders of the debtor corporation liable as before.⁴⁹ An original subscriber for stock whose subscription is subsequently released by unanimous consent of the stockholders, is not liable to subsequent creditors.⁵⁰

§ 626. **Nul tiel corporation.**—It is a general principle that a person dealing with a corporation, can not set up irregularities occurring in the corporation, where no act which is a condition precedent to its existence, has been omitted.⁵¹ But while it is true that when one contracts with a corporation in such a manner

knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as parts of its assets. *Colt v. Amalgamating Co.*, 14 Fed. Rep. 12, 119 U. S. 343. This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant company was issued, and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security for it than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders, and not on their creditors."

⁴⁷ *Harger v. McCullough*, 2 Denio, 119 (1846).

⁴⁸ *Union Mutual Ins. Co. v. Frear Stone Manuf. Co.* (1881), 97 Ill. 537; *Dane v. Young* (1872), 61 Me. 160.

⁴⁹ *Borland v. Haven* (1888), 37 Fed. Rep. 394.

⁵⁰ *Scottish, etc. Co., Receiver, v. Stark* (Ky. 1904), 78 S. W. 455.

⁵¹ *Lessee of Frost v. Frostburg Coal Co.* (1860), 24 How. 278. And although the law under which a corporation is formed is unconstitutional, in an action by the corporation against a stockholder who has been a director and participated in calls upon the subscribers for payment of instalments upon their subscriptions, the defendant is estopped from denying the existence of the company. *Weinman v. Wilkinsburg & E. L. Pass. Ry. Co.* (1888), 118 Pa. St. 192; *Pope v. Capitol Bank* (1878), 20 Kan. 440; *Holbrook v. St. Paul Fire & Marine Ins. Co.* (1878), 25 Minn. 229.

as to recognize its existence either *de jure* or *de facto*, he will often be estopped from denying the fact of corporate existence, yet such cases arise where the corporation sues one who has contracted with it in its real or supposed corporate capacity, and the principle has no application to cases where subscriptions for stock are made in anticipation of incorporation; and to justify a finding that a person is estopped from denying the existence of a corporation on the ground that he has participated in its organization and acts, it must appear that they were performed in its corporate capacity. Thus, when a corporation sued subscribers to recover the balance of their unpaid subscriptions, it was held that the fact that they had paid all their subscription except the amount sued for, did not estop them from denying the existence of the corporation.⁵²

§ 627. **Illegal issue of stock.**—A subscriber to stock issued in excess of the amount allowed by law, is not liable on his subscription;⁵³ and if an overissue of stock is proved, it constitutes a defense in an action by the company or by its assignee in insolvency.⁵⁴ For, certificates of stock of an incorporated company issued in excess of its charter limit, are void, and the holder of them is entitled to none of the rights and subject to none of the liabilities of the holders of authorized stock.⁵⁵ He is not es-

⁵² Schloss v. Montgomery Trade Co. (1888), 87 Ala. 411. Unless the requirements of the statute under which a corporation is formed, have been complied with, it cannot maintain an action against a subscriber to enforce the payment of assessments upon his stock. Anvil Mining Co. v. Sherman (1889), 74 Wis. 226. And where a corporation continued to do business after the expiration of its term of existence under its charter, and one of its members sold property for it in the course of its business and collected the proceeds, he was not estopped from denying its existence in an action brought by it against him to recover the money. The proper remedy was a suit for an accounting by another stockholder bringing in all the stockholders. Krutz v. Paola Town Co. (1878), 20 Kan. 397. Where a corpora-

tion has not been properly organized, its records are not admissible as evidence of an agreement among the proposed shareholders for the purpose of charging them as partners. Fay v. Noble (1851), 7 Cush. 188; Merchants' Nat. Bank of Binghampton v. Pendleton, 8 Ry. & Corp. L. J. 492 (1890).

⁵³ Clark v. Turner, 73 Ga. 1.

⁵⁴ An insurance company, authorized to commence business with a capital of \$100,000, received \$113,000, after which it received a subscription from A. for \$12,000, as "treasurer in trust." It immediately thereafter organized and elected A. treasurer, and it was held that A. was not liable individually upon his subscription either to the company or its assignee in insolvency. Russell v. Bristol, 49 Conn. 251.

⁵⁵ Scovill v. Thayer, 105 U. S. 143.

topped to set up the invalidity of the stock, in an action by creditors, by the fact that he attended the meeting at which it was voted.⁵⁶ A holder both of valid and of spurious stock, can not set-off his claim against the corporation upon the latter, as against its claim against him for assessments upon the former, when the corporation has become insolvent.⁵⁷

§ 628. **Fraud in procuring subscription.**—(See chapter II, secs. 255-266*d*. Defenses to creditors' suits), Misrepresentations made to a subscriber for stock subsequent to his subscription, will constitute no defense in suit for payment.⁵⁸ In case of corporate insolvency the equities of the creditor supersede those of the subscriber, even when his subscription has been induced by fraud. While ordinarily the law does not readily presume acquiescence or waiver in the case of subscriptions procured through fraud, nor hasten to impute laches to subscribers so deceived by the corporate agents; yet when the corporation has become insolvent, a contract of subscription procured through fraud, can not be rescinded to the prejudice of the rights of creditors. One induced by fraud to purchase shares of stock in a corporation, can not avoid his purchase if, after becoming aware of the fraud, he acts as a shareholder or derives a benefit from his shares.⁵⁹ The fact that a stockholder is induced to take his stock upon the false representation of the president of the corporation that it is full-paid capital stock, is no defense in an action by judgment creditors of the corporation on his statutory liability.⁶⁰ And when the subscriber has waited until suit has

⁵⁶ *Scovill v. Thayer*, 105 U. S. 143.

⁵⁷ *Scovill v. Thayer*, 105 U. S. 143.

⁵⁸ *Reed & McCormick v. Gold*, 45 S. E. 868 (Va. 1903).

⁵⁹ *City Bank v. Bartlett* (1885), 71 Ga. 797; *Chubb v. Upton*, 95 U. S. 665, 667 (1877); *Upton v. Tribilcock* (1875), 91 U. S. 45; *Webster v. Upton* (1875), 91 U. S. 65; *Sanger v. Upton* (1875), 91 U. S. 56; *Farrar v. Walker* (1876), 13 Bankr. Reg. 82; *Ogilvie v. Knox Ins. Co.* (1880), 22 Hun, 380; *Ruggles v. Brock* (1876), 6 Hun, 164; *Duffield v. Barnum*, 64 Mich. 293 (1887); *Tennent v. City Bank of Glasgow* (1879), L. R. 4 App. Cas. 615. *Vide*

supra, §§ 255-266*a*, and *infra*, § 633, FRAUDULENT REPRESENTATIONS.

⁶⁰ *Briggs v. Cornwell*, 9 Daly (N. Y.), 436. In this case the defendant held certain bonds, bearing an indorsement by the president, purporting to be a guaranty by the corporation of their payment, and of certain notes of the corporation, payable on demand, together amounting to more than the stock held by him, and all acquired after the corporation had become insolvent, the original consideration for the bonds, the guaranty, or the notes not being shown, and these facts were held not to be available in defense.

been brought by a receiver, it is then too late for him to plead fraudulent misrepresentation;⁶¹ although the fraud was not discovered until after insolvency.⁶² Even impending insolvency, before an actual assignment or appointment of a receiver, may bar the subscriber's remedy.⁶³ Where there are unpaid debts of the corporation, incurred subsequent to the subscription of the defendant, it is no defense that the amount paid by him on his subscription was obtained by the fraudulent representations of the officers of the company, when he had continued to act with the directors after the discovery of the fraud, and until the company ceased to do business.⁶⁴ But if the proceedings have been commenced by a shareholder before the company has become insolvent, his remedy will not be destroyed by a subsequent winding-up order.⁶⁵

§ 629. (a) Insolvency of the corporation bars the defense.—Insolvency of the corporation is a bar to the subscriber's remedies, in case of subscription induced by fraud. It is too late for action

⁶¹ *Upton v. Tribilcock* (1875), 91 U. S. 45; *Ruggles v. Brock*, 6 Hun, 164 (1876). "Since the decision of the *Oakes Case* in the House of Lords, 16 L. T. Rep. (N. S.) 808, particularly, if regard be had to the Lord Chancellor's judgment, there is an element of clear distinction, in determining the rights of such a member, according as the company is of the one or the other class. The Lord Chancellor held that where an order had been made to wind up a company, the liability of a shareholder was a statutable liability, under which the creditors had a right attaching upon a person who had agreed to become a shareholder to contribute to the extent of his shares towards the payment of the debts of the company. Hence, he found fault with the decision of the Lords Justices in the case of the *Reese River Silver Mining Co.*, *Ex parte Smith*, 16 L. T. Rep. (N. S.) 549. Although there was no doubt that Smith had been led to take shares in the company by the false representations of the flourishing condition of the mines

contained in the prospectus, yet when the order for winding-up the company was made, his name was upon the register; it was true that he had filed his bill against the company to be relieved of his shares, but he still held them, and the winding-up order found him in the condition of a person who had agreed to become a member, and whose name was upon the register, and who therefore exactly answered the description of a contributory contained in the Companies Act of 1862." "Relief from Shares," 44 L. T. 40.

⁶² *Turner v. Grangers,' etc. Ins. Co.* (1880), 65 Ga. 649.

⁶³ *Oakes v. Turquand* (1867), L. R. 2 H. L. 325; *Stone v. City & County Bank* (1877), 3 C. P. Div. 283; *Steele's Case* (1879), 28 W. R. 241; *Tennent v. City of Glasgow Bank* (1879), 4 App. Cas. 615.

⁶⁴ *Hamilton v. Grangers' Life & Health Ins. Co.* (1881), 67 Ga. 145.

⁶⁵ *Reese Silver Mining Co. v. Smith* (1869), L. R. 6 H. L. 64; *Henderson v. Lacon* (1867), 6 Eq. 249.

to rescind, after the corporation has become insolvent and a receiver has been appointed.⁶⁶ But, notwithstanding insolvency, the subscriber is allowed a reasonable time after discovery of the fraud to bring his suit for rescission.⁶⁷

§ 630. (b) **Remedy by bill in equity.**—Remedy by bill in equity, because of the various kinds of relief obtainable thereby, is the favorite remedy of the subscriber in case of subscription induced by fraudulent representation. Equity has jurisdiction on the grounds of discovery, account, fraud, misrepresentation and concealment.⁶⁸

§ 631. (c) **Rescission of the contract.**—Instead of filing a bill for rescission, it is sufficient for the subscriber to notify the company of his repudiation of the subscription, on the ground of fraud in its obtainment.⁶⁹ The subscriber may await suit, and then defend on the ground that the subscription was obtained by fraud.⁷⁰ A number of subscribers may join in the bill as complainants, where they were induced to subscribe by the same misrepresentations made in a prospectus,⁷¹ or where they were induced to subscribe by different forms of fraud.⁷²

§ 632. (d) **Fraudulent intent need not be proved.**—A fraudulent intent need not be proved.⁷³ But in the federal court the representations must be proven to have been false, and with fraudulent intent, and that the subscriber relied upon them.⁷⁴ The subscriber may recover assessments already paid, without waiting to recover damages in a suit at law.⁷⁵ The fraud is personal to the original subscriber. His transferee can not bring suit.⁷⁶ The

⁶⁶ Bissell v. Heath (1894), 98 Mich. 472; Howard v. Turner, 155 Pa. St. 349 (1893), 35 Am. St. Rep. 883; Hilliard v. Allegheny, etc. Co. (1896), 173 Pa. St. 1; Sheafe v. Larimer (1897), 79 Fed. 921; Olson v. State Bank (1897), 67 Minn. 267.

⁶⁷ Newton Nat. Bank v. Newbegin (1896), 74 Fed. 135; Dorsey, etc. Co. v. McCaffrey (1894), 139 Ind. 545, 47 Am. St. Rep. 290; Park v. Kribbs (1900), 24 Tex. Civ. App. 650; Beal v. Dillon, 5 Kan. App. 27 (1896), 47 Pac. 317; Savage v. Bartlett (1894), 78 Md. 561, 33 L. R. A. 737.

⁶⁸ Tyler v. Savage (1892), 143 U. S. 79.

⁶⁹ Savage v. Bartlett (1894), 78 Md. 561.

⁷⁰ Turner v. Grobe (Tex. 1898), 44 S. W. 898.

⁷¹ Boshier v. Richmond, etc. Co. (1892), 89 Va. 455.

⁷² Carey v. Coffee, etc. Co. (Va. 1894), 20 S. E. 778.

⁷³ Johnson v. Gulick (1896), 46 Neb. 817, 50 Am. St. Rep. 629; Squires v. Thompson (1902), 73 N. Y. App. Div. 552.

⁷⁴ Bartol v. Walton, etc. Co., 92 Fed. 13 (1899).

⁷⁵ McClanahan v. Ivanhoe, etc. Co. (1898), 96 Va. 124, 30 S. E. 450.

⁷⁶ Duranty's Case (1858), 26 Beav. 268.

subscriber has the remedy by action at law for deceit against the persons guilty of the fraud.⁷⁷ Bank directors are not liable, personally, in an action for deceit, for false statements in a report of the financial condition of the bank, where it was made in reliance upon accounts prepared by clerks or other employees.⁷⁸ It is a fraud, as to creditors, for a corporation to accept full payment of stock and to immediately loan the money to the purchaser.⁷⁹ A mortgage is void, which is given by a corporation to a subscriber as security for the money paid on his subscription for stock.⁸⁰

Fraudulent and Void Agreements.—The agreement of a corporation is void, which undertakes to allow a stockholder to surrender his stock to the corporation, at a fixed value.⁸¹ An agreement is void, whereby a corporation agrees to repay a stockholder upon his subscription, before corporate creditors are paid.⁸² An undertaking, in articles of incorporation, to exempt stockholders from liability of creditors on their unpaid subscriptions, is void.⁸³ Any secret agreement is voidable by other subscribers, or by corporate creditors, which provides that a subscriber may cancel his subscription.⁸⁴

"*Parol agreement*" includes all representations and agreements made up to, but not including the written subscription. Thus it is no defense that the subscriber to stock in a railroad company, was promised stock in a construction company,⁸⁵ or that the road would be built along a certain route,⁸⁶ or that the capital stock would be increased, and it was not.⁸⁷

§ 633. (e) "Fraudulent representations," defined.—"Fraudulent representation" is a statement or omission of statement of past acts or existing facts, which,—when made to one, who, relying

⁷⁷ Paddock v. Fletcher (1869), 42 Vt. 389.

⁷⁸ Utley v. Hill (1900), 155 Mo. 232, 49 L. R. A. 323. See Prescott v. Hughey (1895), 65 Fed. 653.

⁷⁹ State v. New Orleans, etc. Co. (1899), 51 La. Ann. 1827.

⁸⁰ Sawyer v. Hoag (1873), 17 Wall. 610; Boney v. Williams, 55 N. J. Eq. 691 (1897).

⁸¹ Verconture v. Golden, etc. Co. (1897), 116 Cal. 410.

⁸² Guarantee, etc. Co. v. Galveston, etc. R. R. (1901), 107 Fed. 311.

⁸³ Van Pelt v. Gardner (1898), 54 Neb. 701.

⁸⁴ Armstrong v. Danahy (1894), 75 Hun. 405, 27 N. Y. Supp. 60; Beals v. Buffalo, etc. Co. (1900), 49 N. Y. App. Div. 589; Tabor, etc. Ry. v. McCormick (1894), 90 Iowa, 446.

⁸⁵ Russell v. Alabama, etc. Ry. (1894), 94 Ga. 510.

⁸⁶ Chattanooga, etc. R. R. v. Warhen (1896), 98 Ga. 599, 25 S. E. 988.

⁸⁷ Glenn v. Hunt (1894), 120 Mo. 330.

thereon, subscribes to stock,—amounts to a fraud. The rules applying to them as defenses to a suit on subscription, differ widely. The subscription contract cannot be contradicted or varied by either party, by parol evidence of previous or contemporaneous separate agreement.⁸⁸ Fraudulent representation is a statement, or failure to make statement of past acts or existing facts, whereby one was fraudulently induced to subscribe to stock. A corporation is liable for the fraud of its agent in taking a subscription. For his fraudulent representation, the company is liable to the extent that it has profited thereby, and cannot defend against a bill to rescind the subscription, on claim that it was not bound by the agent's representations. It is not material whether he had any authority, where the corporation seeks to profit by his misrepresentations.⁸⁹ The company is not bound by the misrepresentations of any person who has no authority as agent, and does not act as agent between the corporation and the subscriber to its stock.⁹⁰ Where the company accept a subscription taken by one, who without any authority acts as agent, it is liable for his misrepresentations. It can not disavow them and still retain the subscription.⁹¹ Corporations are chargeable with the fraudulent representations of its authorized agent, upon the same principles that apply to contracts between private individuals, but unless specially authorized a director has no power to bind the company by his representation. The representations of the president, or of a director who has no express authority to take a subscription, do not bind the corporation.⁹² Misrepresentations made at a public meeting by an officer of the corporation, do not bind the company, unless he was specially authorized to take subscriptions.⁹³ Fraudulent representations made in a prospectus, issued by authority of the corporation, bind it and release the subscriber.⁹⁴ And so also will the concealment of a material fact, as that a

⁸⁸ *Dady v. O'Rourke* (1902), 172 N. Y. 447; *Moore v. Universal, etc. Co.* (1899), 122 Mich. 48; *Shattuck v. Robbins* (1896), 68 N. H. 565, 44 Atl. 694. *Vide supra*, §§ 255-266a.

⁸⁹ *Garrison v. Technic, etc. Works* (1897), 55 N. J. Eq. 708; *Talmadge v. Sanitary, etc. Co.*, 31 N. Y. App. Div. 498 (1898); *Anderson v. Scott* (1900), 70 N. H. 350.

⁹⁰ *Jewett v. Valley Ry.* (1878), 34 Ohio St. 601.

⁹¹ *Zang v. Adams* (1897), 23 Colo. 408, 48 Pac. 509.

⁹² *Zang v. Adams* (1897), 23 Colo. 408, 48 Pac. 509; *Milwaukee, etc. Co. v. Schoknecht* (1901), 108 Wis. 457.

⁹³ *Kelsey v. Northern, etc. Co.* (1871), 45 N. Y. 505.

⁹⁴ *Bosher v. Richmond, etc. Co.* (1892), 89 Va. 455.

large part of the stock was issued for the good will of the business purchased by the corporation, it being stated that the vendors themselves had taken a large portion of the capital stock.⁹⁵ But where the means of information as to the truth or falsity of the statements, are equally open to the subscriber and he neglected to inform himself, no rescission of the subscription can be had.⁹⁶ Printed reports or statements presented by an agent of the corporation, may be relied upon by a subscriber, and will release him if they contain material misrepresentations.⁹⁷ Among examples of misstatements as to facts or acts, made to a subscriber by an agent of the corporation, which amount to fraudulent misrepresentation when relied upon by the subscriber, are: that specified property had been paid for by the corporation, whereas the greater part of the price was paid to promoters;⁹⁸ statement by the president that he had paid \$35,000 for certain property sold to the corporation, where in fact he had paid only \$12,000, and misstatement that other subscribers had paid in full for their stock;⁹⁹ a gross misstatement of the amount of property belonging to the corporation.¹ Matters of opinion, or statements of the company's prospects or intentions, or the capacity of its enterprise, however unwarranted, are no defense to the subscriber, as misrepresentations.²

§ 634. (f) Necessary allegations in setting up fraud as defense.—It is necessary to allege a material misrepresentation of a question of fact, and fully set out the fact, and how it was misrepresented, that the corporation was bound by the misrepresentation, and that the subscriber disaffirmed his contract of subscription within reasonable time after discovery of the fraud.³

⁹⁵ *Walker v. Anglo-American, etc. Co.* (1893), 72 Hun. 334.

⁹⁶ *Chicago, etc. Co. v. Summerour* (1897), 101 Ga. 820, 29 S. E. 291.

⁹⁷ *Peterson v. People, etc. Assn.* (1900), 124 Mich. 573; *Talmdage v. Sanitary, etc. Co.* (1898), 31 N. Y. App. Div. 498.

⁹⁸ *West End, etc. Co. v. Nash* (W. Va. 1902), 41 S. E. 182.

⁹⁹ *Alabama, etc. Works v. Dallas* (1900), 127 Ala. 513, 29 So. 459.

¹ *Hubbard v. Weare* (1890), 79 Iowa, 678.

² *Milwaukee, etc. Co. v. Schonecht* (1901), 108 Wis. 457; *Johnson v. National, etc. Assn.* (1900), 125 Ala. 465, 28 So. 2, 82 Am. St. Rep. 257; *Shick v. Citizens, etc. Co.* (1896), 15 Ind. App. 329, 57 Am. St. Rep. 230; *Weston v. Columbus, etc. Ry.* (1892), 90 Ga. 289, 15 S. E. 773; *Bartol v. Walton, etc. Co.* (1899), 92 Fed. 13; *Jefferson v. Hewitt* (1892), 95 Cal. 535; *Shattuck v. Robbins* (1896), 68 N. H. 565, 44 Atl. 694.

³ *Armstrong v. Karshner* (1890), 47 Ohio St. 276.

He can set up the defense of fraud in inducing him to subscribe, only by a suit in equity. He can not set up the fraud in a suit at law.⁴ Where the complaint alleges the receipt of a dividend and payment of several instalments by the subscriber, it need not allege that the full capital stock has been subscribed.⁵

§ 635. (g) **Remedy by action for money had and received.**—An action for money had and received can not be brought against other stockholders for the fraud of a promoter.⁶

§ 635a. **Irregular incorporation is no defense.**—Irregular incorporation is no defense by a subscriber to an action by creditors to enforce payment of subscription. A *de facto* corporation may maintain the suit against a subscriber.⁷ “Where there is a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be; and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation,—it is plainly a dictate alike of justice and of public policy, that, in controversies between the *de facto* corporation and those who have entered into contract relations with it as corporators or otherwise, such questions should not be suffered to be raised.”⁸ An exception to the rule, is that where subscription was made before incorporation, the subscriber may make the defense of illegal or irregular incorporation. He may insist upon a “strict compliance with the provisions of the charter, in cases of subscription prior to the organization of the company.”⁹ The company, in its suit upon a subscription made before its

⁴ Bartol v. Walton, etc. Co., 92 Fed. Rep. 13 (1899); Lantry v. Wallace (1901), 182 U. S. 536.

⁵ Duluth, etc. Co. v. De Witt, 63 Minn. 538 (1896).

⁶ Perry v. Hale (1887), 143 Mass. 540.

⁷ Hamilton v. Clarion, etc. R. R. (1891), 144 Pa. St. 34; Hause v. Mannheimer (1897), 67 Minn. 194; Wadesboro, etc. Co. v. Burns, 114 N. C. 353 (1894), 19 S. E. 238; Cardwell v. Kelly (1898), 95 Va. 570, 40 L. R. A. 240.

⁸ Cooley, J., in Swartout v. Michigan, etc. R. R. (1872), 24

Mich. 389; American Alkali Co. v. Campbell (1902), 113 Fed. Rep. 398; Fish v. Smith (1900), 73 Conn. 377, 84 Am. St. Rep. 161; Harris v. Gateway, etc. Co. (1901), 128 Ala. 652, 29 So. 611; Torras v. Raeburn (1899), 108 Ga. 345, 33 S. E. 989.

⁹ Taggart v. Western Md. R. R. (1866), 24 Md. 563, 89 Am. Dec. 760; Capps v. Hastings, etc. Co., 40 Neb. 470 (1894), 28 L. R. A. 259, 42 Am. St. Rep. 677; Northwestern, etc. Co. v. Lanning (1901), 83 Minn. 19.

incorporation, must aver its compliance in detail with the statutory requirements.¹⁰ "I understand the rule to be well settled, that where papers, having color of compliance with the statutes, have been filed with the proper state officers and meet their approval, but are in fact so defective as to be incapable of supporting the corporation as against the State, they are as against a subscriber to its capital, held sufficient to constitute a corporation *de facto* if supported by proof of user."¹¹ But the rule is different where the subscription was made in anticipation of incorporation, and before it. A subscriber for stock prior to incorporation may require regular and legal incorporation as the implied condition of his subscription, and may defend against suit for payment, that the company has not been legally incorporated.¹² Illegal or irregular organization of a corporation is not a good defense by stockholders who have acquiesced in the illegality or irregularity.¹³ Accordingly, in an action against stockholders after corporate insolvency, it is no defense that the by-laws and stock subscriptions were illegal because the trustees were not stockholders, the defendants having acquiesced in the acts of the trustees for several years.¹⁴ Nor can illegality in the election of directors be set up as a defense to an action upon a subscription.¹⁵ Irregularity or informality by failure to record, as required by statute, an increase of the capital stock, furnishes no defense to a subscriber to such increased stock.¹⁶

§ 636. **Conditions unfulfilled.**—Where an individual subscribes for stock in a corporation on certain conditions to be

¹⁰ Brooksville R. R. v. Byron, 50 S. W. 530 (Ky. 1899).

¹¹ Upton v. Hansbrough (1873), 3 Biss. 417; Hamilton v. Clarion, etc. R. R. (1891), 144 Pa. St. 34; Hause v. Mannheimer (1897), 67 Minn. 194; State Bank, etc. Co. v. Peirce (1894), 92 Iowa, 668; American Homestead Co. v. Lenigan (1893), 46 La. Ann. 1118; Ogden Clay Co. v. Harvey (1894), 9 Utah, 497, 35 Pac. 510; Wadsworth v. Burns (1897), 114 N. C. 353, 19 S. E. 238; Cardwell v. Kelly (1898), 95 Va. 570, 40 L. R. A. 240.

¹² Capps v. Hastings, etc. Co., 40 Neb. 470 (1894), 28 L. R. A. 259; Northwestern, etc. Co. v. Lanning

(1901), 83 Minn. 19; Williams v. Citizens, etc. Co. (1900), 25 Ind. App. 351; Brooksville R. R. v. Byron (Ky. 1899), 50 S. W. 530; Greenbrier Ind. Ex. v. Rodes, 37 W. Va. 738 (1893), 17 S. E. 305. *Vide infra, ultra vires*, §§ 896, 646, and *Vide supra*, PARTNERSHIP LIABILITY, §§ 126-140.

¹³ *Of*. §§ 13 and 16, *supra*.

¹⁴ Ross v. Bank of Gold Hill (Nev. 1888), 19 Pac. Rep. 243.

¹⁵ Johnson v. Crawfordsville, etc. R. Co., 11 Ind. 280; Eakright v. Logansport, etc. R. Co., 13 Ind. 404.

¹⁶ Chubb v. Upton, 95 U. S. 665; Handley v. Stutz, 159 U. S. 417.

performed, his liability as a stockholder does not become complete until the conditions have been met; for the question whether the subscription makes him a stockholder depends upon the terms of the contract, the charter, and whether the subscription was a step preliminary to organization.¹⁷ Thus, where a subscription is made on the condition that the whole amount of the capital stock should be a fixed sum, the subscriber is not liable for corporate debts until the whole amount is subscribed;¹⁸ and where two subscriptions were void, being made by married women, and as a matter of fact were never paid, it was held that the condition had not been complied with.¹⁹ But the rights of the subscriber in such cases may be waived, and he may be bound by his subscription, even though the conditions upon which he relied have failed.²⁰ But in order that this defense may be made available

¹⁷ *Butler University v. Scoonover* (1887), 114 Ind. 381; *Appeal of Halin* (Pa. 1887), 7 Atl. Rep. 482; *Brand v. Lawrenceville Branch R. Co.*, 22 Fed. Rep. 522; *Callanan v. Windsor*, 78 Iowa, 193.

¹⁸ *Temple v. Lemon* (1886), 112 Ill. 51.

¹⁹ *Appeal of Halin* (Pa. 1887), 7 Atl. Rep. 482. One subscribed for stock in a projected railroad, and, in consideration of the subscriptions, the company agreed to deposit collaterals to secure him. After he had paid a portion of his subscription, the company made such a disposition of the collaterals as to put them beyond his control, contrary to the contract of subscription; and it was held that he was released from his obligations. *Reusens v. Mexican Nat. Construction Co.*, 22 Fed. Rep. 522.

²⁰ *Musgrave v. Morrison* (1880), 54 Md. 161; *Morrison v. Dorsey*, 48 Md. 468; *Hager v. Cleveland*, 36 Md. 476 (1872). *Cf.* *Boston, etc. R. Co. v. Pearson*, 128 Mass. 445. In an article entitled "Delay in Repudiating Shares," in the *Solicitors' Journal and Reporter*, in the course of a discussion of the necessity of promptness in the re-

scission of the contract of subscription it is said: "In disposing of this topic we saw that there was a considerable difference according to the nature of the claim to rescission—*i. e.*, whether the contention be (1) 'I admit that I agreed to take shares in the company, but I say that my agreement was procured by fraud' (misrepresentation); or (2) 'I admit that I agreed to take shares in a company, but it was a different company to that in which I have been registered' (variation); or (3) 'I deny that I have agreed to take shares in any company at all' (*e. g.*) when the allotment was made too late, or accompanied by an unaccepted condition. . . . Repudiation must not lag far behind discovery. If suspicions have been aroused, the court expects that the party should forthwith take the trouble of satisfying his mind one way or the other. It will not hear of his shutting his eyes and afterwards urging that he had not seen anything until, etc., etc., happened (see *Lord Cairns in Ogilvie v. Currie*, 16 W. R. 769). Doubtless many persons would like to hold on to their shares as long as possible, so as to take the benefit of every

in a creditor's action against a stockholder, it must appear that there was a condition precedent to liability. The subscriber can not create unreal conditions for the purposes of defense. Thus, in an action in behalf of creditors of a corporation, to recover upon a subscription to its capital stock, where the answer admits the purchase of the stock, but alleges a subsequent surrender of it, and a discharge of the obligation to pay therefor, the fact that all of the authorized capital stock may not have been taken, is not available in defense.²¹

chance of the concern turning out well, and repudiate if it became hopeless. This, however, is precisely what the court very sternly sets its face against. . . . Acquiescence is founded on knowledge, and a man cannot be said to have acquiesced in a transaction if he is not proved to have had knowledge of it. *Stewart's Case*, L. R. 1 Ch. App. 574, *per* Lord Justice Turner. . . . In *Lawrence and Kincaid's Cases*, L. R. 2 Ch. App. 412, 426, 15 W. R. 571, the memorandum was not registered when these gentlemen applied for shares. Lord Cairns, L. J., said the applicant 'must be taken to have known either that this memorandum was prepared and accessible at the time of his application, or that it must be prepared forthwith; and that in either case, both it and the articles must, in their very nature, be documents differing widely in form from, and, in all measures of detail at least, going beyond the prospectus; and with regard to documents of this description, on the mode of framing which consistently with the prospectus so much difference of opinion might well arise, it would be contrary to the first principles of justice to hold that Mr. Lawrence was at liberty to remain wholly passive, content to trust to what was stated in the prospectus, and, while he knew that an authority to register his name and hold him out as a shareholder had been

given and probably acted upon, keeping himself in a position to ratify all that had been done if the company turned out prosperous, but for the first time to inquire, and, if possible, repudiate should a financial panic come, or the speculation turn out unsuccessful.' . . . In *Wilkinson's Case*, 15 W. R. 33, L. R. 2 Ch. App. 536, Turner, L. J., said that the fact of the party having paid calls threw on him the *onus* of proving that he did not know of the variance, and it was not enough that he said he had not seen the articles. Lord Cairns thought that 'where a man agrees to take shares and to be bound by the memorandum and articles, he must be affected with notice of their contents, unless, at all events, within a reasonable time during which he can acquire knowledge of the contents he repudiates the shares.' . . . In *Peel's Case*, 15 W. R. 1100, L. R. 2 Ch. App. 674, Lord Cairns repeated what he had said in *Lawrence's Case*, and said that if the memorandum and articles were in existence when the party applied for shares, and if he agreed to take on the footing of them, he ought to be held bound to look before he applied. Where they were not in existence when the application was made, he ought to look, at latest, when he received the allotment."

²¹ *Farnsworth v. Robbins*, 36 Minn. 369 (1887). A stipulation

§ 637. **Forfeiture and cancellation of stock.**—Where the officers of a corporation, in good faith, declare certain stock to be forfeited, under a power conferred upon them by the statute or charter pursuant to which the company was organized, the person in whose name the stock stands upon the books of the company, is freed from liability, in respect not only to the company and his co-stockholders, but also to the corporate creditors,²² and this is true whether the debts were created before or after the forfeiture of the stock.²³ But the officers of a corporation have no power to declare stock forfeited and to cancel it, unless it is for the benefit, not only of the creditors, but also for that of the stockholders and the State, for the directors are the trustees

in a contract of subscription to organization stock of a corporation, that bonds secured by first mortgage on the company's plant shall be issued to the subscriber to the full amount of his subscription, is not to be regarded as a condition precedent to liability upon the subscription; for it is nothing more than an independent stipulation, for the breach of which the remedy would be in damages; so that where the subscriber paid part of his subscription in cash, giving notes, to be paid upon call, for the balance, and having become a director, after the organization was completed, without receiving his bonds, the defense of unfulfilled condition to a creditor's action was held not good, especially as the mortgage to secure the bonds could only be obtained by payment of the fund subscribed. *Morrow v. Nashville, etc. Co.*, 87 Tenn. 262 (1889), 10 Am. St. Rep. 658.

²² *Mills v. Stewart*, 41 N. Y. 384; *Allen v. Montgomery, etc. R. Co.*, 11 Ala. 437, 450; *Macauley v. Robinson*, 18 La. Ann. 619; *Ex parte Beresford*, 2 Macn. & G. 197; *Woolaston's Case*, 4 De Gex & J. 437; *Kelk's Case*, L. R. 9 Eq. 107; *Dawes' Case*, L. R. 6 Eq. 232; *Snell's Case*, L. R. 5 Ch. 22. And

where stock had been issued as a stock dividend, upon the false pretense that it had been earned, and was afterward cancelled, it was held that as to such stock the defendant was released from liability upon corporate debts, the stock having been cancelled before the debts were created. *Hollingshead v. Woodward*, 35 Hun, 410. The A. insurance company, as part of a contract of reinsurance, transferred its assets to the B. insurance company. The B., under the agreement, issued its stock in exchange for the stock of the A., and redeemed it at par. The A. was in fact insolvent, and a receiver was afterwards appointed, who sued a former stockholder in the A. who had thus exchanged his stock and redeemed it at par, to recover the amount thus received by him, and it was held that the action could not be maintained. *Bent v. Hart*, 73 Mo. 641, *Sherwood, C. J.*, dissenting, 10 Mo. App. 143.

²³ *Mills v. Stewart* (1869), 41 N. Y. 384. But the power of forfeiture must be exercised under the authority conferred by the statute creating the corporation; there is no such power at common law. *Creyke's Case*, L. R. 5 Ch. 63.

of all the stockholders and of the State as well.²⁴ The power can not be exercised in behalf of any one shareholder, but is only to be used where the interests of the corporation, its creditors and all the shareholders, demand it. Therefore when the directors of a company, who had the power in their discretion to sue a shareholder for unpaid calls on his stock, or to declare it forfeited, agreed to relieve him of further liability on condition that he would consent to an absolute forfeiture, but afterwards discovered that he was solvent and refused to perform, it was held that they could not be compelled specifically to perform the contract.²⁵ Where a stockholder who has not paid anything for his stock, surrenders it to the corporation, he can not be held liable to a creditor of the corporation whose claim first accrues after the surrender.²⁶ A subscriber to stock is liable to the creditors of the corporation to the amount of his unpaid subscription, although payment was to be in property, and he had, by agreement with the corporation, surrendered all claim for stock, and it had released all claim on the property.²⁷

§ 638. Withdrawal of subscription.—Any time before incorporation, a subscriber may withdraw from his subscription, and give verbal notice thereof to the manager of the projected enterprise.²⁸

§ 639. Rescission of contract.—*Rescission* applies, instead of withdrawal, in case of fraudulent representation. *Cancellation*

²⁴ Bedford R. Co. v. Bowser, 48 Pa. St. 29 (1864). Nor is a forfeiture proper in case the stockholder is responsible. Chouteau v. Dean, 7 Mo. App. 211; Spachman v. Evans, L. R. 3 H. L. 171. Cf. Bedford R. Co. v. Bowser, 48 Pa. St. 29 (1864). A forfeiture brought about by collusion between the stockholder and the directors, will not relieve him of liability either to the corporation or its creditors. Burke v. Smith, 16 Wall. 394; Mills v. Stewart, 41 N. Y. 384, 386 (1869); Slee v. Bloom, 19 Johns. 456; Hall's Case, L. R. 5 Ch. 707; *In re Agricultural Ins. Co.*, L. R. 1 Ch. 161; Stanhope's Case, L. R. 1 Ch. 161; Stewart's Case, L. R. 1 Ch. 511; Gower's Case, L. R. 6 Eq. 77; Spachman's Case, 11 Jur. (N. S.)

207; Richmond's Case, 4 Kay & J. 305; Walters' Second Case, 3 De Gex & Sm. 244. And a forfeiture which is intentionally fraudulent may be enjoined, and, when consummated, set aside. German-town, etc. R. Co. v. Fitler, 60 Pa. St. 124.

²⁵ Harris v. North Devon Ry. Co. (1855), 20 Beav. 284. See, also, Price v. Denbigh, etc. Ry. Co., 38 L. J. Ch. 461.

²⁶ Johnson v. Lullman (1885), 15 Mo. App. 55.

²⁷ Singer v. Given, 61 Iowa, 93.

²⁸ Hudson, etc. Co. v. Tower (1894), 161 Mass. 10; Providence, etc. Co. v. Kent (1896), 19 R. R. 561; Raegener v. Brockway, 58 N. Y. App. Div. 166 (1901); Plank's, etc. Co. v. Birkhard, 87 Mich. 182 (1891).

is the term applicable to surrender of a subscription contract by consent of all parties interested in the contract. The directors have no power to release a subscriber or to allow any new conditions to be made on his subscription without the consent of all the stockholders.²⁹ Where no creditor's rights intervene, the stockholders, by unanimous consent, may reduce subscriptions by cancellation of one-half the amount, but the directors have no such authority.³⁰ One subscriber for stock can not have his subscription cancelled unless by the consent of all the other subscribers, unless in case of fraud or mistake.³¹ A subsequent creditor can not complain where all the stockholders consent to cancel the subscription.³² There may be cancellation of subscription where without any formal action the stockholders all acquiesce.³³ Cancellation of a subscription to the prejudice of creditors may be set aside in equity.³⁴ A subscriber is liable to subsequent creditors, even though he surrenders his stock.³⁵ "The governing officers of a corporation can not by agreement or other transaction with the stockholder release the latter from his obligations to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration."³⁶

§ 640. **Compromise.**—There can be no compromise where there is no controversy. In case of a denial of his liability by a stockholder, the directors, in good faith, may compromise with him by reducing the amount of his subscription,³⁷ and a receiver of the corporation can not afterward collect anything further on the stock.³⁸ The stockholder can not defeat garnishee process by settlement with the corporation for less than the amount due,

²⁹ *Lafayette, etc. Corporation v. Riland* (1891), 80 Wis. 29; *Brad-dock, etc. Ry. v. Bily* (1899), 11 Pa. Sup. Ct. 144.

³⁰ *Glenn v. Hatchet* (1890), 91 Ala. 316, 8 So. 656.

³¹ *Chicago, etc. Co. v. Summer-our* (1897), 101 Ga. 820, 29 S. E. 291; *Pacific Fruit Co. v. Coon*, 107 Cal. 447 (1895); *Chicago, etc. Co. v. Lyon* (1901), 10 Okla. 704, 64 Pac. 6; *Non-Electric, etc. Co. v. Peabody* (1897), 21 N. Y. App. Div. 247.

³² *Shoemaker v. Washburn, etc. Co.* (1897), 97 Wis. 585.

³³ *Tulare, etc. Bank v. Talbot* (1900), 131 Cal. 45.

³⁴ *Carter v. Union Printing Co.* (1891), 54 Ark. 576, 16 S. W. 576; *Harmon v. Hunt* (1895), 116 N. C. 678, 21 S. E. 559; *Balfour v. Baker City Gas Co.* (1895), 27 Oreg. 300, 41 Pac. 164.

³⁵ *Chrisman, etc. Co. v. Inde-pendence, etc. Co.* (Mo. 1902), 68 S. W. 1026.

³⁶ *Potts v. Wallace* (1892), 146 U. S. 689.

³⁷ *Whitaker v. Grummond*, 68 Mich. 249 (1888).

³⁸ *New Haven T. Co. v. Nelson* (1901), 73 Conn. 477.

just before the process is commenced against him.³⁹ A court of equity can not authorize a receiver to compromise a subscription, unless all the stockholders are parties to the equitable suit.⁴⁰ It is no available defense to a subscriber, that he never paid the percentage required by statute to be paid at the time of his subscription.⁴¹ The defense will not avail him, that the corporation engaged in business before the one-half of its capital had been paid in, as required by the charter.⁴² Such a statutory requirement of payment of percentage of the capital stock may be complied with by payment in property.⁴³

§ 641. **Estoppel to deny liability.**—Inasmuch as outsiders dealing with the corporation, have no means of knowing of its financial condition except the public acts and records and declarations of its officials and stockholders, they have a right to rely upon them; and stockholders who have participated in corporate acts and made themselves responsible for representations to third parties by their assent, express or implied, can not evade their liability to corporate creditors. Thus, when a subscription to the capital stock of a corporation is made for the purpose of subsequent organization, which is afterwards had, and the subscriber pays part of his subscription, and transfers shares, he thereby recognizes and affirms his contract of subscription.⁴⁴ So, persons who subscribe to stock and participate in an irregular formation of a corporation become a corporation *de facto*, if not *de jure*, and as such are liable at least to the extent of the stock subscribed by them;⁴⁵ and one who participates in the organization of a company and acts as its president, waives any irregularities therein, and upon him the by-laws and charter are binding.⁴⁶

³⁹ *World's Fair, etc. Co. v. Gasch* (1896), 162 Ill. 402.

⁴⁰ *Hambleton v. Glenn* (1890), 72 Md. 331, 20 Atl. 115.

⁴¹ *Webb v. Baltimore, etc. R. R.* (1893), 77 Md. 92, 39 Am. St. Rep. 396; *Union Water Co. v. Kean*, 52 N. J. Eq. 111 (1893).

⁴² *Maine, etc. Co. v. Southern, etc. Co.* (1899), 92 Me. 444; *Naugatuck Water Co. v. Nicolls*, 58 Conn. 403 (1890), 8 L. R. A. 637.

⁴³ *Fargason v. Oxford, etc. Co.* (1900), 78 Miss. 65, 27 So. 877; *McCandless v. Inland, etc. Co.*, 115 Ga. 958 (1902), 42 S. E. 449.

⁴⁴ *Bell's Appeal*, 115 Pa. St. 188. The payment of one invalid assessment upon stock is not a waiver of another. *Atlantic De Laine Co. v. Mason* (1858), 5 R. I. 463. *Of. Field v. Pierce* (1869), 102 Mass. 253; *Cover v. Manaway* (1886), 115 Pa. St. 338; *Thompson v. Reno Savings Bank* (1885), 19 Nev. 103; *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568.

⁴⁵ *Marshall Foundry Co. v. Kilian* (1888), 99 N. C. 501, 6 Am. St. Rep. 539.

⁴⁶ *Marshall Foundry Co. v. Kilian* (1888), 99 N. C. 501, 6 Am. St.

But whether one who subscribes for stock in a corporation, is thereafter estopped from denying his liability as a stockholder, depends upon the terms of his contract of subscription and the organic law of the corporation. When the corporation, in its correspondence, uses letter-heads upon which is a statement purporting to be the amount of the capital stock, the officers and stockholders are not estopped from denying that the amount indicated was the actual capital stock.⁴⁷ Nor, in an action by a corporate creditor against a stockholder, is the defendant bound by entries in the books of the corporation.⁴⁸ Stockholders are estopped to deny the validity of increase of capital, by accepting their *pro rata* of the increase, or by voting for it, or taking dividends upon it, and by holding it out to those dealing with the company as an actual component part of the capital.⁴⁹

§ 642. **Laches. Ratification. Waiver of defenses.**—Where the facts constituting fraudulent inducement to purchase stock, were not discovered till more than five years afterwards, and only a little while before the purchaser filed his bill to set aside the purchase, he is not estopped by laches.⁵⁰ It is the subscriber's

Rep. 539. Where one, prior to the incorporation of a turnpike company, subscribed a certain amount when the incorporation was completed and work begun, the subscription is not a mere voluntary donation, but is enforceable, having been made in consideration of receiving a property right as stockholder in the road; and other persons having subscribed on the faith of that subscription, and work having been commenced, the subscriber is estopped to deny the subscription. *Bullock v. Falmouth & Chipman Hall Turnpike Road Co.* (1887), 85 Ky. 184. In an action to recover from defendant a debt of a manufacturing corporation, on the ground that the capital stock had not been fully paid in, it appeared that defendant had signed the articles of incorporation, had subscribed for stock, was a trustee and secretary of the corporation, and actively engaged in its management, and that his name was recorded in the

corporate books as a stockholder. It was held, that he was a stockholder, although he had neither paid for his stock nor received a certificate for it. *Wheeler v. Millar*, 90 N. Y. 353. *Acc. Griswold v. Seligman* (1880), 72 Mo. 110.

⁴⁷ *Warfield, Howell & Co. v. Marshall County Canning Co.*, 72 Iowa, 666 (1887).

⁴⁸ *Nielson v. Crawford*, 52 Cal. 248 (1877). Where a subscriber gives to a corporation a bond which assumes that the obligor has subscribed for stock and has retained the subscription price as a loan for which the bond is given, it appearing that he had never subscribed for nor received any stock, the obligor is not estopped from denying that he is a stockholder. *Butler University v. Scoonover* (1887), 114 Ind. 381, 5 Am. St. Rep. 627.

⁴⁹ *Handley v. Stutz*, 139 U. S. 417.

⁵⁰ *Chicago Trust, etc. Bank v. Ball* (1903), 108 Ill. App. 321.

duty, immediately upon learning of the fraud, to decide whether to rescind the subscription, or to waive his right to do so. He cannot wait to see if the corporate enterprise is a success, and afterward, if it fails, repudiate the subscription. Any such delay will be a bar to his relief.⁵¹ Laches date from the time the subscriber first has information of the fraud.⁵²

Ratification as a bar to the subscriber's remedies.—A subscription obtained by fraud, may cease to be voidable and become binding upon the subscriber by any act of his, inconsistent with his intent to repudiate the contract. Any such act of his, after he knew of the fraud, will ratify the contract, and waive his right to disaffirm it. Examples of such acts are: Acting as director in the corporation with knowledge of the fraud;⁵³ attending a stockholders' meeting and voting to assess the stock, and afterwards paying the assessment;⁵⁴ paying a call and waiting a year after knowledge of the fraud;⁵⁵ paying an instalment and participating in a corporate meeting.⁵⁶

Waiver of defenses.—Participation in corporate meetings by a subscriber with knowledge that the whole capital stock is not subscribed, constitutes waiver of that defense,⁵⁷ and such participation is waiver of right to defend, on the ground of non-payment of the statutory percentage of the capital stock.⁵⁸ Payment of part of his subscription, and taking part in organization of the company, is waiver of objection to irregular incorporation.⁵⁹ Participating in benefits with knowledge, is waiver.⁶⁰ A subscriber may waive the defense that the full capital stock has not been subscribed. He may do so expressly,⁶¹ or impliedly by acts,

⁵¹ *Bosley v. National, etc. Co.* (1890), 123 N. Y. 550; *Cedar Rapids Ins. Co. v. Butler* (1891), 83 Iowa 124; *Philadelphia, etc. R. R. v. Cowell* (1857), 28 Pa. St. 329, 70 Am. Dec. 128; *Phelps v. American, etc. Assn.* (1899), 121 Mich. 343.

⁵² *Thompson v. Clanmorris*, 1 Ch. 718 (1900).

⁵³ *Foley v. Holtry* (1894), 41 Neb. 563, 59 N. W. 781.

⁵⁴ *Marten v. Paul, etc. Co.*, 99 Cal. 355 (1893).

⁵⁵ *Acetelyn, etc. Co. v. Smith*, 10 Pa. Sup. Ct. 61 (1899).

⁵⁶ *West End, etc. Co. v. Claiborne* (1900), 97 Va. 734, 34 S. E. 900.

⁵⁷ *Kampmann v. Tarver* (Tex. 1895), 29 S. W. 1144; *International Assn. v. Walker* (1893), 97 Mich. 159.

⁵⁸ *Canfield v. Gregory* (1895), 66 Conn. 9.

⁵⁹ *Greenbrier, etc. Express v. Squires* (1895), 40 W. Va. 307, 52 Am. St. Rep. 884.

⁶⁰ *Detroit, etc. Club v. Fitzgerald* (1896), 109 Mich. 670.

⁶¹ *MacFarland v. West, etc. Assn.* (1898), 56 Neb. 277, 76 N. W. 584.

as, by paying calls,⁶² or by serving as director, and upon committees.⁶³ Payment of part of the subscription is no waiver of the defense.⁶⁴ By paying calls, a subscriber may waive the defense that the full capital stock of the corporation has not been subscribed. This waiver may be express, or implied from the acts or declarations of the subscribers.^{64a}

Essentials of waiver of defense.—A waiver must be voluntary. It implies a knowledge of the right, or claim or thing waived. What facts and circumstances constitute a waiver, is a question of fact for the jury. A subscriber, by paying calls, may waive the defense that the full capital stock has not been subscribed.^{64b}

§ 643. **Ignorance, or mistake, is no defense. Forfeiture of charter.**—Ignorance of the actual conditions of the corporation at the time of subscribing, is no defense to an action against the subscriber.⁶⁵ It is no defense that the corporate charter has been forfeited.⁶⁶

§ 644. **Statute of limitations as a bar to suit.**—Actions by corporate creditors against stockholders to enforce their individual liability, may, like other actions, be barred by limitation;⁶⁷ and in the absence of special statutes, applicable only to this liability, the general statute, by which the right of action on ordinary contracts is barred, controls.⁶⁸ In New York, where the General Manufacturing Act prohibits actions against stockholders of cor-

⁶² *California Hotel Co. v. Callender* (1892), 94 Cal. 120.

⁶³ *Auburn, etc. Assn. v. Hill*, 32 Pac. 587 (Cal. 1893).

⁶⁴ *Schloss v. Montgomery, etc. Co.* (1889), 87 Ala. 411, 13 Am. St. Rep. 51, 6 So. 360.

^{64a} *California, etc. Hotel Co. v. Callender* (1892), 94 Cal. 120, 28 Am. St. Rep. 99.

^{64b} *California, etc. Hotel Co. v. Callender* (1892), 94 Cal. 120, 28 Am. St. Rep. 99.

⁶⁵ *Payson v. Withers* (1873), 5 Biss. 269.

⁶⁶ *Gaff v. Fisher* (1877), 33 Ohio St. 107.

⁶⁷ *Vide supra*, § 334, and see 48 L. R. A. 637.

⁶⁸ *Gridley v. Barnes*, 103 Ill. 211; *Diversey v. Smith* (1882), 103 Ill. 378; *Cable v. McCune*, 22 Mo. 380; *Lawlor v. Burt* (1857), 7 Ohio St.

341; *Cady v. Smith* (1882), 12 Neb. 628; *Knox v. Baldwin* (1880), 80 N. Y. 610; *Duckworth v. Roach* (1880), 81 N. Y. 49; *Terry v. Tubman* (1875), 92 U. S. 156; *Knox v. Baldwin* (1880), 80 N. Y. 610; *Hawkins v. Furnace Co.* (1884), 40 Ohio St. 507; *Prince v. Yates*, 7 Weekly Notes, 51 (U. S. C. C., Pa. 1879); *Hollingshead v. Woodward* (1887), 107 N. Y. 96; *King v. Duncan* (1886), 38 Hun. 461; *Phillips v. Therasson* (1877), 11 Hun. 141; *Bullard v. Bell* (1817), 1 Mason, 243, 289; *Thornton v. Lane*, 11 Ga. 459 (1852); *Lane v. Morris* (1851), 10 Ga. 162; *Corning v. McCullough* (1847), 1 N. Y. 47; *Jagger Iron Co. v. Walker* (1879), 76 N. Y. 522; *Terry v. Calnan*, 13 S. C. 220; *Lawlor v. Burt*, 7 Ohio St. 340; *King v. Duncan* (1880), 38 Hun. 461; *Stilphen v. Ware*, 45

porations formed thereunder, unless they are brought within two years after they cease to be stockholders, it was held that the statute began to run from the time the corporation ceased to do business, its property having been sequestered and a receiver appointed.⁶⁹ But where the statute bars such actions three years after an assignment for the benefit of creditors, the mere voluntary dissolution of the corporation, or its ceasing to do business, does not affect the creditor's right, the statute being limited to cases of insolvency, expiration by limitation, or forfeiture.⁷⁰ If debts of the corporation, upon which recovery is otherwise barred by the statute, have been secured by a deed of trust under which the corporate property, including unpaid subscriptions, has been conveyed, equity will give the creditors relief.⁷¹ Where the remedy is barred at law, it will be barred in equity also.⁷² Liability of a penal nature is barred in a shorter period than that arising *ex contractu*.⁷³ As a bar to liability on his subscription, the statute begins to run from the time of subscription.⁷⁴ The statute

Cal. 110 (1872); *Shellington v. Howland* (1873), 53 N. Y. 371; *Birmingham Nat. Bank v. Mosser* (1878), 14 Hun, 605; *Lindsley v. Simonds* (1866), 2 Abb. Prac. (N. S.) 69. *Cf.* *State Sav. Assn. v. Kellogg* (1873), 52 Mo. 583; *Freeland v. McCullough* (1845), 1 Denio, 414, 422; *Merchants' etc. Co. v. Bliss* (1860), 21 How. Pr. 366, affirmed 35 N. Y. 414; *Davidson v. Rankin* (1868), 34 Cal. 503; *Godfrey v. Terry* (1877), 97 U. S. 171; *Conklin v. Furman* (1865), 8 Abb. Pr. (N. S.) 164; *Schalucky v. Field* (1888), 124 Ill. 321, 16 N. E. Rep. 904; *Bank of Poughkeepsie v. Ibbotson* (1840), 24 Wend. 473; *Carroll v. Green*, 92 U. S. 509 (1875); *Baker v. The Atlas Bank* (1845), 9 Metc. 182; *Lindsay v. Hyatt* (1842), 4 Edw. Ch. (N. Y.) 104; *Van Hook v. Whitlock* (1832), 3 Paige, 409; *Green v. Beckman* (1881), 59 Cal. 545, 38 Fed. Rep. 777; *Wiles v. Suydam* (1876), 64 N. Y. 173, 176; *Mapper v. Mortimer* (1871), 11 Abb. Prac. (N. S.) 455; *Commonwealth v. Cochituate Bank*, 3 Allen, 42 (1861); *Terry v. Mc-*

Lure (1880), 103 U. S. 442; *Lewis v. Ryder*, 13 Abb. Pr. 1; *Kuykendall v. Draper*, 19 Hun, 577; *Moore v. Boyd* (Cal. 1887), 15 Pac. Rep. 670; *Paine v. Stewart* (1882), 33 Conn. 516; *Baker v. Bachus*, 32 Ill. 99; *In re Bank of Sing Sing* (1884), 32 Hun, 462, affirmed 96 N. Y. 672; *Terry v. Anderson*, 95 U. S. 628 (1877); *Handy v. Draper* (1882), 89 N. Y. 334; *Merritt v. Reid*, 13 Week. Dig. (N. Y.) 453 (1882); *Longley v. Little* (1846), 26 Me. 162.

⁶⁹ *Hollingshead v. Woodward* (1887), 107 N. Y. 96.

⁷⁰ *Sleeper v. Goodwin*, 67 Wis. 571.

⁷¹ *Hamilton v. Glenn* (1889), 85 Va. 901.

⁷² *Carroll v. Green* (1875), 92 U. S. 509; *Lindsay v. Hyatt*, 4 Edw. Ch. (N. Y.) 104.

⁷³ *Lowry v. Inman* (1871), 46 N. Y. 119; *Patterson v. Baker*, 34 How. Pr. 180 (1867). *Cf.* *Union Iron Co. v. Pierce* (1869), 4 Biss. 327; *Howell v. Manglesdorf*, 33 Kan. 194 (1885).

⁷⁴ *Great Western, etc. Co. v. Purdy* (1896), 162 U. S. 329;

of limitations against the liability of a stockholder to a corporate creditor, begins to run from the time the creditor's right of action accrues against the corporation, where the liability does not depend upon the obtaining of the creditor's judgment against the corporation.^{74a} The statute is not set running by the appointment of a receiver to carry on the corporate business.^{74b} The statute begins to run at once upon a stockholder's subscription, payable in instalments and subject to call by the directors, when the corporation becomes insolvent and suspends active business, or closes its doors and ceases all its usual business, leaving debts unpaid.^{74c} The statute of limitations begins to run against liability upon a contract of subscription to capital stock, from the time when a call is made and is due.⁷⁵ If the subscription is conditional, as where it is payable when the railroad is finished, it runs from the time of actual completion.⁷⁶ Where it is a bar as to the corporation, it is also a bar as to the creditors of the corporation.⁷⁷ Where the statute begins to run against one call, it does not run against all the subscription.⁷⁸ Where, by statute, it is provided that upon his appointment a receiver shall immediately begin the collection of subscriptions, the statute begins to run from the time of his appointment.⁷⁹ Where a promissory note, payable upon demand, is given in payment of subscription, the statute begins to run from time of demand, or from the time when the corporation becomes insolvent.⁸⁰ As to running of the statute, courts of equity will follow the law.⁸¹

Whether the statute runs before the call is made.—In Pennsylvania it is held that the call must be made before six years from

Glenn v. Marbury (1892), 145 U. S. 499; Priest v. Glenn (1892), 51 Fed. 405.

^{74a} Boyd v. Mutual Fire Assn. (Wis. 1902), 90 N. W. 1086.

^{74b} Younglove v. Lime Co., 49 Ohio St. 663 (1892).

^{74c} Chesapeake, etc. Ry. v. Speakman (Ky. 1903), 63 L. R. A. 193. *Vide supra*, § 334.

⁷⁵ Glenn v. Priest (1891), 48 Fed. 19; Glenn v. Liggett (1890), 135 U. S. 533; Glenn v. Marbury (1892), 145 U. S. 499; Hawkins v. Glenn (1899), 131 U. S. 319; Semple v. Glenn (1891), 91 Ala. 245, 6 So. 46, 24 Am. St. Rep. 894; Priest v. Glenn (1892), 51 Fed.

Rep. 405; Lehman v. Glenn, 87 Ala. 618 (1889), 6 So. 44.

⁷⁶ Cornell's Appeal (1886), 114 Pa. St. 153; Garner v. Hall (1899), 122 Ala. 221, 25 So. 187.

⁷⁷ Hawkins v. Donnerberg, 66 Pac. 691 (Oreg. 1901); Stilphen v. Ware (1872), 45 Cal. 110.

⁷⁸ Priest v. Glenn (1892), 51 Fed. 405.

⁷⁹ Webber v. Hovey (1895), 108 Mich. 49.

⁸⁰ Crofoot v. Thatcher (1899), 19 Utah, 212, 57 Pac. 171, 75 Am. St. Rep. 725.

⁸¹ Bank of United States v. Dallah (1836), 4 Dana (Ky.), 574.

the time the call is possible. Where no call is made before the statute becomes a bar, it begins to run from the time of subscription.⁸² Even though no call was made, it runs from time of making assignment for benefit of creditors.⁸³ The decision of a state, that the statute begins to run from the time of subscription, involves no federal question.⁸⁴

§ 645. **Ultra vires acts of corporation, or directors. Mismanagement. Delay.**—That the corporation or its directors have done acts *ultra vires* the corporation, will not avail as a defense against an action to collect a subscription.⁸⁵ For examples: that a railroad corporation has changed the location of its route,⁸⁶ or that the company has formed an illegal combination with other competing corporations.⁸⁷ *Mismanagement and waste* of the corporate funds is no defense.⁸⁸ *Long delay* in carrying on the business of the corporation is no defense, as, where there was delay of two and a half years in commencing the construction of a railroad.⁸⁹ And where, after partial construction, a railroad was abandoned for fourteen years and then completed,⁹⁰ the delay was held no defense. Failure of the undertaking and insolvency of the company are no defense.⁹¹ That subscriptions by others have been cancelled, is no defense.⁹²

§ 646. **Secret agreements; irregular incorporation.**—Secret agreement to release from payment is no defense; as a secret agreement of a corporation, made with a subscriber, to take back the stock at the end of two years at ten per cent. advance.⁹³ That the subscriptions of other persons were cancelled and the subscribers released by the directors, is no defense.⁹⁴

⁸² Hamilton v. Clarion, etc. R. R. (1891), 144 Pa. St. 34.

⁸³ Swearingen v. Sewickley, 198 Pa. St. 68 (1901), 53 L. R. A. 471.

⁸⁴ Great Western, etc. Co. v. Purdy (1896), 162 U. S. 329.

⁸⁵ Cartwright v. Dickinson, 88 Tenn. 476 (1890), 7 L. R. A. 706, 17 Am. St. Rep. 910.

⁸⁶ Central R. R. Co. v. Clemens (1852), 16 Mo. 359.

⁸⁷ United States Vinegar Co. v. Foehrenbach (1895), 148 N. Y. 58.

⁸⁸ Hards v. Platte, etc. Co., 46 Neb. 709 (1896), 65 N. W. 781; Cook v. Hopkinsville, etc. Co., 32 S. W. 748 (Ky. 1895).

⁸⁹ Miller v. Pittsburgh, etc. R. R. (1861), 40 Pa. St. 237, 80 Am. Dec. 570.

⁹⁰ Blake v. Brown (1890), 80 Iowa, 277.

⁹¹ Morgan Co. v. Thomas (1875), 76 Ill. 120.

⁹² Rensselaer, etc. v. Wetzell, 21 Barb. 56 (1855).

⁹³ Vance, etc. Co. v. Bentley, 92 Ill. App. 287 (1900).

⁹⁴ Bristol, etc. Co. v. Selliez, 175 Pa. St. 18 (1896); Bennett v. Glenn (1893), 55 Fed. Rep. 956. *Vide supra*, § 635a.

§ 647. **Failure of subscription to full capital stock.**—The contract of subscription can not be enforced upon the subscriber before the capital stock has been fully subscribed for. This is the implied condition of his subscription.⁹⁵ "This rule has been held inflexible in all cases, both for the security of the public and also of the subscribers."⁹⁶ In a suit upon a subscription, the corporation must aver that the full capital stock has been subscribed.⁹⁷ Where the whole capital stock is not subscribed, any one subscriber may recover back what he has paid.⁹⁸ It is no defense to a subscriber that a corporation, *ultra vires* had subscribed for some of the stock.⁹⁹

§ 648. **Material change of corporate enterprise.**—A material change of the corporate enterprise after subscription, will release the subscriber who has not acquiesced therein. Illustrations: Where the plan was to purchase and improve land in a city, and the plan was changed to buy and sell land anywhere and to do many other things;¹ where the statute authorizing generating and selling electricity, and the articles of incorporation added thereto, the manufacture and sale of electrical apparatus and supplies;² where the object of incorporation was stated to be the purchase of certain patents, and the corporation was organized also to do a manufacturing business;³ where the subscription was to a joint stock corporation or partnership, and subsequently a corporation was organized;⁴ where the agreement was to take stock in an incandescent electric lighting company, and the corporation was organized to furnish electric light and power;⁵ and where, after the subscription, the capital stock was doubled, and the objects and purposes of the corporation were changed.⁶

§ 649. **Failure of corporation to tender stock certificate.**—Failure of the corporation to deliver or tender a certificate for the shares he subscribed, is no defense by the subscriber to an action on his subscription.⁷ It is unnecessary to tender certificate before

⁹⁵ Salem Mill-Dam Corp. v. Ropes (1897), 23 Mass. 23.

⁹⁶ Livesey v. Omaha Hotel (1876), 5 Neb. 50.

⁹⁷ Hain v. Northwestern, etc. Co. (1872), 41 Ind. 196.

⁹⁸ Winters v. Armstrong (1889), 37 Fed. Rep. 508.

⁹⁹ McCoy v. World's Exposition (1899), 87 Ill. App. 605.

¹ West End, etc. Co. v. Nash, 41 S. E. 182 (W. Va. 1902).

² Burk v. Mead (Ind. 1902), 64 N. E. 880.

³ Stern v. McKee (1902), 70 N. Y. App. Div. 142.

⁴ Knottsville, etc. Co. v. Mattingly (Ky. 1896), 35 S. W. 1114.

⁵ Maysville, etc. Co. v. Johnson (1895), 109 Cal. 192.

⁶ Baker v. Fort Worth, etc., 8 Tex. Civ. App. 560 (1894).

⁷ Beals v. Buffalo, etc. Co., 49 N. Y. App. Div. 589 (1900); Glenn

bringing the suit.⁸ A subscriber to increased capital stock who has paid part of the price, can not recover the payment upon the company's insolvency on the ground that no certificate has been issued.⁹ A subscriber can not compel the issue to him, of a certificate, before making full payment of subscription to increased capital stock.¹⁰ The corporation, in suing the subscriber, must allege its readiness to issue the certificate upon payment.¹¹ A subscription for the stock of a corporation, does not stand on the footing of a purchase of stock or purchase of other property, where the promise to pay and the promise to sell, are concurrent and dependent, and where neither party can compel the other to perform without performing or offering to perform on his part, but stands upon the ground that when the subscriber pays, he is the owner of the stock, that it is the payment which makes him a stockholder, the certificate being merely the evidence of his right; and that he is a full stockholder with all his rights of one, even if a certificate is never issued to him, and therefore it is for him to demand the certificate when he wishes one, and not for the corporation to tender one.¹²

§ 650. **Discharge of stockholder in bankruptcy.**—Discharge in bankruptcy of a subscriber, is a bar to a suit to enforce subscription when the company became insolvent before the bankruptcy.¹³ But discharge in bankruptcy is no defense against calls made subsequently.¹⁴ Change of name of corporation is no defense of a stockholder, to a creditor's suit.¹⁵

v. Rosborough, 48 S. C. 272, 26 S. E. 611; Webb v. Baltimore (1893), 77 Md. 92, 39 Am. St. Rep. 396; Holland v. Duluth (1896), 65 Minn. 324, 60 Am. St. Rep. 480; Walter v. Robbins (1893), 56 Minn. 48; Nebraska, etc. Assn. v. Townly (1896), 46 Neb. 893, 69 N. W. 1062; Barron v. Burrill, 86 Me. 66 (1893); San Joaquin, etc. Co. v. Beecher (1894), 101 Cal. 70.

⁸ California v. Callender (1892), 94 Cal. 120, 28 Am. St. Rep. 99; Marson v. Deither (1892), 49 Minn. 423.

⁹ Butler v. Eaton (1891), 141 U. S. 240.

¹⁰ Baltimore v. Hambleton, 77 Md. 341 (1893).

¹¹ Walter, etc. Co. v. Jefferson (1894), 57 Minn. 456; Seymour v.

Jefferson (Minn. 1898), 74 N. W. 149.

¹² Marson v. Deither (1892), 49 Minn. 423; Columbia Electric Co. v. Dixon, 46 Minn. 463; Heaston v. Cincinnati R. R. Co. (1861), 16 Ind. 275, 79 Am. Dec. 430; New Albany Co. v. McCormick, 10 Ind. 499, 71 Am. Dec. 337.

¹³ Carey v. Mayer (1897), 79 Fed. 926.

¹⁴ Glenn v. Howard (1886), 65 Md. 40.

¹⁵ Priest v. Glenn, 51 Fed. 400 (1892); McCormick v. Great Bend, etc. Co. (1892), 48 Kan. 614; Joseph v. Davis (Ala. 1892), 10 So. 830; Howard v. Glenn (1890), 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156.

CHAPTER XXV.

ATTACHMENT AND EXECUTION.

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| <p>§ 651. Levy of attachment and execution upon shares of stock.</p> <p>652. Levy on stock held in pledge or trust.</p> <p>653. Statutory provisions.</p> <p>654. <i>Situs</i> of the shares; attachment out of the state.</p> <p>655. Registration of stock sold under execution.</p> <p>656. Debtors title to the shares he holds as trustee or pledgee.</p> <p>657. Jurisdiction in equity.</p> | <p>§ 658. Transferee's stock unregistered not subject to execution.</p> <p>659. Attachment by creditors of the transferrer.</p> <p>660. Notice of the unregistered transfer.</p> <p>661. Attachment by creditors of the transferee.</p> <p>662. Garnishment.</p> <p>662<i>a</i>. Execution and attachment upon the property and franchises of railroads and other <i>quasi</i>-public corporations.</p> |
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References:

Civil actions by and against corporations. Sections 918-1014.

Forfeiture of shares upon non-payment of subscription. Sections 320-326.

Creditors' suits against stockholders. Sections 605-619.

§ 651. **Levy of attachment and execution upon shares of stock.**—Shares of stock being choses in action and intangible at common law, a levy of execution could not be made upon them, and unless a statute so provides, they cannot be made subject to payment of the shareholder's debts.¹ They cannot be levied upon by attachment, unless the statute expressly makes shares of stock subject to execution for debt of the shareholder.²

§ 652. **Levy on stock held in pledge or trust.**—Usually an attachment or execution may be levied upon the equity of redemption in stock mortgaged or pledged.³ Dividends on the attached stock are covered by the attachment.⁴ A corporation may enforce, by attachment upon stock, its lien for debt due it from the stockholder.⁵

¹ Foster v. Potter, 37 U. S. 526; Feige v. Burt (1898), 118 Mich. 243, 74 Am. St. Rep. 390.

² Plimpton v. Bigelow (1883), 93 N. Y. 592.

³ Norton v. Norton (1885), 43 Ohio St. 509.

⁴ Jacobus v. Monongahela, etc. Co. (1888), 35 Fed. 395.

⁵ Sabin v. Bank of Woodstock (1849), 21 Vt. 353.

§ 653. **Statutory provision.**—Nearly all jurisdictions have by statute made shares of stock in a corporation subject to execution and sale for payment of debts of the shareholder. Such statutes are strictly construed.⁶ Attachment is generally provided for in case of non-residence, or fraud of the debtor. Where both attachment and execution are allowed by statute, the former is the preferable remedy, when the corporation has a lien on the stock.⁷ Shares in companies having capital stock, are subject to execution and attachment.⁸ It is expressly declared by statute in

⁶ *Clafin Co. v. Bretzfelder*, 69 Ark. 271 (1901); *Feige v. Burt* (1898), 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; *Curtis v. Steever*, 36 N. J. Law, 304.

⁷ *Weaver v. Huntingdon*, etc. Co. (1865), 50 Pa. St. 314.

⁸ *Union Nat. Bank v. Byram*, 7 Ry. & Corp. L. J. 148 (Ill. 1889), where Magruder, J., said: "In *People v. Manufacturing Co.*, 99 Ill. 355, we said: 'The property of a stockholder consists of his right to a share in the net assets of the corporation, proportionate to the number of shares to which he has title.' *Bouvier* defines a 'right' as 'a well-founded claim.' Whatever may be the correct definition of the word 'rights,' as used in section 8 (of Ill. Rev. Stat., ch. 11, the Attachment Act), it refers to some kind of property interest, which is incorporeal in its character, and not to that species of property which is capable of being actually and corporeally seized by the sheriff. 'Effects' are defined to be 'property or worldly substance,' and as denoting 'property in a more extensive sense than goods.' 1 *Bouv. Law Dict.* 579; 1 *Schouler on Personal Property*, § 16. A share of stock cannot be regarded otherwise than as 'property,' nor can it be said that it is not 'wordly substance.' By the use of the word 'attached' in sections 53, 54 and 55 (of Ill. Rev. Stat., ch. 77, the Execution Act), as above quoted, the legislature assumed that provision had already been

made for attaching shares of stock. It will not be presumed that this assumption was a mistaken one, unless it clearly appears to be so. When section 8 of the Attachment Act making use of terms which are broad enough to embrace shares of stock is carefully studied in connection with said sections 53, 54 and 55, it is evident that the latter sections refer back to said section 8, and point to it as the provision for attaching corporate stock, which is assumed to exist. Nearly twenty years before July 1, 1872, this court had said in *Newhall v. Buckingham*, 14 Ill. 405: 'Under our statute, whatever is the subject-matter of seizure and sale on execution may be taken in the proceeding by attachment, and held subject to sale on the judgment that may be recovered.' There is no such difference between the statute now in force and the statute of 1845, which was in force when the *Newhall Case* was decided, as would make the statement in the quotation any the less true now than it was then. The objection that the statute provides no mode of levying the writ of attachment will also disappear upon a comparison of the Attachment Act with the act in regard to judgments and executions. Section 26 of the Attachment Act provides that 'the practice and pleadings in attachment suits, except as otherwise provided in this act,

some States that the shares of stock of any person in an incorporated company, are personal property and may be levied on by execution and attachment, and sold as goods and chattels.⁹ After shares of stock have been attached, and the corporation served, a transfer to a creditor of more shares than are necessary to secure his debt, for which there has been an equitable hypothecation, can not be made as against the attaching creditor.¹⁰

§ 654. Situs of the shares; attachment out of the State.—

For purposes of attachment, stock in a corporation has its *situs* only where the corporation is incorporated. There only, shares of stock are subject to execution and attachment. They can not

shall conform, as near as may be, to the practice and pleadings in other suits at law.' The word 'practice,' as here used, includes the mode of serving mesne process and the mode of executing final process. It refers to the manner in which an attachment writ is to be levied, and also in the manner in which a writ of *fi. fa.*, or an execution, is to be levied. *Fleischman v. Walker*, 91 Ill. 318. The word 'levy' is applied to attachment writs as well as to executions. An attachment writ is levied upon personal property in the same way in which an execution is levied thereon. A 'levy' is defined by Bouvier to be a 'seizure,' and it is no less a seizure when made under an attachment than when made under an execution. The seizure is made in the same way under the one as under the other. The acts necessary to a valid levy of an attachment are equally essential to the valid levy of an execution (2 *Freeman on Executions*, 2d ed., § 262) and the converse of the proposition is also true. The object of the attachment of personal property is to seize and hold it until judgment is rendered, so that it may be taken and sold under execution. The object of levying an execution upon personal property is to seize and sell

it, so as to make out of it the amount recovered by the judgment." The shares of a stockholder in a railroad corporation are liable to attachment; and by virtue thereof, the attaching creditor acquires a claim superior to that of a subsequent *bona fide* purchaser of the shares for value without notice of the attachment. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913. But under Md. Act of 1886, ch. 287, which provides that no attachment or garnishment levied on corporate stock shall affect the rights of any pledgee, acquired before the levy, or prevent the pledgee and the corporation from transferring the shares on the company's books, the court does not, by the garnishment of a pledgee, obtain any control of the stock, and a bill does not lie for the appointment of a receiver, and to enforce the garnishment. *Morton v. Grafflin* (1888), 68 Md. 545.

⁹ Ala. Code of 1876, § 2041; R. I. Rev. Stat., ch. 196, § 21; ch. 197, § 9; ch. 212, §§ 18-20; R. I. Pub. Stat., ch. 207, § 22; ch. 208, § 9, ch. 223, §§ 20-22; N. Y. Code Civ. Proc., § 647; Pa. Act of June 16, 1836; Conn. Gen. Stat., ch. 2, § 19; ch. 14, § 237; Wyoming Rev. Stat., §§ 2773, 2774.

¹⁰ *Kyle v. Montgomery*, 73 Ga. 337.

be levied upon in another State, although the indebted owner resides there, or the certificates be found there.¹¹ For example, certificates of stock of a Colorado corporation, which were located in Indiana within jurisdiction of the court, and belonged to a non-resident, were held not subject to attachment by a citizen of Indiana.¹² "We do not doubt that shares, for the purpose of attachment proceedings, may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to wit, in the State or country of its creation. . . . Manifestly the *res* can not be within the jurisdiction, as a mere consequence of a legislative declaration, when the actual locality is undeniably elsewhere."¹³ In cases involving execution and attachment of stock in foreign corporations, the *situs* of the certificates is unimportant. Their seizure by execution or attachment would not be seizure or levy upon the stock itself, without notice to the company. It is the *situs* of the corporation that determines.¹⁴ If it be doing business in the State in the capacity of a foreign corporation, shares of its stock can not be reached by levy, although its officers are present in the State engaged in carrying on its business there.¹⁵ But if the corporation, by having its officers and transacting its business in a State other than of its origin, is deemed to be itself present as an entity in the foreign State in the same sense in which it is present in the State which created it, it may be conceded that its shares might be properly attached in the foreign jurisdiction.¹⁶ Accordingly, it has been held that where a foreign corporation was carrying on the business of making iron within Tennessee, and its officers and its general office were required by its by-laws to be in that State, and all of its

¹¹ *Young v. South Tredegar Iron Co.* (1887), 85 Tenn. 189, 4 Am. St. Rep. 752; *Winslow v. Fletcher* (1886), 53 Conn. 390, 55 Am. Rep. 122; *Ireland v. Globe Milling, etc. Co.* (1895), 19 R. I. 180, 61 Am. St. Rep. 756.

¹² *Smith v. Downey* (1893), 8 Ind. App. 179; *Daniel v. Gold Hill, etc. Co.* (Wash. 1902), 68 Pac. 884. 453.

¹³ *Plimpton v. Bigelow*, 93 N. Y. 592 (1883).

¹⁴ *Young v. South Tredegar Iron*

Co. (1886), 85 Tenn. 189, 4 Am. St. Rep. 752.

¹⁵ *Plimpton v. Bigelow*, 93 N. Y. 592, 66 How. (N. Y.) Pr. 131, 13 Abb. (N. Y.) N. Cas. 173, holding that New York Code, section 647, applies only to domestic corporations, and reversing 29 Hun, 362.

¹⁶ *Dicta* in *Plimpton v. Bigelow*, 93 N. Y. 592, quoted with approval in *Young v. South Tredegar Iron Co.* (1886), 85 Tenn. 189, 4 Am. St. Rep. 752.

books, including its stock-books, were kept therein, its elections of directors held therein, and its directory, plant and property were located therein, it was presumed that the corporation had complied with the law, and was to be deemed a domestic corporation, the stock of which, owned by a non-resident stockholder, was liable to attachment in Tennessee.¹⁷ Although the foreign corporation has a branch office in the State, and the certificates are in the same State, an attachment can not be levied upon them there. No more so than could the title deeds to land be levied upon themselves, under attachment, where the land is situate in another State.¹⁸ But in New York it was recently held that certificates of a New Jersey corporation, which were in New York, were there subject to attachment and sale as a property right there, the court saying: "Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand and they are the subject of larceny."¹⁹ Where shares of stock of a foreign corporation belonging to a non-resident are held as collateral security by a domestic corporation, they are not attachable by service of process on the officers of such domestic corporation.^{19a} For taxation purposes, shares follow the owner and are taxable at his legal domicile.^{19b}

§ 655. Registration of stock sold under execution.—Upon application by the purchaser for registration in his name, of stock sold under attachment or execution, the corporation, if in doubt whether the outstanding certificate is in the hands of another unregistered purchaser, may refuse to allow the registry until compelled to do so by a court, and so protect itself against any such purchaser of the outstanding certificate.²⁰

§ 656. Debtor's title to the shares he holds as trustee or pledgee.—Although the debtor may appear on the corporate books as owner, the shares are not subject to execution or attach-

¹⁷ *Young v. South Tredegar Iron Co.* (1886), 85 Tenn. 189, 4 Am. St. Rep. 752. But see *Martin v. Mobile & O. R. Co.*, 7 Bush, 116.

¹⁸ *Christmas v. Biddle*, 13 Pa. St. 223 (1850).

¹⁹ *Plimpton v. Bigelow*, 13 Pa. St. 223 (1850).

^{19a} *Winslow v. Fletcher*, 53 Conn. 390.

^{19b} *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490.

²⁰ *Friedlander v. Slaughter, etc. Co.* (1879), 31 La. Ann. 523.

ment where the debtor holds them simply as trustee, or pledgee, or where he has, in good faith, transferred them for value.²¹ The pledgee, of stock assigned as collateral security for financial obligation, is protected to the extent of the amount due as against an attaching creditor of the assignor, where notice of the assignment is given to the corporation, although the assignment is not registered upon the corporate books.^{21a} But such pledgee is not so protected in States where the registry is held to be for the benefit of creditors and stockholders, as well as for the benefit of the corporation, or where the by-laws, in pursuance of the charter, provide that its transfer shall be valid without registry. There the attaching creditor, without notice of such unrecorded assignment, takes free from the claims of the assignee.^{21b}

Equitable title.—Unless under statute, only the legal title of the debtor can be reached by attachment or execution.²²

§ 657. **Jurisdiction in equity.**—A court of equity has no jurisdiction to subject stock to the payment of debts, merely because it is not subject to attachment or execution,²³ though it has jurisdiction to set aside a transfer of shares, made to defraud creditors, where they have no adequate remedy at law.²⁴ A court of equity has no power to subject stock to payment of the shareholder's debts, unless where he has transferred his stock in fraud of his creditors.²⁵

§ 658. **Transferees' stock unregistered not subject to execution.**—The law favors the transfer of stock certificates, and the protection of *bona fide* purchasers of stock against subsequent attachments and executions, and accordingly the weight of authority of the State and federal courts, holds that, by the common law, stock in the hands of a *bona fide* purchaser, though the transfer be unregistered, is not subject to attachment or execution for the debts of the registered shareholder, although the apparent owner. "The tendency of modern decisions, is to regard certificates of stock attached to an executed blank assignment and

²¹ Mowry v. Hawkins, 57 Conn. 453, 18 Atl. 784.

^{21a} State Ins. Co. v. Gennett, 2 Tenn. Ch. 100; Finney's Appeal, 59 Pa. 398; Thurber v. Crump, 86 Ky. 408.

^{21b} Bridgewater, etc. Co. v. Lissberger, 116 U. S. 8, citing numerous authorities.

²² Gypsum, etc. Co. v. Grove, 97 Mich. 631.

²³ Disborough v. Outcalt, 1 N. J. Eq. 298.

²⁴ Gillett v. Bate, 86 N. Y. 87.

²⁵ Williams v. Reynolds (1856), 7 Ind. 622; State Bank v. Gill, 23 Hun, 410 (1881).

power to transfer, as approximating to negotiable securities, though neither in form or character negotiable."²⁶

§ 659. **Attachment by creditors of the transferrer.**—Where shares have been transferred, by assignment of the certificates without registration upon the books of the company, two questions arise, to wit: whether creditors of the transferrer thereby lose the right to levy upon the shares, and whether the transferee acquires thereby a property right which his creditors may subject to execution and attachment. These questions depend for their solution upon the distinction between legal and equitable titles.²⁷ The legal title to shares, assignable only on the company's books, does not pass by an assignment not so made and recorded.²⁸ The unregistered transferee takes only an equitable title as between himself and his transferrer, or parties having actual knowledge of the transfer.²⁹ Accordingly, a mere transfer of the certificates representing shares which, either by charter or statute, are declared to be transferable only on the company's books, is ineffectual to pass the property, as against attaching creditors of the transferrer having no notice thereof.³⁰ So, of course, it follows

²⁶ *Scott v. Pequonock Nat. Bank* (1883), 15 Fed. 494; *United States v. Vaughan* (1811), 3 Binn. 394; *May v. Cleland* (1898), 117 Mich. 45, 44 L. R. A. 163; *Smith v. American Coal Co.* (1873), 7 Lans. 317.

²⁷ In England, the House of Lords having decided that shares of stock are *choses in action* (*Bank v. Whinney*, 11 App. Cas. 426), it is now held that an equitable assignment of stock without notice to the corporation relieves it of the claims of the judgment creditors of the assignee. *Arden v. Arden*, 29 Ch. Div. 702; *Bevan v. Oxford*, 6 D., M. & G. 492; *Pickering v. Ilfrac. Ry. Co.*, L. R. 3 C. P. 235; *Robinson v. Nesbitt*, L. R. 3 C. P. 264; *Browne & Theobald's Ry. Law*, 76.

²⁸ *Noble v. Turner* (1888), 69 Md. 519; *Lippitt v. American Wood Paper Co.* (1885), 15 R. I. 141, 2 Am. St. Rep. 1886, and note 891. The assignment and delivery, as collateral, of certificates of stock transferable on the books of

the company, on presentment, properly indorsed, passes an equitable title only; and where the assignee delays for seven years to notify the company of the assignment, or present the stock for transfer, pending which the stock is attached and sold as property of the assignor, and a transfer on the books made by the sheriff to the purchaser as authorized by statute (Code Md. art. 10, § 19, and art. 26, §§ 205, 206, as amended by act 1868, ch. 471) his title is extinguished. *Noble v. Turner*, 69 Md. 519 (1888).

²⁹ *Lippitt v. American Wood Paper Co.* (1885), 15 R. I. 141; *Noble v. Turner* (1888), 69 Md. 519. Stock certificates not being negotiable instruments, an assignee takes them subject to equities and defenses. *Young v. South Tredegar Iron Co.* (1886), 85 Tenn. 189, 4 Am. St. Rep. 752, and cases in note, 759.

³⁰ *Buttrick v. Nashua, etc. R. Co.* (1882), 62 N. H. 313, 13 Am. St. Rep. 578; *Pingerton v. Man-*

that an attachment of shares of stock takes precedence over a sale thereof previously negotiated but not consummated by delivery until after attachment. Accordingly, where the sale of shares of

chester, etc. R. Co., 42 N. H. 454; *Scripture v. Francistown Soapstone Co.*, 50 N. H. 571, 585-589; *Fisher v. Essex Bank*, 5 Gray, 373; *Blanchard v. Dedham Gas L. Co.*, 12 Gray, 213; *Shipman v. Ætna Ins. Co.*, 29 Conn. 245, 253; *Johnston v. Laffin*, 103 U. S. 804; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Fiske v. Carr*, 20 Me. 301; *Dutton v. Connecticut Bank*, 13 Conn. 493; *Oxford Turnpike Co. v. Bunnell*, 6 Conn. 552; *State v. First Nat. Bank*, 89 Ind. 302; *Coleman v. Spencer*, 5 Blackf. (Ind.) 197; *Farmers' Gold Bank v. Wilson*, 58 Cal. 600 (1882); *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *Strout v. Natoma, etc. Co.*, 9 Cal. 78; *Weston v. Bear River, etc. Co.*, 5 Cal. 186, 63 Am. Dec. 117; *People's Bank v. Gridley*, 91 Ill. 457; *In re Murphy*, 51 Wis. 519. But see *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161. Under Mass. Stat. of 1870, ch. 224, providing that shares might be transferred by an instrument to be recorded in the corporation book, and that the transferee on producing the instrument and delivering up the certificate should be entitled to a new one, the shares might be attached in a suit against the assignor before these things were done. *Central Bank v. Williston*, 138 Mass. 244. B. transferred on the books of a corporation his shares to G. as collateral security. Afterwards, the necessity for the security being at an end, G., at B.'s request, indorsed and transferred the certificate to D., a creditor of B. Before any record of this transfer had been made on the corporate books, another creditor of B. attached the shares as B.'s property, and it was held that the attachment could not be maintained. *Beckwith v. Burroughs*, 13

R. I. 294. Code Ala. 1876, § 2041, provides that the shares of stock of any person in an incorporated company are personal property and transferable on the company's books as the company may prescribe, and may be levied on by attachment and execution and sold as goods and chattels. Section 2043 provides that no transfer of stock on the books shall be valid as against "*bona fide* creditors and subsequent purchasers, without notice," except from the time that the transfer shall have been made on the company's books. Section 2044 provides that persons holding stock not so transferred must have the transfer made on the books of the company, or, upon failing to do so within fifteen days, the transfer shall be void as to *bona fide* creditors or subsequent purchasers without notice. Under these provisions it is held that an attaching creditor who perfects his lien by the recovery of a judgment, is a *bona fide* creditor from the inception of his lien; and that where the purchaser of stock fails to have it transferred on the company's books within fifteen days, the stock becomes liable to attachment at the suit of any creditor of the person in whose name it stood on the books. *Berney Nat. Bank v. Pinckard* (1889), 87 Ala. 577, 6 Ry. & Corp. L. J. 329. In this case Stone, C. J., after reviewing cases decided under the statute concerning registration of deeds and patents, continued: "Cases have been before us in which controversies have arisen between parties claiming to be transferees of stock in corporations and creditors of the transferrers. The following are some

stock has been negotiated between non-residents, but, before the purchase price has been paid, or the certificates assigned and delivered to the intended purchaser, an attachment has been levied on them in an equity suit against the owner, in which this particular stock is described, the intended purchaser acquires no title as against a purchaser at the attachment sale, although the owner and intended purchaser have no actual notice of the attachment bill at the time of the attempted sale.³¹ Where an attachment can not be levied on corporate stock by reason of its having been previously transferred, a bill can not lie to protect the lien of such an attachment by enjoining the payment of dividends to the holder; and the injunction, if granted, can be vacated by *mandamus*.³² The rule above stated has been applied where only the by-laws of the company make the provision as to registration.³³

of the cases; *Nabring v. Bank*, 58 Ala. 204, in which the transfer had been made on the books of the company. No question arose in that case which is material to the present one. *Jones v. Latham*, 70 Ala. 164, was the case of a creditor having an execution followed by a levy on the stock. We held that the bill was imperfect for the want of necessary averments.

We feel constrained to construe the foregoing provisions—*First*, as placing stocks in private corporations on the same footing as other personal chattels as to their amenability to levy either under execution or attachment; *second*, that if a transfer of such stock is not recorded within fifteen days after the transfer, then such transfer is void as to *bona fide* creditors or subsequent purchasers without notice; and, *third*, that a judgment creditor having a lien, or an attaching creditor who perfects his lien by the recovery of judgment, is each a *bona fide* creditor from the inception of the lien. The question as to priority of lien was settled as we have declared it in *Hardaway v. Semmes*, 38 Ala. 657. See, also, *Jordan v. Mead*, 12 Ala. 247; *Application of*

Thomas Murphy, 51 Wis. 519; *Weston v. Mining Co.*, 5 Cal. 186; *Fisher v. Jones*, 82 Ala. 117. We place our ruling above on the language of the statute, which, as we interpret it, accords equal efficacy to attachment levy as it does to levy under execution. But a plaintiff in attachment levied does not thereby become a purchaser (*Wollner v. Lehman*, 85 Ala. 273) and can assert no claim as such. We have ruled above that, under our statutes, *Pinckard, De Bardelaben & Co.* were allowed fifteen days after their purchase of the stock within which to have it transferred on the corporation books, and that failing to do so within that time, the stock became liable to levy under execution or attachment at the suit of any creditor of *Davin*, in whose name the stock stood on the books."

³¹ *Young v. South Tredegar Iron Co.* (1887), 85 Tenn. 189, 4 Am. St. Rep. 752.

³² *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204.

³³ *Dutton v. Connecticut Bank*, 13 Conn. 493. *Contra*, *Boston Music Hall v. Cory*, 129 Mass. 434; *Sargent v. Essex, etc. Ry. Co.*, 26 Mass. 202.

The rights of unregistered transferee superior to those of attaching creditors.—Though there is diversity of opinion, the weight of authority holds that the *bona fide* transferee of shares, though the transfer be not recorded on the books of the corporation, is protected in equity against levy of attachment or execution by a creditor of the vendor, where notice is given to the corporation of the transfer, although it is not recorded.^{33a} That requirement of registry on the corporate books is for the benefit of the corporation alone,—though dissented from in *Fisher v. Essex Bank*, 5 Gray, (Mass.) 373, and *Peoples' Bank v. Gridley*, 91 Ill. 457, holding that the requirement is for the benefit of strangers as well as for the corporation, and that an attaching creditor, without notice, has equities superior to those of an unrecorded transferee. In the United States, two rules prevail, with reference to the effect of an unregistered transfer of stock, upon the rights of the creditors of the transferor, when the statute provides that the transfer shall only be effective as between the parties until it is registered.³⁴ The English rule, which is also followed in several States, is as above stated. In New York, on the other hand, where the courts do all in their power to facilitate the transfer of stock, a *bona fide* sale, with written assignment and delivery of the certificates and power of transfer on the books, conveys the title to the stock free from liability to the creditors, or the assignee in insolvency of the vendor.³⁵ The New York rule is followed in Pennsylvania, and in several other States,³⁶ and also by the

^{33a} *Broadway Bank v. McElrath*, 13 N. J. Eq. 24, and numerous citations; *Baldwin v. Canfield*, 26 Minn. 43.

³⁴ *In re Murphy*, 51 Wis. 519; *Weston v. Bear River, etc. Co.*, 5 Cal. 186, 63 Am. Dec. 117. See, also, *Fisher v. Essex Bank*, 71 Mass. 373; *Newall v. Williston*, 138 Mass. 240; *Central Bank v. Williston*, 138 Mass. 244.

³⁵ *Taylor on Corporations*, § 796, citing *Smith v. American Coal Co.*, 7 Lans. 317; *Comeau v. Guild Farm Oil Co.*, 3 Daly, 218.

³⁶ *United States v. Vaughn*, 3 Binn. 294, 5 Am. Dec. 375; *Telford, etc. Turnpike Co. v. Gerhab* (Pa. 1888), 13 Atl. Rep. 90; *Eby v. Guest*, 94 Pa. St. 160; *Fenney's*

Appeal, 59 Pa. St. 398; *Commonwealth v. Watmouth*, 6 Whart. 117; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24, *sub nom.* *Hunterdon Bank v. Nassau Bank*, 17 N. J. Eq. 496; *Rogers v. Stevens*, 8 N. J. Eq. 167; *Cornick v. Richards*, 3 Lea, 1. But see *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507; *Merchants' Nat. Bank v. Richards*, 74 Mo. 77, affirming 6 Mo. App. 454; *Seligson v. Brown*, 61 Tex. 114; *Newberry v. Detroit, etc. Co.*, 17 Mich. 141; *Beckwith v. Burroughs*, 13 R. I. 294; *Fraser v. Charleston*, 11 S. C. 486, 519; *Thurber v. Crump*, 86 Ky. 408 (1888); *Pitot v. Johnson*, 33 La. Ann. 1286; *Smith v. Crescent City, etc. Co.*, 30 La. Ann. 1378. In Louisiana it has been

federal courts,³⁷ which apply it even in States where the opposite prevails.³⁸ In some States this rule has been embodied in legislative enactments. Thus, in Maryland, an act provides that the rights of a pledgee acquired previous to a levy of attachment or garnishment, shall not be affected by such levy of attachment, or pledgee or corporation be prevented from registering a transfer;³⁹ so also in Massachusetts, where the other rule originated.⁴⁰ A debtor can not, however, as against an attaching creditor, where notice of the attachment has been served on the corporation, assign to another creditor more stock than will leave him sufficient to secure the debt.⁴¹

§ 660. **Notice of the unregistered transfer.**—Even in those States, where under statute requiring transfers of stock to be registered on the corporate books, the courts give an attachment or execution precedence over prior unregistered transfer of the stock, they hold, nevertheless, that if the attaching creditor or purchaser at the sale had notice of transfer by the debtor of his certificate, its unregistered purchaser is entitled to the stock, and may permanently enjoin its attachment or the registration of its sale.⁴² Where the purchaser at the execution sale at the time knew of the prior purchase, he took no title as against such purchaser.⁴³ The legal title is not subject to attachment by creditors:

held that a pledge of corporate stock is validly effected so far as the pledgor's creditors are concerned by the delivery of the certificates without notice to the corporation or transfer on its books, although the certificates refer to the charter, which contains a provision that no sale or transfer shall be made without first giving the corporation sixty days' notice, with the privilege to it or its members to purchase on equal terms. *Crescent City Seltzer & Mineral Water M. Co. v. Deblieux* (1888), 40 La. Ann. 155.

³⁷ *Continental Nat. Bank v. Eliot Nat. Bank*, 5 Fed. Rep. 369.

³⁸ *Scott v. Pequonock Nat. Bank*, 13 Fed. Rep. 494. But see *Williams v. Mechanics' Bank*, 5 Blatchf. 59. And see *Hazard v. Exchange Bank*, 26 Fed. Rep. 94, where certain shares of a corporation were transferred, but no rec-

ord thereof was made as the by-laws required, and a creditor of the transferrer, with no notice of the transfer, and in good faith, attached the shares and had them sold and transferred to a third party. It was held that a suit against the corporation for refusing to record the transfer to him could not be maintained by the former transferee.

³⁹ Md. Act of 1886, ch. 287; *Morton v. Graffin* (1888), 68 Md. 545.

⁴⁰ Mass. Act of May 9, 1884.

⁴¹ *Kyle v. Montgomery*, 73 Ga. 337.

⁴² *Van Cise v. Merchants' Nat. Bank* (1887), 4 Dak. 485, 33 N. W. 897.

⁴³ *Wilson v. St. Louis, etc. Ry.* (1891), 108 Mo. 588, 32 Am. St. Rep. 624; *Blakeman v. Paget Sound, etc. Co.* (1887), 72 Cal. 321; *Selma, etc. Co. v. Harris*, 31 So. 508 (Ala. 1902).

having knowledge that the equitable title is in another party, and who are not misled or deceived by the registration book.⁴⁴ This principle would seem to be carried so far in Pennsylvania as to impute the assignor's knowledge to his attaching creditors.⁴⁵ When the company itself attaches the shares of one of its members, it is not chargeable with knowledge of a transfer thereof possessed by one of its creditors, who took no part in causing the attachment to be made and who had no knowledge of it.⁴⁶

§ 661. **Attachment by creditors of the transferee.**—Ordinarily the creditors of an unregistered transferee of stock certificates, can not subject his interest in the shares to execution and attachment.⁴⁷ For until his name has been entered, as holder of

⁴⁴ *Mowry v. Hawkins* (1890), 57 Conn. 453, 18 Atl. Rep. 784; *Bridgewater Iron Co. v. Lissbeyer*, 116 U. S. 8, appealed from Massachusetts. But under Mass. Pub. Stat., ch. 105, § 24, which provides that an assignment of stock, until recorded, or a new certificate issued, shall not affect the right of the assignor's creditor to attach, it has been held that where the owner of stock transferred his certificate to a transferee who wrote to the corporation requesting a transfer, and a minute was made on the certificate-stub in the book of the corporation, the company having no transfer book, the transferrer's creditor attaching the stock, with notice of the facts, could hold it. *Newell v. Williston*, 138 Mass. 240.

⁴⁵ Pennsylvania Act of June 2, 1874, relating to limited partnership associations, prescribes a particular form for the transfer of stock, and declares that no change of ownership can be accomplished in any other mode or form, or by any other means than a transfer as specified, and it was held, that, notwithstanding, an assignment in another form passed the title as against the assignor, and therefore, as against his attaching creditor. *Tide Water Pipe Co. v. Kitchenman*, 108 Pa. St. 630.

⁴⁶ *Buttrick v. Nashua, etc. R. Co.* (1882), 62 N. H. 413, 13 Am.

St. Rep. 578. For, since directors can act only as a board, their power being joint and not several, notice to one of them is not notice to the corporation. *Buttrick v. Nashua, etc. R. Co.* (1882), 62 N. H. 413, 13 Am. St. Rep. 578, 581, citing *Washington Bank v. Lewis*, 22 Pick. 24, 31; *Commercial Bank v. Cunningham*, 24 Pick. 270, 276, 35 Am. Dec. 322; *Atlantic State Bank v. Savery*, 32 N. Y. 291; *New Haven, etc. R. Co. v. Chatham*, 42 Conn. 465, 480.

⁴⁷ *Lippitt v. American Wood Paper Co.* (1885), 15 R. I. 141, 2 Am. St. Rep. 886. Executions and attachments cannot be levied on shares of corporation stock if the debtor is not himself the legal possessor of the interest, or where he has only an equitable right, or has regularly assigned his interest. *Van Norman v. Jackson* Circuit Judge, 45 Mich. 204. The provisions of the Pennsylvania Act of June 16, 1836, section 32, requiring the plaintiff issuing an attachment execution against stock held in a name other than that of defendant, to file an affidavit and enter into a recognizance, were intended to apply only to those cases where there is a claimant disputing the defendant's title, and not to those cases where the defendant's title is conceded. *Betts v. Towanda Gas & Water Co.*, 97 Pa. St. 367. In another Pennsyl-

the shares, upon the books of the company, he has only an equitable right to them as between himself and his transferrer, or those claiming under the latter with notice.⁴⁸ At common law an equitable right or interest in personal property is not attachable.⁴⁹ It is natural to suppose that the intention, of statutes subjecting corporate stock to attachment and levy, is simply to put it on a par with other personal property.⁵⁰ This view accords with the

vania case an attachment issued against stock of a building association, standing in the name of defendant, but which had been assigned to the association as collateral security; no affidavit or recognizance was filed, as required by Pennsylvania Act of 1836. A third party intervened and claimed the stock, but he likewise did not file the affidavit and recognizance. At his instance the writ was quashed, and it was held, that the writ had been improperly issued, and that while the claim of the intervening party was not made in conformity with the requirements of the act, yet the attachment being improper, the decree of the court below, refusing to allow the plaintiff in the first case to file the affidavit and recognizance, must be affirmed. *Eby v. Guest*, 94 Pa. St. 160.

⁴⁸ *Middletown Savings Bank v. Jarvis*, 33 Conn. 372, construing Conn. Gen. Stat., ch. 2, § 19; ch. 14, § 237. Under Dakota Code Civil Proc., § 314, providing that all goods, chattels, money and other property, "or any interest therein," and all other property "not capable of manual delivery," shall be liable to execution, the interest of a pledgor in stock of a corporation "in pool," which has been transferred to the trustee of "the pool" by indorsement only, may be seized and sold under execution. *Van Cise v. Merchants' Nat. Bank* (1887), 33 N. W. Rep. 897. Wyoming Rev. Stat., § 2774, provides that a levy upon the interest of the legal or equitable owner of corporate stocks shall

be made in a particular way. In an action by the assignee of a certificate of stock, to compel the corporation to make the proper transfer on its books, the answer alleged that on a certain date one B. obtained a judgment against the husband of the assignor, "who held said certificate of stock in trust for and to the use of her said husband, and on the 19th day of December, 1887, execution was issued on said judgment, and on the 6th day of February, 1888, the sheriff of Laramie county, Wyoming territory, levied said execution upon said shares of stock as the property of said" husband, and that defendant had no notice of the assignment to plaintiff. It was held that the answer was demurrable, in that it did not allege that the judgment debtor was the equitable owner of the stock at the date of the levy, nor that the sheriff of Laramie county was the proper officer to execute the writ, nor how the levy was made. *Wyoming Fair Assn. v. Talbott*, 3 Wyom. 444 (1889), 21 Pac. Rep. 700. See, further, as to attachment of equitable interest, *Foster v. Potter*, 37 Mo. 525; *Thacker v. Chambers*, 5 Humph. 313, 42 Am. Dec. 431, and note, 432; *Reed v. Upton*, 10 Pick. 522, 20 Am. Dec. 545, and note, 547; *Badlam v. Tucker*, 1 Pick. 389, 11 Am. Dec. 202.

⁴⁹ *Vide supra*, § 659.

⁵⁰ *Lippitt v. American Wood Paper Co.* (1885), 15 R. I. 141, 2 Am. St. Rep. 886, citing *Freeman on Executions*, § 116.

language of the statutes. It is "the shares of the defendant," or his "stock or shares," and not his right or interest in the stock or shares, which, in the words of these acts, may be attached or levied upon.⁵¹ Where, however, the wording of the statute is broad, in terms subjecting the stockholder's "rights" or "interest" to execution and attachment, equitable rights are held to be included.⁵²

§ 662. **Garnishment.**—In the absence of statutory authority, shares of stock are not subject to payment of the shareholder's debt, by garnishee process. As shareholder, he is no creditor of the corporation. Shares of stock are not representatives of money or of debt. They are choses in action, and at common law are not the subject of garnishee process. The creditor of a stockholder cannot subject his shares to the satisfaction of his debt, by service of garnishment upon the corporation.^{52a} Attachment of the stock by garnishment is void.⁵³ The creditor can not by garnishment reach certificates held by one person, which belong to another who is the debtor. The certificate is not the property itself, but like a title deed, is only the evidence of property.⁵⁴ The creditors may garnishee a delinquent subscriber to the extent of unpaid calls made upon him.⁵⁵ A creditor may attach a resident subscriber delinquent to a foreign corporation.⁵⁶ After a call has been made, a creditor of the company may garnishee the stockholder.⁵⁷ For, if subscriptions are due and payable, they are, to

⁵¹ *Lippitt v. American Wood Paper Co.* (1885), 15 R. I. 141.

⁵² *Lippitt v. American Wood Paper Co.* (1885), 15 R. I. 141, construing R. I. Gen. Stat., ch. 196, § 21; ch. 197, § 9; ch. 212, §§ 18-20; R. I. Pub. Stat., ch. 207, § 22; ch. 208, § 9; ch. 223, §§ 20-22. *Cf. Weller v. Pace Tobacco Co.* (1888), 2 N. Y. Supp. 292, declaring that N. Y. Code Civ. Proc., § 647, providing that shares of stock may be levied on, is applicable only where the defendant has the legal title to the stock, and not to a case where the defendant has, in another state of which he was a resident, assigned the certificates, although no transfer has been made on the company's books.

^{52a} *Mooar v. Walker*, 46 Iowa,

164; *Ross v. Ross*, 25 Ga. 297; *Foster v. Potter*, 37 Mo. 525.

⁵³ *Mooar v. Walker* (1877), 46 Iowa, 164.

⁵⁴ *Packard, etc. Co. v. Laev*, 100 Wis. 644 (1898).

⁵⁵ *McKelvey v. Crockett* (1884), 18 Nev. 238, 2 Pac. 386; *Bohrer v. Adair* (1901), 61 Neb. 824, 86 N. W. 495.

⁵⁶ *Cooper v. Adel, etc. Co.*, 122 N. C. 463 (1898), 30 S. E. 348.

⁵⁷ *Faull v. Alaska, etc. Mining Co.* (1882), 8 Sawy. 520; *Meints v. East St. Louis, etc. Co.*, 89 Ill. 48; *Hannah v. Moberly Bank*, 67 Mo. 678; *Simpson v. Reynolds*, 71 Mo. 594 (1880); *Curry v. Woodward*, 53 Ala. 371; *Bingham v. Rushing*, 5 Ala. 403; *Hays v. Lycoming, etc. Co.* (1882), 99 Pa. St.

that extent, like other debts due the corporation, subject to garnishment.⁵⁸ But a creditor can not resort to garnishment proceedings until a call has been made, unless by the terms of the subscription the amount was payable without call,⁵⁹ or unless, as is sometimes the case, this remedy be given by statute whether a call has been made or not.⁶⁰ In Pennsylvania the efficacy of attachment process is not confined to the garnishment of legal demands, but extends to those of an equitable nature, and it has been held that the unpaid subscriptions to the capital stock of an insolvent corporation, can be reached by writ of attachment, although no assessment or call has been made.⁶¹ But a limitation has been placed upon the right of a creditor of a corporation to resort to garnishment proceedings. It is admitted that if the corporation is solvent, and the subscription is in the form of an absolute engagement to pay the price of the stock, there is no doubt that the creditor can reach the amounts unpaid by attachment in execution, but it is denied that this can be done, if the corporation be insolvent, because upon insolvency the unpaid amounts constitute

621. Cf. "Execution Against Members of Corporations," 6 Am. Jur. 468. But see *In re Glen Iron Works* (1883), 17 Fed. Rep. 324, (1884), 20 Fed. Rep. 674; *Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 571; *Bunn's Appeal*, 14 Week. N. Cases, 193. An unpaid balance due on a subscription to the stock of a corporation is a thing in action which may be sequestered in proceedings had upon a judgment against the corporation. *Dean v. Biggs*, 25 Hun, 122.

⁵⁸ *Faull v. Alaska G. & S. Min. Co.*, 14 Fed. Rep. 657; *De Mony v. Johnston*, 7 Ala. 51; *Meints v. East St. Louis, etc. Co.*, 89 Ill. 48; *Brown v. Union Ins. Co.*, 3 La. Ann. 177, 182; *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *Hannah v. Moberly Bank*, 67 Mo. 678; *Peterson v. Sinclair*, 83 Pa. St. 250. See note to *Freeland v. McCullough*, 43 Am. Dec. 702; 2 *Morawetz on Corporations*, § 819.

⁵⁹ *Lane's Appeal*, 165 Pa. St. 49, 51 Am. Rep. 166; *McKelvey v. Crockett*, 18 Nev. 238; *Paschall v. Whitsett*, 11 Ala. 472, 477; *Cooper*

v. Frederick, 9 Ala. 737, 742; *Bingham v. Rushing*, 5 Ala. 403; *Brown v. Union Ins. Co.*, 3 La. Ann. 177, 182; *Hannah v. Moberly Bank*, 67 Mo. 678; *Simpson v. Reynolds*, 71 Mo. 594; *Hughes v. Oregonian Ry. Co.*, 11 Oreg. 158; *Peterson v. Sinclair* (1877), 83 Pa. St. 250; *Langford v. Ottumwa Water Power Co.* (1882), 59 Iowa, 283; *Chandler v. Liddle*, 10 N. B. R. 236; *In re Glen Iron Works*, 20 Fed. Rep. 674, 17 Fed. Rep. 324; *Bunn's Appeal* (1884), 105 Pa. St. 49; *Coalfield Coal Co. v. Peck* (1881), 98 Ill. 139. Cf. *Rand v. White Mountains R. Co.* (1860), 40 N. H. 79; *Angell & Ames on Corporations*, § 517; *Thompson on Liability of Stockholders*, §§ 265, 276, 317; *Dean v. Biggs* (1881), 25 Hun, 122.

⁶⁰ *Bartlett v. Drew* (1874), 57 N. Y. 587; *Griffith v. Mangam*, 73 N. Y. 611 (1878); *Robertson v. Noeninger*, 20 Ill. App. 227; *Ala. Civ. Code* (1887), § 2972.

⁶¹ *In re Glen Iron Works*, 20 Fed. Rep. 674, affirming 17 Fed. Rep. 324, 16 Phila. 563.

a trust fund for the benefit of all the creditors.⁶² Although a statute which provides that, upon the return unsatisfied of an execution against a corporation, execution may, on notice and motion, issue against any shareholder for the amount of his unpaid balance due on shares,—is retrospective, it is nevertheless valid, and applicable to a corporation chartered previously under a special act.⁶³ A petition asking for an execution against a stockholder, based on a judgment against the corporation, must be filed in the court by which the judgment was rendered;⁶⁴ for, a proceeding by motion for execution against a stockholder of an insolvent corporation, is in no sense the institution of an independent suit, but a mere supplementary proceeding in aid of the execution against the corporation.⁶⁵ Under the Illinois corporation act of 1872, making stockholders liable to creditors, garnishee process lies after judgment against the corporation; it is not necessary to proceed against the stockholders at the time of instituting suit against the corporation.⁶⁶ Under the Kansas statute,—declaring that in the absence of corporate property on which to levy, execution may be issued against any of the stockholders, but no execution shall issue except upon an order of the court in which the action, suit or other proceeding shall have been brought, made upon motion in open court after reasonable notice in writing to the person sought to be charged,—the service of notice must be in like manner as in the case of an original summons, and jurisdiction can not be obtained by service without the State.⁶⁷

§ 662a. **Execution and attachment upon the property and franchises of railroads and other quasi-public corporations.**—The necessity to the public that the regular service of a railroad shall not be interfered with, will not allow it, or any of its property necessary to such service, to be taken in any part, in levy of execution, in the absence of express authority of statute. The levy must be upon the whole of the property or none. The judgment creditor's remedy is in equity for appointment of a receiver.⁶⁸

⁶² Lane's Appeal, 105 Pa. St. 49, 51 Am. Rep. 166.

⁶³ Merchants' Ins. Co. v. Hill, 86 Mo. 466.

⁶⁴ Paxon v. Talmage, 87 Mo. 13.

⁶⁵ Kohn v. Lucas, 17 Mo. App. 29.

⁶⁶ Coalfield Co. v. Peck, 98 Ill. 139.

⁶⁷ Howell v. Marylesdorf, 33

Kan. 194; Kan. Comp. L. 1879, ch. 23, § 32.

⁶⁸ Connor v. Tennessee, etc. Ry. (1901), 109 Fed. 931; George v. St. Louis, etc. Ry. (1890), 44 Fed. 117; East Alabama v. Doe (1885), 114 U. S. 340; Central Trust Co. v. Moran (1894), 56 Minn. 188, 29 L. R. A. 212; Lake Shore, etc. Ry.

Land acquired by a railroad for its uses, in performing its duties to the public, can not be sold on execution apart from its franchises, so as to give title to the property free from the duties assumed by the corporation.⁶⁹ This exemption does not apply to the property of purely private corporations, nor to the property of a *quasi*-public corporation not in use by it or necessary to the performance of its duties to the public.⁷⁰ Unless authorized by statute, the corporate creditors can not reach by execution or attachment the franchises of a corporation, or the franchises or property of a *quasi*-public corporation, requisite to the performance of its duties to the public, and it is not material how the property was acquired, whether by purchase, donation or under condemnation proceedings.⁷¹ The national banking act prohibits any attachment against a national bank or its property before a final judgment.⁷² Where the statute authorizes the sale of the property or franchises of a corporation, in satisfaction of judgment, the mode pointed out by the statute must be followed.⁷³

v. Grand Rapids (1894), 102 Mich. 374, 29 L. R. A. 195.

⁶⁹ Rutland Ry. Co. v. Chaffee, 72 Vt. 404; Gooch v. McGee, 83 N. C. 59.

⁷⁰ Plymouth R. Co. v. Colwell, 39 Pa. St. 337, 80 Am. Dec. 526.

⁷¹ Doe v. Fischer, 114 U. S. 340.

⁷² Dennis v. First Nat. Bank, etc., 127 Cal. 453, and cases cited.

⁷³ James v. Pontiac, etc. Co., 9 Mich. 91; Atlantic v. Grant (1876), 57 Ga. 340.

CHAPTER XXVI.

MEETINGS.

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| <p>§ 663. Corporate acts are authorized only at corporate meetings.</p> <p>664. Called or special meetings. Remedy for refusal to call.</p> <p>665. Notice of meeting.</p> <p>666. (a) To be unconditional.</p> <p>667. (b) Service of notice.</p> <p>668. (c) To directors absent from the state.</p> <p>669. (d) Requisites of the notice.</p> <p>670. Stockholders' meetings</p> <p>671. (a) Must be within the state creating the corporation.</p> <p>672. (b) First meeting under special charter.</p> <p>673. (c) Place of meeting of consolidated companies.</p> | <p>§ 674. (d) Place of meeting of interstate corporations.</p> <p>675. Directors' meetings. Place of holding.</p> <p>676. Estoppel to plead illegality of place of meeting.</p> <p>677. Time and place of meeting.</p> <p>678. Premature meeting.</p> <p>679. Postponed meeting.</p> <p>680. Adjourned meeting.</p> <p>681. Irregularities at meetings.</p> <p>682. Trick, secrecy, surprise, bribery.</p> <p>683. Failure to hold meetings or elections.</p> <p>684. Meetings of church trustees.</p> <p>685. Minutes of meetings of directors and of stockholders.</p> |
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References:

"Dormant corporations." Effect of failure to hold meetings and elections. Section 1315.

Corporate records and minutes of meetings. Sections 108-117.

§ 663. Corporate acts are authorized only at corporate meetings.—The powers conferred by the charter of a corporation upon the body of incorporators and board of directors, respectively, can be exercised by them only when duly convened in a corporate meeting. And where an alleged corporate act rests upon the assent of a majority of the members, expressed, not in a corporate meeting, but given by each one separately and at different times, and evidenced, not by the minutes of their corporate proceedings, but by a separate paper in the possession of a committee, it is a nullity.¹ Assent by the stockholders given

¹ Commonwealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Dennis v. Joslin Manuf. Co., 19 R. I. 666, 61 Am. St. Rep. 805. In Duke v.

Markham (N. C. 1890), 10 S. E. Rep. 1017, where it was held that a mortgage so executed is not a corporate act, and that even the

elsewhere than in meeting, will not authorize the appointment of an agent for the corporation, or the execution of any corporate

use by the company of money raised by a mortgage so authorized would not of itself be a ratification. If the company ratify the mortgage, it would not validate it as to other creditors, if the mortgage is invalid when registered. *Pierce v. New Orleans Build. Co.* (1836), 9 La. 397, 404, where the court said: "We cannot see in this any legal evidence of the consent of the corporation, either according to its charter or the general principles of law." *Finley Stove, etc. Co. v. Kurtz*, 34 Mich. 89 (1876); *Commonwealth v. Cullen* (1850), 13 Pa. St. 133, 53 Am. Dec. 450. Even though all the capital stock should be acquired by one person, he does not thereby become the corporation. *Button v. Hoffman* (1884), 61 Wis. 20. *Contra*, *Swift v. Smith* (1886), 65 Md. 428, *per* Irving, J., 34 Alb. L. J. 257. But see *In re Great Northern Salt & Chemical Works Co.* (Ch. Div. 1890), 7 Ry. & L. J. 157, a case arising under the English Companies Act of 1862, 25 & 26 Vic., ch. 89, being an application to fix K. upon the list of contributories of a company in liquidation, in respect of five hundred shares. He objected on the ground that there had never been any valid allotment to him of the shares in question. The company was formed in April, 1888, under Table A to the act of 1862, which provides (art. 52) that the number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association; and (art. 53) that until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors. Two only of the subscribers of the memorandum had, in the first instance, purported to

appoint directors, but the directors so appointed had resigned, and on the 27th of July, 1888, the seven subscribers of the memorandum, by a document in writing, signed by them all, appointed four persons to be directors. On the 2d of August those four persons held a meeting and resolved that two directors should form a quorum to conduct the business of the company. At the first general meeting of the company, held on the 20th of August, three of those four directors were authorized and requested to continue to act as directors for the present. Two of these directors subsequently allotted to K. the shares in question, and K. had paid money in respect of such shares. On the 24th of November, 1888, the company was ordered to be wound-up. At that time K. was on the register of shareholders as the holder of five hundred shares. It appeared that the document, of the 27th of July, 1888, had not been signed at any meeting of the subscribers of the memorandum, and it was contended on behalf of K. that it was therefore an invalid appointment of directors, and the persons who had made the allotment were not legally directors, as the subscribers, to exercise the powers given by article 52, ought to have met together in the same way as directors are required by article 66 to meet together for the dispatch of business. It was held that article 52 required that the subscribers should "determine," and if it could be shown in any way that they had determined, the directors upon whom they had determined would be validly appointed, although such determination was not reached at any meeting; and in the present case the directors had been ap-

contract, or other act to bind the corporation.² This is the rule, not only as to the incorporators themselves, but also as to their trustees or directors.³ The directors can lawfully act only when duly convened as a board.⁴ This is the law, even where the act by which the company derived its corporate existence makes no provision for the manner in which the incorporators are to be convoked, or how they are to vote.⁵ Where the organic law of the body is silent on these points, its proceedings and the validity of acts done in its name, must be judged according to the principles of law applicable to corporations in general as above set forth, and such by-laws as may have been adopted for the regulation of its conduct.⁶ So that, unless the contrary be provided by statute or

pointed, and the allotment made by them was valid. *Hallows v. Fernie*, 15 L. T. Rep. (N. S.) 602; L. Rep. 3 Eq. 520, followed. *D'Arcy v. Tamar, etc. Railway Company*, L. R. 2 Ex. 158, distinguished. *Cf. Granger v. Grubb* (1870), 7 Phila. 350; *Graham v. Boston, etc. R. Co.* (1886), 118 U. S. 161; *Peirce v. New Orleans, etc. Co.*, 9 La. 397, 29 Am. Dec. 448; *Duke v. Markham*, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017.

² *Dennis v. Joslyn Manuf. Co.*, 19 R. I. 666, 61 Am. St. Rep. 805.

³ *Buttrick v. Nashua, etc. R. Co.* (1882), 62 N. H. 413, 13 Am. St. Rep. 578.

⁴ *Gashwiler v. Willis* (1867), 33 Cal. 11; *People's Bank v. St. Anthony's R. C. Church*, 39 Hun, 498, where a majority of the trustees of a Romish church attempted to bind the church upon notes executed without a meeting of the board. *Cf. Granger v. Grubb*, 7 Phila. 350 (1870).

⁵ *Pierce v. New Orleans Build. Assn.* (1836), 9 La. 397.

⁶ *Pierce v. New Orleans Build. Assn.* (1836), 9 La. 397; *People v. Albany, etc. R. Co.* (1869), 55 Barb. 344. *Cf. Craw v. Easterly* (1873), 54 N. Y. 679; *Easterly v. Barber* (1875), 65 N. Y. 252. In England it is enacted that at the

first meeting of directors held after the passing of the special act of incorporation, and at the first meeting of the directors held after each annual appointment of directors, the directors present at such meeting shall choose one of the directors to act as chairman of the directors for the year following such choice, and shall also, if they think fit, choose another director to act as deputy chairman for the same period; and if the chairman or deputy chairman die or resign, or cease to be a director, or otherwise become disqualified to act, the directors present at the meeting next after the occurrence of the vacancy shall choose some other of the directors to fill such vacancy; and every such chairman or deputy chairman so elected as last aforesaid shall continue in office so long only as the person in whose stead he may be so elected would have been entitled to continue if such death, resignation, removal or disqualification had not happened. 8 Vic., ch. 16, § 93. If at any meeting of the directors neither the chairman nor deputy chairman be present the directors present shall choose some one of their number to be chairman of such meeting. 8 Vic., ch. 16, § 94.

charter, there are but two ways in which a corporation as such can act, to wit, either through its president and directors, or at a meeting of the stockholders duly convoked and conducted in conformity with the general rules governing corporate meetings, or the special by-laws supplementary thereto.⁷ Any material departure therefrom destroys the validity of the proceedings so taken. Unless, of course, provision be made for suspension of the rules.⁸ It has been held in Colorado, however, that where claims against a corporation are approved by a majority of the board of directors, acting separately, in accordance with a customary usage, the approval is sufficient, there being no law or by-law restricting the directors to a different mode.⁹ The corporation may be bound, as against subsequent creditors, by such assent of all the stockholders, given elsewhere than at a corporate meeting.¹⁰

§ 664. Called or special meetings. Remedy for refusal to call.—Provisions, for calling special meetings, found in the charter or by-laws of the companies or in the statutes of the incorporating States, generally make it obligatory upon the directors or some specified corporate officer, to issue a call upon the demand of a certain number of members, or of shareholders owning a certain percentage of the capital stock.¹¹ To render a meeting legal, it must be called as provided in the by-laws, if they are not repugnant to the charter, or to any law of the State.¹² Unless otherwise provided in the by-laws, the directors may call a meeting whenever they deem it necessary.¹³ Unless otherwise provided, the call must be made by the directors as a board, or by an officer entrusted with the general management.¹⁴ No other officer or agent has any implied authority to call a meeting.¹⁵ The president and secretary have no power to call a stockholders' meeting.¹⁶ While as a general rule it should appear in the notice that the meeting has been summoned by the proper official,¹⁷—the board

⁷ *Pierce v. New Orleans Build. Assn.* (1836), 9 La. 397.

⁸ *Pierce v. New Orleans Build. Assn.* (1836), 9 La. 397.

⁹ *Longmont Supply Ditch Co. v. Coffman* (1888), 11 Colo. 551.

¹⁰ *Coe v. East & West, etc. Ry. Co.*, 52 Fed. 531.

¹¹ 8 Vic., ch. 16, § 70; W. Va. Code, ch. 53, § 41.

¹² *Matthews v. Columbia Nat. Bank*, 79 Fed. 558; *Taylor v. Gris-*

wold, 14 N. J. Law, 222, 27 Am. Dec. 33.

¹³ *Commonwealth v. Smith*, 45 Pa. St. 59.

¹⁴ *Stebbins v. Merritt*, 64 Mass. 27; *Johnston v. Jones*, 23 N. J. Eq. 216.

¹⁵ *Attorney General v. Looker*, 111 Mich. 498.

¹⁶ *Dusenberry v. Looker* (1896), 110 Mich. 58.

¹⁷ *Stevens v. Eden Meeting*

of directors,¹⁸ or the general agent of the company,¹⁹ and while the provisions of the statute or by-laws relating to the calling of special meetings, must be complied with in every particular,²⁰ yet there are circumstances under which a meeting may be otherwise lawfully assembled.²¹ If the directors fail to call the meeting when required, or send out insufficient notices thereof, the members may call a meeting themselves.²² Especial care is to be observed in respect of the notifications sent to members and stockholders. The same is true in calling special meetings of governing corporate bodies, such as boards of trustees or directors, undue haste and irregularity respecting notification being fatal to the legality of the proceedings.²³ The notification should set forth, in a general way, the nature of the business to be transacted at the special meeting, and action taken upon matters not mentioned in the notice is invalid.²⁴ Where, however, the minutes recite that a meeting was "called for the purpose" of transacting a certain piece of business, it will be presumed, until the contrary is proven, that the purpose was specified in the call.²⁵ The pre-

House Soc. (1839), 12 Vt. 688; State v. Pettineh (1875), 10 Nev. 141; Johnson v. Jones (1872), 23 N. J. Eq. 216; Congregational Soc. v. Sperry (1834), 10 Conn. 200; Evans v. Osgood (1841), 18 Me. 213; Ang. & Ames, Corp. 491.

¹⁸ Reilly v. Oglebay (1884), 25 W. Va. 36, decided under W. Va. Code, ch. 53, § 41, and holding that a meeting called by the secretary was illegal, the code prescribing that the directors should issue the call.

¹⁹ Stebbins v. Merritt (1852), 10 Cush. 27.

²⁰ Reilly v. Oglebay (1884), 25 W. Va. 36, where it was held under the West Virginia Code, ch. 53, § 41, providing that "a general meeting of the stockholders may be called at any time by the board of directors, or by any number of stockholders, holding together at least one-tenth of the capital," that a call by the secretary simply on authority of stockholders holding one-tenth of the capital was invalid and all proceedings thereunder illegal.

²¹ Newcomb v. Reed (1866), 12 Allen, 362; Citizens' Mutual F. Ins. Co. v. Sortwell (1864), 8 Allen, 217; Judah v. American Live Stock Ins. Co. (1853), 4 Ind. 333; Chamberlain v. Painesville, etc. R. Co. (1864), 15 Ohio St. 225.

²² 8 Vic., ch. 16, § 70; Isle of Wight Ry. Co. v. Tahourdin, 25 Ch. Div. 320; Browne & Theobald's Ry. Law, 98. Cf. W. Va. Code, ch. 53, § 41.

²³ State v. Smith (1887), 15 Oreg. 98.

²⁴ Isle of Wight Ry. Co. v. Tahourdin, 25 Ch. Div. 320; D'Arcy v. Tamar, etc. Ry. Co., L. R. 2 Ex. 158; 8 Vic., ch. 16, § 69; Doyle v. Mizner, 42 Mich. 332; Kersey Oil Co. v. Oilcreek, etc. R. Co., 12 Phila. 374; Pike Co. v. Rowland, 94 Pa. St. 238; State v. Ferguson, 31 N. J. 107; Farwell v. Houghton Copper Works (1881), 8 Fed. Rep. 66; Harding v. Vandewater, 40 Cal. 77 (1870).

²⁵ Chase v. Tuttle (1887), 55 Conn. 455, 3 Am. St. Rep. 64, 66.

sumption of regularity covers a multitude of sins in such cases, and throws the burden on those who would deny the regularity of a meeting, for want of due notice, to establish it by proof.²⁶ Substantial compliance with the requirements is sufficient in making the call.²⁷ It will be presumed that a meeting was regularly called.²⁸ Any irregularity in the call is waived by attendance of all persons who are entitled to vote,²⁹ or by unreasonable delay to object.³⁰

Remedy for Refusal to Call.—*Mandamus* will lie at the instance of any stockholder, to enforce the duty of an officer to call a stockholders' meeting.³¹ And, in the absence of fraud or conspiracy, irregularities in the calling of special meetings may be cured by the reading and approval of the minutes, at a subsequent meeting properly called.³²

§ 665. **Notice of meetings.**—When the time and place for regular meetings, is fixed in the by-laws or charter, no other notice of the meeting is required,³³ but without notice, the by-laws can not be changed at such meeting, or authority given for increase of capital stock.³⁴ Notice of meeting to discuss the giving of a mortgage, is sufficient for the meeting to authorize a mortgage.³⁵ "Four weeks' notice," means the lapse of four full weeks between first publication and time of meeting.³⁶ The rules of notice of directors' regular or stated meetings, substantially follow those for meetings of stockholders, but notice must be given of special meetings of the board of directors.³⁷ No notice is required, where all the directors attend the meeting.³⁸ Unless otherwise prescribed,

²⁶ *Sargent v. Webster* (1847), 13 Met. 504, 46 Am. Dec. 743.

²⁷ *Braintree, etc. Co. v. Braintree*, 146 Mass. 482.

²⁸ *Wallace v. First Parish, etc.*, 109 Mass. 263.

²⁹ *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454.

³⁰ *Weinburgh v. Union, etc. Co.*, 55 N. J. Eq. 640.

³¹ *Lehigh, etc. Co. v. Central Ry. Co.*, 35 N. J. Eq. 349; *Bassett v. Atwater*, 65 Conn. 355, 32 L. R. A. 575.

³² *County Court v. Baltimore & O. R. Co.* (1888), 35 Fed. Rep. 161.

³³ *Morrill v. Little Falls Manuf. Co.* (1893), 53 Minn. 371, (1895) 60 Minn. 405.

³⁴ *Jones v. Concord, etc. R. R.*, 67 N. H. 234 (1892), 21 L. R. A. 174; *Bagley v. Reno, etc. Co.* (1902), 201 Pa. St. 78, 56 L. R. A. 184.

³⁵ *Evans v. Boston, etc. Co.*, 157 Mass. 37 (1892).

³⁶ *Hodge v. United States Steel Corp.* (N. J. 1903), 54 Atl. 1.

³⁷ *Relley v. Campbell* (1901), 134 Cal. 175; *Curtin v. Salmon* (1900), 130 Cal. 345; *Hill v. Rich Hill, etc. Co.* (1893), 119 Mo. 9; *First Nat. Bank v. Ashville, etc. Co.* (1895), 116 N. C. 827; *Bank of Little Rock v. McCarthy* (1892), 55 Ark. 473, 29 Am. St. Rep. 60; *Singer v. Salt, etc. Co.* (1898), 53 Pac. 1024, 17 Utah, 143, 70 Am. St. Rep. 773.

³⁸ *Bank of National City v. Johnston* (Cal. 1900), 60 Pac. 776.

service by mail is sufficient, and its receipt is presumed on proof of mailing the notice.³⁹ A meeting, whether general or special, can not transact unusual or extraordinary business, unless notice thereof has been given to all the stockholders. At a special meeting, no business can be transacted except that named in the notice.⁴⁰ An opportunity to deliberate, and, if possible, to convince their fellows, is the right of the minority, of which they can not be deprived by the arbitrary will of the majority.⁴¹ Accordingly, notice of the time, place and purpose of all special meetings, whether of stockholders or directors, is essential to the validity of any deliberative action taken thereat.⁴² But in respect of notice, a manifest distinction exists between the general stated meetings of a corporation, and its special meetings. Stated meetings may, nevertheless, be special, that is, limited to particular business. But stated meetings of a corporation are usually general, that is, for the transaction of all business within the corporate powers. Unless the object of such a meeting is restricted by express provision of the by-laws, it would ordinarily be understood to be general; and so every corporator would be bound to understand it. But if the object of the meeting be limited by the by-laws, it is then a special meeting, and no other business can be lawfully transacted unless special notice has been given. "Where the meeting is stated and general, no notice is required, either of the time or place of holding the meeting, or of the business to be transacted,"⁴³ unless some statute of the State, or the charter, or

³⁹ *Stockton, etc. Works v. Houser* (1895), 109 Cal. 1; *Balfour Guthree, etc. Co. v. Woodworth* (1899), 124 Cal. 169; *Mills v. Boyle, etc. Co.* (1901), 132 Cal. 95.

⁴⁰ *Jones v. Concord, etc. Ry. Co.*, 67 N. H. 119, 68 Am. St. Rep. 650; *People's Mutual Ins. Co. v. Westcott*, 14 Gray (Mass.), 440.

⁴¹ *Commonwealth v. Cullen*, 13 Pa. St. 133, 33 Am. Dec. 450.

⁴² *Farwell v. Houghton Copper Works* (1881), 8 Fed. Rep. 66; *State v. Ferguson*, 31 N. J. 107; *Pike Co. v. Rowland*, 94 Pa. St. 238; *Kersey Oil Co. v. Oilcreek, etc. Ry. Co.*, 12 Phila. 374; *Doyle v. Mizner*, 42 Mich. 332; *Harding v. Vandewater*, 40 Cal. 77; *D'Arcy v. Tamar, etc. Ry. Co.*, L. R. 2 Ex. 158; *State v. Pettineli* (1875), 10

Nev. 141; *Moore v. Hammond*, 6 Barn. & C. 456; *Rex v. Langhorn*, 4 Ad. & E. 538, 2 Nev. & M. 618; 6 Nev. & M. 203; *Smyth v. Darley*, 2 H. L. Cas. 789; *Rex v. Theodorick*, 8 East, 543; *Rex v. Gabonian*, 11 East, 86, n., 87, n. *Of People's Ins. Co. v. Westcott*, 14 Gray, 440; *Dillon on Municipal Corporations*, § 202; *Angell & Ames on Corporations*, § 493. As to the validity of acts done at meetings not properly called, see note in 18 Am. Dec. 102, 103; and note to *Chase v. Tuttle*, 3 Am. St. Rep. 64, 69, 70. But see *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207. See, also, *Bank v. Flour Co.*, 41 Ohio St. 552.

⁴³ *Redfield, J.*, in *Warner v. Mower* (1839), 11 Vt. 385, 391. "Where the meeting is stated and

by-law of the company, requires notice of all meetings to be given.⁴⁴ Even a requirement of the by-laws, that notice shall be given of "all meetings" of the company, is deemed to refer only to special meetings.⁴⁵ But under a statutory requirement that notice of the "regular meetings" shall be given, not only must notice of a regular meeting itself be given, but also, in the event of an adjournment to a subsequent day, those who were absent from the original meeting must be notified of the place and hour to which it may be adjourned.⁴⁶ Even though the date and place of reg-

general, notice of the time and place of holding it, or of the business to be transacted, is, in the absence of provision or regulation to the contrary, in no case required." *State v. Bonnell* (1878), 35 Ohio St. 10, 15; *People v. Bachelor* (1860), 22 N. Y. 128; *Merritt v. Farris*, 22 Ill. 303. *Cf.* *Atlantic Mutual Fire Ins. Co. v. Sanders* (1858), 36 N. H. 252; *Sampson v. Bowdoinham Steam Mill Co.* (1854), 36 Me. 78; *Moore v. Hammond*, 6 Barn. & C. 456. But see *King v. Atwood*, 4 Barn. & Ad. 481; *King v. Westwood*, 7 Bing. 1; *King v. Bird* (1811), 13 East, 361; *Green v. Durham*, 1 Burr. 127; and *Wiggin v. Freewill Baptist Church*, 8 Met. 301, from which it seems that mere custom cannot take the place of definite notice.

⁴⁴ *E. g.* Cal. Civ. Code, § 320, requiring that each director shall have special notice of the regular meetings of the board, unless provision is made in the by-laws for such meetings. *Thompson v. Williams* (1888), 76 Cal. 153, 9 Am. St. Rep. 187.

⁴⁵ *Warner v. Mower* (1839), 11 Vt. 385, 393, where Redfield, J., said: "From the nature and character of its provisions it could have reference only to special meetings. For why should the annual meeting, whose time and place and object were all fixed by the by-laws, be notified in this manner. It would seem to be purely a work of supererogation."

⁴⁶ *Thompson v. Williams* (1888), 76 Cal. 153, 9 Am. St. Rep. 187, a case under Cal. Civ. Code, § 320, relating to corporations, which provides that "when no provision is made in the by-laws for regular meetings of the directors, and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary, on the order of the president, or, if there be none, on the order of two directors." The by-laws of the corporation contained a provision for regular meetings, and at such a meeting, certain directors being absent, the board adjourned until the next day without fixing an hour; nor was notice of the adjourned meeting given the absent directors. In holding that the adjourned meeting was a special meeting and that notice thereof should have been given to non-attending directors the court said: "To hold that the adjourned meeting of the 9th, the hour of which was not fixed or declared by the meeting on the 8th of October, was a part of the meeting of the board of the 8th, and therefore no further notice of it was required, would be to sanction an evasion of the law in regard to notice to the directors of the meeting of the board. An inspection of the minutes of the meeting of the 8th would give no information to the directors not attending that meeting of the time to which that meeting had been adjourned. In

ular meetings be provided for in the charter or by-laws, such notice of the hour and exact place of assembling must be given as will leave no room for controversy.⁴⁷ Mandatory provisions of the charter respecting the time of notification are not to be rendered nugatory by any by-law in conflict therewith.⁴⁸ But where the provisions of a statute in this respect are directory only, a failure to comply with them, if assented to by the incorporators, does not vitiate the company's franchise.⁴⁹ And generally speaking, the stockholders may, by attendance or acquiescence in the action taken at a meeting, lose their right to object on the ground of want of notice.⁵⁰ Thus, where stock of the company had been issued to its president as compensation for his services,—and by way of payment for sums of money advanced to it by him, and all the parties interested countenanced or ratified his dealing with the stock as owner thereof,—it was decided that his title thereto could not be impeached for want of notice to the directors, of the meet-

fact it does not appear that the board as a board ever did fix the hour on the 9th at which the adjourned meeting was to be held; and as it does not so appear, we must, in construing the facts as found, hold that the board on the 8th did not fix the hour at all. Under these circumstances, we cannot hold that the meeting on the 9th, at which the assessment was levied, was anything more than a special meeting, of the calling of which the non-attending directors, Allen and Thompson, had no notice or knowledge. The assessment was therefore levied without authority and was a nullity. See *San Buenaventura Manuf. Co. v. Vassault*, 50 Cal. 534." Cf. *Alexander v. Simpson* (Eng. Ct. App. 1889), 6 Ry. & Corp. L. J. 497.

⁴⁷ *San Buenaventura Manuf. Co. v. Vassault* (1875), 50 Cal. 534. Cf. *United States v. McKelden*, 8 Fed. Rep. 778 (1879), 4 MacA. 318. ⁴⁸ *United States v. McKelden*, 8 Fed. Rep. 778 (1879), 4 MacA. 318. In this case it was held that where the charter of a corporation declares that two weeks' pub-

lished notice of the annual meeting for the election of managers shall be given, managers elected after a notice of two days only, are not elected according to law; and no by-law can render nugatory the mandatory provision of the charter.

⁴⁹ *Braintree Water-Supply Co. v. Town of Braintree* (1883), 146 Mass. 482; construing Mass. Pub. Stat., ch. 105, § 9.

⁵⁰ *Bryant v. Goodnow*, 5 Pick. 228; *Kenton Furnace R., etc. Manuf. Co. v. McAlpine*, 5 Fed. Rep. 737; *Richardson v. Vermont, etc. R. Co.* (1872), 44 Vt. 613; *Jones v. Milton, etc. Turnpike Co.*, 7 Ind. 547; *Judah v. American, etc. Ins. Co.* (1853), 4 Ind. 333; *Smallcombe v. Evans*, L. R. 3 H. of L. 249; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Turquand v. Marshall*, L. R. 4 Ch. 376. But see *United States v. McKelden*, 8 Fed. Rep. 778, 4 MacA. 318; *In re Long Island R. Co.* (1838), 19 Wend. 37, 32 Am. Dec. 429. See *People v. Peck* (1834), 11 Wend. 604, 27 Am. Dec. 104; *King v. Theodoric*, 8 East, 543.

ing at which the resolution was passed in accordance with which the stock was issued.⁵¹ And where the action of the directors, at a special meeting, was ratified at a subsequent special meeting, of which all the directors had legal notice, and at the next regular meeting, "the minutes of the last two meetings were read and approved," it was considered immaterial whether all the directors were legally notified of the first special meeting, in the absence of fraud or conspiracy on the part of the officers or directors.⁵² An officer issuing the notice can not take advantage of irregularities therein.⁵³

§ 666. (a) **Notice to be unconditional.**—The notice of corporate meetings must be absolute and unconditional. So, in an English case in point, notice of an extraordinary general meeting to be held at a given time and place, on the 12th of July, for the purpose of passing resolutions for the voluntary liquidation and reconstruction of the company, concluded as follows: "Should such resolutions be duly passed, the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company, which will be held on the 29th of July at the same time and place." The meeting of the 12th of July was held, and the resolutions were declared by the chairman to be passed; and on the 15th of July the company caused a copy of a financial newspaper, containing a report of the meeting, to be sent to each shareholder, with a mark placed against the report. At the meeting of the 29th of July the resolutions were confirmed. A shareholder moved for an injunction restraining the directors from carrying into effect the resolutions, and from transferring the undertaking to any other company, on the ground, among others, that the notice for the 29th of July was bad, and the resolutions were therefore invalid; and it was held that the notice of the meeting of the 29th of July being *conditional*, was not good, and that an injunction should be granted.⁵⁴

§ 667. (b) **Service of notice.**—To support the validity of corporate acts, each member must be actually summoned.⁵⁵ The

⁵¹ Reed v. Hayt (1888), 109 N. Y. 659, 4 Ry. & Corp. L. J. 135, 137; Beach on Railways, § 442.

⁵² County Court v. Baltimore, etc. R. Co. (1888), 35 Fed. Rep. 161.

⁵³ Schenectady, etc. Plank Road Co. v. Thatcher (1854), 11 N. Y.

102; Bucksport, etc. R. Co. v. Buck, 68 Me. 81.

⁵⁴ Alexander v. Simpson (Eng. Ch. App. 1889), 6 Ry. & Corp. L. J. 497.

⁵⁵ Angell & Ames on Corporations, § 492; People v. Albany, etc. R. Co., 55 Barb. 344; Common-

manner of giving notice of corporate meetings, is generally provided in the charter or by-laws, but in the absence of such provision, it should be regulated according to the general law of corporations.⁵⁶ This general law is, that notice should be personally served upon the stockholder himself;⁵⁷ or, in the case of his death, upon his executor or administrator,⁵⁸ at a reasonable time before the date of meeting.⁵⁹ An established custom, however, of sending notice through the mails, may render personal service unnecessary where there is no statute, charter or by-law, requiring it.⁶⁰ But if the manner of serving notice of corporate meetings be prescribed by statute, charter or by-law, a strict compliance with the provisions thereof must be observed, and is necessary to

wealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Shelby R. Co. v. Louisville, etc. R. Co., 12 Bush, 62; McDaniels v. Flower Brook Manuf. Co. (1850), 22 Vt. 274; Jackson v. Hampden, 20 Me. 37; Wiggin v. Freewill Baptist Church, 8 Metc. 301; San Buenaventura Commercial Co. v. Vassault (1875), 50 Cal. 534; Smyth v. Darley, 2 H. L. Cas. 789; Rex v. Langhorn, 4 Ad. & E. 538; Moore v. Hammond, 6 Barn. & C. 456. *Cf.* People v. Batchelor (1860), 22 N. Y. 128, 134; People v. Peck, 11 Wend. 604 (1834), 27 Am. Dec. 104; McDougall v. Gardiner, 1 Ch. Div. 13; Shontz v. Unangst, 3 Watts & S. 45; Stebbins v. Merritt (1852), 10 Cush. 27; Cannon v. Trask, L. R. 20 Eq. 669. When stock has been pledged, the notice of meeting should be served upon the pledgor unless the pledgee has foreclosed. New York, etc. R. Co. v. Schuyler (1860), 38 Barb. 534, 542; McDaniels v. Flower Brook Manuf. Co. (1850), 22 Vt. 274.

⁵⁶ *In re* Long Island R. Co., 10 Wend. 37; Newling v. Francis, 3 Term Rep. 189.

⁵⁷ Stevens v. Eden Meeting House Soc. (1839), 12 Vt. 688; Taylor v. Griswold, 3 Green, 122, 27 Am. Dec. 33; Tuttle v. Michigan Air Line R. Co. (1877), 35 Mich. 247; Harding v. Vandewater,

40 Cal. 77; Savings Bank v. Davis, 8 Conn. 191; Stow v. Wise, 7 Conn. 214, 18 Am. Dec. 99; Wiggin v. Freewill Baptist Church, 8 Metc. 301. *Cf.* Porter v. Robinson, 30 Hun, 209; Stebbins v. Merritt, 10 Cush. 27 (1852); Rex v. Doncaster, 2 Burr. 738; Rex v. Town of Liverpool, 2 Burr. 723.

⁵⁸ As to effect of death of shareholder upon the validity of a meeting held before the appointment of his administrator, see Freeman's Nat. Bank v. Smith, 13 Blatchf. 220.

⁵⁹ *In re* Long Island R. Co., 19 Wend. 37 (1838), 32 Am. Dec. 429; Wiggin v. Freewill Baptist Church, 8 Metc. 301. *Cf.* Covert v. Rogers, 38 Mich. 368, 2 Am. Rep. 706. As to what constitutes a reasonable time, see Shelby R. Co. v. Louisville, etc. R. Co., 12 Bush, 62. At least fourteen days' public notice by advertisement of all meetings, both ordinary or extraordinary, is required by 8 Vic., ch. 16, § 71.

⁶⁰ Thus, the Albany Medical College created by N. Y. Laws of 1839, ch. 26, is not controlled by 1 N. Y. Rev. St. 460, which applies only to institutions for literary instruction. Accordingly, in absence of any showing that all the members of the board of trustees of Albany Medical College did not

the validity of the business transacted at any meeting.⁶¹ The presumption, however, of regularity is applicable to notices of corporate meetings;⁶² so that, in the absence of evidence to the contrary, it will be presumed that all legal steps necessary to call a meeting, at which a quorum attended, were duly taken.⁶³ And a finding that a meeting of directors of a corporation was "duly and regularly convened," and that an assessment made thereat was "lawfully and rightfully" levied, includes a finding that the necessary notice was given.⁶⁴ It does not lie in the mouth of one, who has attended a corporate meeting, afterwards to object that he was not duly notified thereof.⁶⁵ Neither can one who has

receive the postal card mailed to each, and notifying them of the time and place of the meeting at which S. was removed from the position of professor therein, it was held, that they would be presumed to have been received; such being for many years the custom of giving notice. *People v. Albany Medical College*, 26 Hun, 348, reversing 10 Abb. N. Cas. 122, 62 How. Pr. 220.

⁶¹ *Reilly v. Oglebay* (1884), 25 W. Va. 36; *Warner v. Mower*, 11 Vt. 385 (1839); *Stevens v. Eden Meeting House Soc.* (1839), 12 Vt. 688; *Johnston v. Jones* (1872), 23 N. J. Eq. 216; *Shelby R. Co. v. Louisville*, etc. R. Co., 12 Bush, 62; *Swansea Dock Co. v. Levien*, 20 L. J. Ex. 447. *Cf. Citizens' Mutual*, etc. Co. v. *Sortwell* (1864), 8 Allen, 217; *Smith v. Law* (1860), 21 N. Y. 296.

⁶² *Sargent v. Webster* (1847), 13 Met. 497, 46 Am. Dec. 743; *Blanchard v. Dow* (1851), 32 Me. 557; *Ashtabula*, etc. R. Co. v. *Smith* (1864), 15 Ohio St. 328; *Porter v. Robinson*, 30 Hun, 209; *Medical & Surgical Soc. v. Weatherby*, 75 Ala. 248; *McDaniels v. Flower Brook Manuf. Co.* (1850), 22 Vt. 274.

⁶³ *Sargent v. Webster* (1847), 13 Met. 497, 46 Am. Dec. 743; *Law v. Brainerd*, 30 Conn. 565; *Chouteau Ins. Co. v. Holmes* (1878), 68 Mo. 601, 30 Am. Rep. 807; *Wells v. Rahway White Rubber Co.*, 19 N.

J. Eq. 402; *Insurance Co. v. Holmes*, 68 Mo. 601; *McDaniels v. Flower Brook Manuf. Co.* (1850), 22 Vt. 274; *Chamberlain v. Painesville*, etc. R. Co. (1864), 15 Ohio St. 225; *Leavitt v. Oxford*, etc. Mining Co., 3 Utah, 265. *Cf. Stowe v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99, annotated; *Pitts v. Temple*, 2 Mass. 538; *Copp v. Lamb* (1835), 12 Me. 312. But it is held in Kentucky that as the Kentucky Act of April 12, 1888, providing for an election of turnpike road officers on the first Tuesday in May following, not having fixed a place for holding the election, no presumption arises of notice to the stockholders. *Cassell v. Lexington, H. & P. Turnpike Road Co.* (Ky. 1888), 9 S. W. Rep. 701, not officially reported.

⁶⁴ *Younglove v. Steinman*, 80 Cal. 375 (1889).

⁶⁵ *Kenton Furnace R. & Manuf. Co. v. McAlpin*, 5 Fed. Rep. 737; *Stebbins v. Merritt* (1851), 10 Cush. 27; *Ex parte Faris*, L. J. Ch. 369; *King v. Chetwynd*, 1 Barn. & C. 695. "The object of the notice is that the voters may be fully apprised of the election and may attend and exercise their rights. There is no pretence in this case that every voter was not present, for they appear to have come from a distance, the time was well understood, and had been the same for many years, no

not suffered, by the omission avail himself of a neglect to give notice to any other member.⁶⁶

§ 668. (c) Notice to directors absent from the State.—If a stockholder be absent from his usual place of residence or business, notice should be left there,⁶⁷ with some member of his family.⁶⁸ As a general rule, every director who is within reach, ought to have notice sent to him of every board meeting; and mere absence from the country can not be said to be in all cases an excuse for failing to notify the absent director.⁶⁹ But, in an English case, which was an action by the official liquidator of the plaintiff company, in its name, asking for a declaration that an indenture, which was a conveyance to the defendants of certain property of the company upon trusts for securing the payment of debentures issued by it, was invalid, and to have it set aside on the ground that no properly constituted board of directors had been convened for the purpose of authorizing the execution of the deed, it was held not to be in all cases essential that absent directors should be notified.⁷⁰ In the case above cited, it appeared that the articles of association of the company provided that the number of the directors should not be less than three; that the continuing directors might act, notwithstanding any vacancies in their body, as long as there remained three directors qualified to act; that the office of a director should be vacated if he should absent himself from the meetings of the board during three calendar months without special leave of absence from the directors. Of the four directors of the company, two were absent at the same time. One of them was resident in Nova Scotia, and

evil resulted from the omission if there was any, no fraud was imputed, and all parties attended and thereby admitted notice." *People v. Peck* (1834), 11 Wend. 604, 27 Am. Dec. 104; *Jones v. Milton, etc. Turnpike Co.*, 7 Ind. 547; *In re Joint Stock Companies Act of 1856*, 3 Kay & J. 408; *Williams v. Financial Corporation*, L. R. 16 Eq. 363, 375. *Of. San Buenaventura, etc. Co. v. Vassault* (1875), 50 Cal. 534; *In re British Sugar Refining Co.*, 3 Kay & J. 408; *State v. Pettineli* (1875), 10 Nev. 141.

⁶⁶ *Schenectady, etc. Plankroad Co. v. Thatcher* (1854), 11 N. Y.

102; *In re Mohawk & Hudson R. Co.* (1838), 19 Wend. 135.

⁶⁷ *Jackson v. Hampden*, 20 Me. 37.

⁶⁸ Leaving a written or even a verbal notice with a member of the stockholder's family has been held sufficient in *Williams v. German Mutual Fire Ins. Co.*, 68 Ill. 387. But see *Stevens v. Eden Meeting House Soc.*, 12 Vt. 688.

⁶⁹ *Halifax Sugar Refining Co. v. Francklyn* (Ch. Div. 1890), 8 Ry. & Corp. L. J. 91.

⁷⁰ *Halifax Sugar Refining Co. v. Francklyn* (Ch. Div. 1890), 8 Ry. & Corp. L. J. 91.

was appointed a director to secure his influence there, and was charged with duties for the performance of which residence there was essential. The other was traveling abroad, and it was not known where he was. And it was held as above stated that during their absence it was not essential for the validity of every board meeting, that notice thereof should be sent to them, and the other two directors were entitled to act as a board to bind the company. Without going into the distinction between ordinary and extraordinary business, the court intimated that had the business of the meeting been of the latter character, notice would be essential wherever the directors might be.⁷¹ In a well considered American case in point, notice of a meeting of the board of directors, at which an assignment was made for the benefit of creditors, was

⁷¹ "I decline to enter into the question of ordinary and extraordinary business, a distinction which does not exist in the articles themselves; it seems to me involved and difficult. As far as I can judge this is a piece of business which might be fairly considered by the directors, and ought to be treated by the court as falling within the category of ordinary business. The directors were not exercising any extraordinary powers, such as powers of borrowing and so forth; what they were asked to do by the debenture holders, and what it seems to me as honest men they were bound to do, was to perfect the security which had been already given, which was assumed to be valid, and which was found to be, or might be, defective by reason of non-registration. I think, therefore, that this might be treated even in that respect as ordinary business. I am of opinion that in each point of view, there was no necessity to go through the form of giving Mr. Dustan notice of a meeting which it was perfectly well known he would not attend. He never gave any intimation of his intention to come to England, and he never did in point of fact come to England;

if he had, a totally different set of circumstances would have arisen, and it would have been certainly proper, and I think also necessary, that he should have been summoned to attend directors' meetings. So much as regards Mr. Dustan. The other director is Mr. Ryder. The evidence is that he was out of the country and in America, that he was traveling about, and it was not known where he was. It was almost impossible to give him notice of the meeting, and, therefore, it seems to me, on the ground that the business of the company cannot be stopped by a director choosing to go away to America, or traveling about, that notice to him was unnecessary. I come to the conclusion, under these circumstances, that the two directors were entitled to act as a board to bind the company during the absence of Mr. Ryder, and during the absence of Mr. Dustan in Canada performing the duties with which he was charged. It seems to me, on these grounds, that the action fails and that it must be dismissed with the usual consequences." *Halifax Sugar Refining Co. v. Francklyn* (Ch. Div. 1890), 8 Ry. & Corp. L. J. 91, 93.

sent by telegram to all the directors at their respective residences. Two of them, by reason of being absent from the State, did not receive the notification. A sufficient number, however, received notice and attended the meeting, to constitute a quorum; and under the circumstances the court declared that "it would seem unreasonable to hold that a majority of the whole number, being present, could not do a legal act binding the corporation. The exigency demanded immediate action to save the property and to save expense. It is easy to see how disastrous might be the consequences were we to adopt the principle contended for by the defendants. The situation of the absent directors might be much more remote and inaccessible than in the present case, requiring several months to reach them by actual notice. Must the corporation remain paralyzed all this time without ability to protect itself?"⁷² The suggestion was made in the argument of the case above cited, that the absence of the two directors might have been treated as a vacancy, which the other directors were empowered by law to fill. If, however, the office was vacant as to the two absent directors, then surely the remaining directors could lawfully represent the corporation, for there is no general law or principle requiring vacancies to be filled, before the remaining directors can act in the business of the corporation, provided, of course, the number left is sufficient to constitute a legal quorum.⁷³

§ 669. (d) **Requisites of the notice.**—The notice of a corporate meeting should specify the place and time at which it is to be held. The time should be definitely stated to be on a certain day at a certain hour.⁷⁴ This is ordinarily all that is required, and when only the usual course of business is to be carried out, no notice of the questions to be considered need be given;⁷⁵ but when the purpose of the meeting is to consider some matter out-

⁷² Chase v. Tuttle, 55 Conn. 455 (1887), 3 Am. St. Rep. 64.

⁷³ Chase v. Tuttle, 55 Conn. 455 (1887), 3 Am. St. Rep. 64.

⁷⁴ San Buenaventura Commercial Min. & Manuf. Co. v. Vassault (1875), 50 Cal. 534, 537, where the court said: "Conceding that this by-law is notice *per se* that the annual meeting will be held on the third Monday in April of each year, it is insufficient as a notice of the point of time dur-

ing that day at which the meeting is to be held."

⁷⁵ Warner v. Mower (1839), 11 Vt. 385, 391, 394; Sampson v. Bowdoinham Steam Mill Co., 36 Me. 78 (1854); People's Ins. Co. v. Westcott, 14 Gray, 440; Wills v. Murray, 4 Ex. 843; People v. Batchelor (1860), 22 N. Y. 128; South School District v. Blakeslee (1839), 13 Conn. 228; Merritt v. Farris, 22 Ill. 303.

side of the usual routine of business, the notice should set forth the nature of the business to be transacted.⁷⁶ It is not necessary, however, that a notification should be drawn up with all the formality of a special plea. All that is required is, that it should be so expressed as that the members may fairly understand the purpose for which they are to be convened.⁷⁷ The notice need not announce the business to come before the meeting, where the meeting is prescribed by charter, or where it is required by charter, statute, or by-law, and is the only business to be transacted at the meeting. At the annual meeting of stockholders, the number of directors can not be increased, or the capital stock increased, or any specific restriction adopted as to any particular business.⁷⁸

§ 670. Stockholders' meetings.—In respect of the place of holding corporate meetings, a distinction is drawn between those of the members composing the corporate body itself, and meetings of their managing or directing boards. It is well settled that the former may not be held beyond the borders of the State from which the charter is derived; while there seems to be no doubt that the latter may meet and transact such business as has been committed to their direction, wheresoever may be most con-

⁷⁶ *Atlantic Delaine Co. v. Mason* (1858), 5 R. I. 463; *Shelby R. Co. v. Louisville, etc. R. Co.*, 12 Bush, 62; *Tuttle v. Michigan, etc. R. Co.*, 35 Mich. 247; *Merritt v. Farris*, 22 Ill. 303; *In re Silkstone Fall Colliery Co.*, 1 Ch. Div. 38; *In re Bridport Old Brewery Co.*, L. R. 2 Ch. 191; *Zabrinski v. Cleveland, etc. R. Co.*, 23 How. 381; *Savings Bank v. Davis*, 8 Conn. 192; *Asbury Ry. etc. Co. v. Riche*, L. R. 7 H. L. 653; *Hutton v. West Cork Ry. Co.*, 23 Ch. Div. 654; *King v. Hill*, 4 Barn. & C. 426. *Cf. Wills v. Murray*, 4 Ex. 843. But see *Granger v. Original Empire Mill, etc. Co.* (1882), 59 Cal. 678, where a mortgage was executed under a resolution passed at a special meeting of the directors. The resolution recited that written notices of the meeting had been served on each director. The purpose of the meeting was not specified in the notices; but it was held that the meeting was regu-

larly called, and the mortgage valid.

⁷⁷ *South School District v. Blakeslee* (1839), 13 Conn. 228, 234, where the following notice was held sufficient: "Notice is hereby given to the legal voters in the South School District in Northford, that there will be a school meeting at the dwelling house of Samuel Bartholomew, Thursday, August 24th, 1837, at 6 o'clock, P. M., to decide whether they will direct a suit to be commenced for the damage lately done to the school-house and furniture, and to appoint agents for the purpose of conducting a suit, if necessary. Northford, August 18th, 1837."

⁷⁸ *Bagley v. Reno, etc. Co.*, 201 Pa. St. 78 (1902), 56 L. R. A. 184; *Jones v. Concord, etc. Co.* (1892), 67 N. H. 234, 68 Am. St. Rep. 650; *Mutual, etc. Co. v. Farquhar*, 86 Md. 668 (1898).

venient. In support of the proposition that the members or stockholders can not hold a valid meeting except in the State from which they derive their corporate existence, it is said that where corporations are created by State legislatures without specifying a locality in their charters, they are regarded as, by implication of law, local to the State in which they are created, and must have their business locations therein;⁷⁹ that, accordingly, all votes and proceedings of persons professing to act in the capacity of corporators, if assembled beyond the sovereignty granting the charter, are wholly void.⁸⁰ The Bank of Augusta v. Earle,⁸¹ is a lead-

⁷⁹ Aspinwall v. Ohio & M. R. Co. (1863), 20 Ind. 492, 83 Am. Dec. 329. The case of Wright v. Bundy, 11 Ind. 398, accords with Aspinwall v. Ohio & M. R. Co. (1863), 20 Ind. 492, in principle. The difference is in the facts. In the former the stockholders constituted the corporation, the directors being but its agents. In the latter the directors were constituted the corporation by the charter.

⁸⁰ Miller v. Ewer, 27 Me. 509. This case was a writ of entry to recover a tract of land in the state of Maine and the demandants claimed title through a mortgage thereof executed by the president and secretary of the Bluehill Granite Company, a corporation chartered by that state in 1836. It appeared in proof that shortly after the date of the charter a meeting of the corporators for organization under it was called and held in the city of New York, that the charter was there accepted, and the officers of the corporation, president, secretary and directors, were chosen; that at a meeting of the directors held in the same city in April, 1837, the president and secretary were authorized by vote to execute the mortgage in question, which they accordingly did; and there was no proof that any meeting for the organization of the company or for the choice of its officers had ever

been held in the state of Maine. The court upon this proof held that the mortgage passed no title because the directors who ordered its execution, were not lawfully chosen. Wood Hydraulic Co. v. King (1872), 45 Ga. 35; Hilles v. Parrish (1862), 14 N. J. Eq. 380; Aspinwall v. Ohio, etc. R. Co., 20 Ind. 492, 497 (1863), 83 Am. Dec. 329; Freeman v. Machias Water Power, etc. Co. (1854), 38 Me. 343; Ormsby v. Vermont Copper, etc. Co. (1874), 56 N. Y. 623; Merrick v. Brainard (1860), 38 Barb. 574; La Fayette Ins. Co. v. French, 18 How. 404; Smith v. Silver Valley, etc. Co., 64 Md. 85, 10 Am. & Eng. Corp. Cas. 1, 54 Am. Rep. 760; Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619; Franco-Texan Land Co. v. Laigle (1883), 59 Tex. 339, where the charter of a Texas corporation purported to authorize it to transact business at Paris, France, and it was held, that the corporation could not hold stockholders' meetings outside of Texas; that directors elected at a meeting held at Paris were not directors even *de facto*, and that their acts were a nullity; Farnum v. Blackstone, etc. Corporation, 1 Sumn. 46; Day v. Newark, etc. Manuf. Co., 1 Blatchf. 628; Plimpton v. Bigelow (1883), 93 N. Y. 592, 598; Stevens v. Phoenix Ins. Co., 41 N. Y. 149; Merrick v. Van Santvoord (1866), 34 N. Y. 208,

⁸¹ 13 Pet. 519, 588.

ing case in point; and it was there said by Chief Justice Taney, that a corporation "must dwell in the place of its creation, and can not migrate to another sovereignty;" but that its residence in one State creates no insuperable objection "to its power of contracting" in another; nor does it make any difference as to the operation of this rule, that the corporators named in the charter are empowered by it to manage the affairs of the corporation and to exercise all rights therein granted "as directors," until others shall be elected.⁸² The two capacities, of corporators and directors, are distinct, and they can not do in the latter capacity those acts which the law requires them to do in the former.⁸³ Subsequent ratification, however, at a meeting properly held, may suffice to impart validity to former irregular proceedings.⁸⁴ And the legislature, having power to authorize a meeting to be held out of the State, may cure the irregularity of one there held, without authority first obtained, by the subsequent passage of an act which recognizes the proceedings of the meeting as valid.⁸⁵

§ 671. (a) Must be within the State creating the corporation.—The place of meeting of stockholders must be within the boundaries of the State which created the corporation,⁸⁶ but this requirement does not preclude the corporation from transacting business and contracting beyond the State. Upon the question, whether the acts and proceedings of a stockholders' meeting held out of the State are void, or are merely voidable, there

218; *Reichwald v. Commercial Hotel Co.* (1883), 106 Ill. 439. In England it has been enacted that all meetings, whether ordinary or extraordinary, shall be held in the place prescribed in the charter, if any, and if no place be prescribed, then at some place to be appointed by the directors. 8 Vic., ch. 16, § 66.

⁸² *Smith v. Silver Valley Mining Co.* (1885), 64 Md. 85, 54 Am. Rep. 760.

⁸³ *Smith v. Silver Valley Mining Co.* (1885), 64 Md. 85, 54 Am. Rep. 760, 20 Atl. 1032.

⁸⁴ *Freeman v. Machias Water Power & Mill Co.* (1854), 38 Me. 343, 346; *Ohio, etc. R. Co. v. McPherson* (1864), 35 Mo. 13, 86 Am. Dec. 128.

⁸⁵ *Graham v. Boston, etc. R. Co.* (1886), 118 U. S. 161, 178, 14 Fed. Rep. 753. Upon the general question of legislative sanction of irregular corporate acts, see the following cases, which relate to irregular municipal elections: *Anderson v. Santa Anna* (1885), 16 U. S. 356, 359; *St. Joseph Township v. Rogers*, 16 Wall. 644; *Grenada Co. v. Brogden* (1884), 112 U. S. 261; *Keithsburg v. Frick*, 38 Ill. 405; *Cogwill v. Long*, 15 Ill. 202; *Howe v. Freeman*, 14 Gray, 566; *Shaw v. Norfolk R. Co.*, 5 Gray, 162.

⁸⁶ *Jones v. Pearl Min. Co.* (1894), 20 Colo. 417, 38 Pac. Rep. 700; *Harding v. American, etc. Co.* (1899), 182 Ill. 551, 74 Am. St. Rep. 189.

is difference of opinion in the courts. By some courts such proceedings, held out of the State, are declared to be entirely void, and the stockholders to be liable as partners.⁸⁷ But the weight of opinion is, that acts and contracts of stockholders, at their meetings held out of the State, are not void but only voidable.⁸⁸ The corporation is estopped to deny the validity of acts done outside the State,⁸⁹ and stockholders, participating in such meetings, are estopped.⁹⁰ A corporate meeting may be held at any convenient place within the State.⁹¹ It is a nullity, as to any absent dissenting stockholder, if the meeting is held at a place other than that named in the notice.⁹²

Meetings held without the State.—If there is a legislative requirement that all corporate meetings shall be held within the State, a meeting held without the State is a nullity, as to any non-participating and dissenting stockholder.⁹³ In the absence of any such requirement, a stockholders' meeting, held without the State, is binding upon those who participated therein, or assented thereto.⁹⁴

Presumption.—In the absence of proof to the contrary, the presumption will be, that the meeting was held at the place provided by the charter or by-laws.⁹⁵

§ 672. (b) **First meeting under special charter.**—Whatever doubt there may be as to the legality of stockholders' meetings beyond the State after the company has been duly organized, there is none as to the insufficiency of votes and elections given and held without the State for the purpose of accepting the charter and electing the first officers and board of directors.⁹⁶ But a subscriber to the stock of a corporation thus illegally organized,

⁸⁷ *Welch v. Old Dominion, etc. Ry.* (1890), 10 N. Y. Supp. 174; *Duke v. Taylor* (1896), 37 Fla. 64, 53 Am. St. Rep. 332; *Craig Silver Co. v. Smith* (1895), 163 Mass. 262; *Hodgson v. Duluth, etc. R. R.* (1891), 46 Minn. 454; *Harding v. American, etc. Co.* (1890), 182 Ill. 551, 74 Am. St. Rep. 189.

⁸⁸ *Handley v. Stutz* (1891), 139 U. S. 417; *Stutz v. Handley* (1890), 41 Fed. Rep. 531; *Wight v. Lee* (1892), 2 S. D. 596.

⁸⁹ *Graham v. Boston, etc. R. R.* (1886), 118 U. S. 161.

⁹⁰ *Stutz v. Handley* (1890), 118 Fed. Rep. 531; *Heath v. Silverthorn, etc. Co.*, 39 Wis. 146.

⁹¹ *Commonwealth v. Smith* 45 Pa. St. 59.

⁹² *American, etc. Society v. Pilling*, 24 N. J. Law, 653.

⁹³ *Hodgson v. Duluth, etc. Co.*, 46 Minn. 454.

⁹⁴ *Ohio & M. Ry. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128; *Missouri, etc. Co.*, 114 Mo. 218, 35 Am. St. Rep. 746.

⁹⁵ *Matthews v. Columbia Nat. Bank*, 79 Fed. Rep. 558.

⁹⁶ *In Smith v. Silver Valley Min-*

who has given his note for the amount subscribed, may, by his acts, be estopped from denying the legal existence of the corporation, when sued by a *bona fide* endorsee for value before maturity.⁹⁷ For, it is said, if he did it with knowledge of the fact that the company, of which he thus became a member, was in point of fact a mere cheat, and a fraud upon the public, he should not be permitted to take advantage of his own wrong.⁹⁸ After the first meeting, and subscription and organization, the incorporators have no further powers, and may be enjoined from attempting to exercise any power.⁹⁹

§ 673. (c) Place of meeting of consolidated companies.—

That a meeting in one of several States of the stockholders of a corporation chartered by all of those States, is valid in respect to the property of the corporation in all of them, without the necessity of a repetition of the meeting in any other of those States, is declared by the federal Supreme Court to be a sound proposition.¹

§ 674. (d) Place of meeting of interstate corporations.—

Corporations created under laws of different States, and consolidated, or corporations of one State also incorporated in another, may hold a valid corporate meeting in either State.² Thus, the Boston, Hartford & Erie Railroad Company, though made up of distinct corporations, chartered by the legislatures of different

ing Company (1885), 64 Md. 85, 54 Am. Rep. 760, a charter was granted to a corporation by the legislature of North Carolina. The corporators held their first meeting in Baltimore, Maryland, there accepting the charter; and it was decided that this acceptance was invalid and that the corporation had no legal existence. *Freeman v. Machias Water Power, etc. Co.* (1854), 38 Me. 343. But see *Hearth v. Silverthorn Lead. etc. Co.* (1875), 39 Wis. 146, as to estoppel of the corporation to deny extra-territorial acts, to the injury of third parties.

⁹⁷ *Camp v. Byrne* (1867), 41 Mo. 525.

⁹⁸ *Camp v. Byrne* (1867), 41 Mo. 525.

⁹⁹ *Union Water Co. v. Kean* (1893), 52 N. J. Eq. 111; *Simonds*

v. East Windsor, etc. Ry. (1901), 73 Conn. 513.

¹ *Graham v. Boston, H. & E. R. Co.* (1886), 118 U. S. 161, 168, 169, where Mr. Justice Blatchford, delivering the opinion of the court, continued: "Whether it be or be not true that proceedings of persons professing to act as corporators, when assembled without the bounds of the sovereignty granting the charter, are void (*Miller v. Ewer*, 27 Me. 509), there is no principle which requires that the corporators of this consolidated corporation should meet in more than one of the states in which it has a domicile, in order to the validity of a corporate act." See also *Covington, etc. Bridge Co. v. Mayer* (1877), 31 Ohio St. 317.

² *Graham v. Boston, etc. Co.* 118 U. S. 161.

States, had a capital stock which was a unit, and only one set of shareholders, who had an interest, by virtue of their ownership of shares of that stock, in all its property everywhere. In its organization and action, and the practical management of its property, it was one corporation, having one board of directors, though in its relations to any State, it was a separate corporation, governed by the laws of that State as to its property therein. It, therefore, had a domicile in each State, and the corporators or shareholders could, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in any one State, so as to bind the corporation in respect to its property everywhere.³ There is a case, however, apparently to the contrary, where, in respect to a company incorporated both in Ohio and Indiana, it was said: "The authority given by the legislature of Indiana to the corporation created by that body, to own and manage property in Ohio, did not include in it the authority to the corporation to change its domicile to that State." The authority given to the Indiana corporation, by the legislature of Ohio, to act in that State, did not confer upon it, in the absence of authority from Indiana, the right to migrate to that State as an Indiana corporation.⁴ Meetings of stockholders of interstate corporations may be held in either State, and without necessity of repeating meetings in all of the States in which they are incorporated.⁵

§ 675. Directors' meetings. Place of holding.—Proceedings of a directors' meetings held outside the boundaries of the State wherein incorporated, in the absence of statutory prohibition, are binding upon all those participating, as also upon those

³ Mr. Justice Blatchford in *Graham v. Boston, H. & E. R. Co.* (1886), 118 U. S. 161, 169, 170, citing *Bridge Co. v. Mayer* (1877), 31 Ohio St. 317, and *Pierce on Railroads*, 20. "The irregularity, if any, was one which the legislatures of the four states could rectify, as they did, because all of them, acting together for the one purpose, could have authorized in advance the holding of the meeting at New York." *Graham v. Boston, H. & E. R. Co.* (1886), 118 U. S. 161, 170, citing *Grenada Co. v. Brogden* (1884), 112 U. S. 261;

Anderson v. Santa Anna (1885), 116 U. S. 356; *Shaw v. Norfolk R. Co.*, 5 Gray, 162; *Howe v. Freeman*, 14 Gray, 566. *Of. Culbertson v. Wabash Navigation Co.*, 4 McLean, 544; *Richardson v. Vermont, etc. R. Co.*, 44 Vt. 613. *Contra, Aspinwall v. Ohio, etc. R. Co.* (1863), 20 Ind. 492, 83 Am. Dec. 329.

⁴ *Aspinwall v. Ohio & M. R. Co.* (1863), 20 Ind. 492, 83 Am. Dec. 329.

⁵ *Graham v. Boston, etc. R. R.* (1886), 118 U. S. 161. See, also, 46 Am. Dec. 619.

acting upon the faith of their validity, or receiving stock to be issued at such meeting.⁶ It would certainly be an extraordinary anomaly, if, while by the comity existing between the States a corporation is allowed to conduct its business beyond the borders of the incorporating State, it could disavow the acts of those whom it has appointed to conduct its business in the foreign State, on the ground that the votes by which they were done were passed there.⁷ Accordingly, directors may hold meetings, have an office, make contracts and transact a part at least of the general business of the corporation in another State, unless prohibited by local legislation. But the directors, when so acting, are not the corporate body, but its mere agents.⁸ So long as its stockholders' meetings, and the election of its officers and directors are held in the State of its origin, the company will not be deemed to have migrated to the State in which its business is carried on, for the purpose of holding its members personally liable as partners.⁹ Nor are the shares of a non-resident defendant, in the stock of a foreign corporation, deemed to be within the State for the purposes of an attachment suit, by reason of the fact that the president or other officers of the corporation are there engaged in corporate business.¹⁰ Indeed, a company may be organized under the laws of one State for the express purpose of doing business in another, if only its corporate organization be maintained and

⁶ *Galveston, etc. R. Co. v. Cowdrey*, 78 U. S. 459, 11 Wall. 459; *Handley v. Stutz*, 139 U. S. 417; *Ashley Wire Co. v. Illinois Steel Co.* (1896), 164 Ill. 149; *Glymont Imperial Co. v. Toler* (1894), 80 Md. 278.

⁷ *Saltmarsh v. Spaulding* (1888), 147 Mass. 224, 229; *Galveston Railroad v. Cowdrey* (1870), 11 Wall. 459, 476; *Smith v. Alvord* (1872), 63 Barb. 415.

⁸ *Smith v. Silver Valley Mining Co.* (1885), 64 Md. 85, 54 Am. Rep. 760, citing *Angell & Ames on Corporations*, 104; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287; *Ohio, etc. R. Co. v. McPherson* (1864), 35 Mo. 13, 86 Am. Dec. 128; *Wood Hydraulic, etc. Co. v. King* (1872), 45 Ga. 34; *Bellows v. Todd* (1874), 39 Iowa, 209, 217; *Wright v. Bundy*, 11 Ind. 398, 404; *McCall*

v. Byram Manuf. Co., 6 Conn. 428; *Armes v. Conant* (1864), 36 Vt. 744. Under the Colorado incorporation act, § 18, meetings of the directors may be held beyond the limits of the state, if provision therefor be made in the certificate of incorporation. *Humphrey v. Mooney* (1881), 5 Colo. 282.

⁹ In *Merrick v. Van Santvoord* (1866), 34 N. Y. 208, the corporation held its annual elections in Connecticut, and the court refused to consider it as having migrated by reason if its business being carried on in New York, and declined therefore to hold the defendant individually liable as a member of an absconding corporation.

¹⁰ *Plimpton v. Bigelow* (1883), 93 N. Y. 592, 598.

directed from the State of its origin.¹¹ The powers of a company so organized and managed, are determined by its charter and the laws of the incorporating State, while the manner of carrying out its powers and the form of its deeds and contracts, are regulated by the laws of the State wherein its business is conducted.¹²

§ 676. **Estoppel to plead illegality of place of meeting.**—While the meeting of members of a company out of the State granting them their charter, is undoubtedly irregular, and the proceedings of a meeting so held for the purpose of accepting a charter, are wholly nugatory,¹³ yet, it does not lie in the mouth of members of a company already organized who have participated or acquiesced in the holding of meetings beyond the State, to object to the validity of proceedings there taken.¹⁴ While a dis-

¹¹ *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888), where it was held that if a corporation be organized for the purpose of doing business outside the state, and its contracts are made and business conducted in another state, and its by-laws, while providing for an annual meeting and election of officers in the former state, provide also for directors' meetings for business in the latter state, the appointment of agents and the filling of vacancies in the board of directors there, a vote authorizing certain officers to mortgage land in the latter state may properly be taken by the directors in that state. For examples of charters of companies authorized to do business beyond the state, requiring only that their shareholders' meetings shall be held within the state, see N. Y. Laws of 1826, ch. 143, incorporating *The United States Mexican Co.*; N. Y. Laws of 1827, ch. 308, incorporating *The New York South American Steamboat Association*; N. Y. Laws of 1849, ch. 407, incorporating *The Panama Railroad Co.* See also N. Y. Laws of 1828, ch. 211; of 1847, ch. 513; of 1848, ch. 396; of 1850, ch. 627; of 1864, ch. 758; of 1865, ch. 360, cited as illustrating the New York legislative con-

struction of the rules of international comity, by Porter, J., in *Merrick v. Van Santvoord* (1866), 34 N. Y. 208, 216.

¹² Mass. Pub. Stat. ch. 106, § 23, providing that a corporation shall not convey or mortgage its estate or give a lease thereof for more than a year "unless authorized by a vote of the stockholders at a meeting called for the purpose," does not apply to foreign corporations; and accordingly where the directors of such a corporation have power to do so, they may at a meeting held in Massachusetts validly authorize their president and treasurer to execute a mortgage of the corporate property. "While they must comply in their forms of conveyance with those here required, they derive their authority to make them from the rules imposed upon them by the states where they were created." *Saltmarsh v. Spaulding* (1888), 147 Mass. 224, 227.

¹³ *Vide supra*, § 673.

¹⁴ "After the corporation had become full fledged, I see nothing in reason or in principle why the stockholders might not as well elect directors as the directors a treasurer on the Missouri side of the line. The utmost that could be said under such circumstances

senting shareholder may attack the proceedings as irregular and as in fraud of his rights, (unless by failure to take any action within the time prescribed by the Statute of Limitations, his remedy be barred),¹⁵ the irregularity is not to be taken advantage of either by the company,¹⁶ or by persons contracting with it.¹⁷ And a stockholder,—who has contracted with the company in its corporate name, paid his money to it as an existing, living thing, in answer to its corporate demands, and from year to year has attended meetings of its stockholders, and voted at elections upon questions which clearly implied the company's existence,—ought to be estopped from denying what he has thus often and solemnly admitted.¹⁸ The directors of a corporation that has been duly organized, although they may have been elected at a meeting of stockholders held without the State, become directors *de facto* by accepting their offices and ordering a call for payment upon subscriptions to the capital stock; and their authority can not be questioned collaterally by a stockholder in an action against him for the call thus made, without showing a judgment of ouster against them, in direct proceedings instituted by the State for that purpose.¹⁹ In an early case, the Supreme Court of Maine refused to declare the proceedings of a meeting illegal and void, on the ground that it was convened in New Hampshire where the members resided, the statute not prescribing that the meeting should be held in the commonwealth.²⁰

§ 677. **Time of meeting.**—If the time of holding corporate meetings be not fixed in the charter or articles of association, it is within the province of the by-laws to prescribe the times at which they shall be so held.²¹ But if the time be not prescribed

is that the election was irregular." *Ohio & M. R. Co. v. McPherson* (1864), 35 Mo. 13, 86 Am. Dec. 128, distinguishing *Miller v. Ewer* (1847), 27 Me. 509, 46 Am. Dec. 619. A participating shareholder can not take advantage of an extra-state organization even. *Camp v. Byrne* (1867), 41 Mo. 525.

¹⁵ *Ormsby v. Vermont Copper, etc. Co.* (1874), 56 N. Y. 623.

¹⁶ *Heath v. Silverthorn Lead, etc. Co.* (1875), 39 Wis. 146; *Humphreys v. Mooney* (1881), 5 Colo. 282.

¹⁷ *Humphreys v. Mooney* (1881), 5 Colo. 282.

¹⁸ *Ohio & M. R. Co. v. McPherson* (1864), 35 Mo. 13, 86 Am. Dec. 128, 132, citing *All Saints Church v. Lovett*, 1 Hall, 191; *John v. Farmers' & Mechanics' Bank*, 2 Blackf. 367, 20 Am. Dec. 119; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

¹⁹ *Ohio & M. R. Co. v. McPherson* (1864), 35 Mo. 13, 86 Am. Dec. 128; *Humphreys v. Mooney*, 5 Colo. 282 (1881).

²⁰ *Copp v. Lamb* (1835), 12 Me. 312, 314.

²¹ *Newling v. Francis*, 3 Term. Rep. 189; *In re Long Island R. Co.*, 19 Wend. 37. It is enacted by

by the organic law of the company, it is for the directors to determine the date of meeting; and a court of equity will not ordinarily interfere with their discretion.²² Their discretion in this regard is not, however, to be arbitrarily exercised to perpetuate themselves in power, nor to give one party of shareholders an undue advantage over others.²³ Thus, where the directors fixed an unusually early date for the annual meeting, for the purpose of preventing certain stockholders from exercising the full voting power which they would derive from newly acquired shares if the meeting were held at the customary time, an injunction was granted these stockholders to prevent the meeting being held until the usual time.²⁴

§ 678. **Premature meeting.**—While a considerable delay may not render the proceedings of the meeting invalid, the premature organization of a meeting, even but a few minutes before the time fixed by custom or notice, is obviously a surprise upon such stockholders as did not participate therein, and as against them the proceedings will be held irregular and invalid.²⁵

Time of holding a meeting.—The call and notice for meeting must state the hour of meeting, as well as the place and day.²⁶ The meeting is not to be held before the hour specified in the notice,²⁷ and it must be held then, or within reasonable time thereafter.²⁸

Annual meeting.—When the time for holding annual meeting for election of directors is required by charter, they, without assent of a majority of the stockholders, can not continue themselves in office more than a year, by a by-law changing the time

the English Companies Clauses Act of 1845, that the first general meeting of the shareholders of the company shall be held within the time prescribed by the act of incorporation, or if no time be prescribed, within one month after the passing of the special act of incorporation, and the future general meetings shall be held at the prescribed periods, and if no periods be prescribed, in the months of February and August in each year, or at such other stated periods as shall be appointed for that purpose by an order of a general meeting. 8 Vic. ch. 16, § 66.

²² Cannon v. Trask (1875), L. R. 20 Eq. 669, 675; Inderwick v. Snell, 2 Mac. & G. 216.

²³ Elkins v. Camden & A. R. Co. (1882), 36 N. J. Eq. 467; Cannon v. Trask (1875), L. R. 20 Eq. 669.

²⁴ Cannon v. Trask (1875), L. R. 20 Eq. 669.

²⁵ People v. Albany & S. R. Co. (1869), 55 Barb. 346, 363.

²⁶ San Buenaventura, etc. Co. v. Vassault, 50 Cal. 534.

²⁷ People v. Albany, etc. Co., 55 Barb. (N. Y.) 344.

²⁸ State v. Bonnell, 35 Ohio St. 10, 17.

of holding such annual election.²⁹ While, of course, a reorganization at the appointed time, fully, fairly and openly made, as at a new meeting, and attended with no circumstances of deception or unfairness, may cure such an irregularity,³⁰—its subsequent reorganization at the designated hour, has been held insufficient to give validity to a meeting, where the original meeting was not broken up, the chairman and secretary retaining their seats at the table with their friendly stockholders, where they sat at the first meeting, and there being no abandonment of the room nor relinquishment of its preoccupation by those who held the first meeting, and there being no formal organization of a new meeting in the ordinary way.³¹

§ 679. **Postponed meeting.**—Stated meetings of the corporations should be convened upon the appointed day,³² and should be organized promptly at the appointed hour.³³ If, however, a delay is for the mere purpose of enabling all the members to assemble, and without prejudice to any one, it would be unjust to hold the proceedings illegal. But, on the other hand, if it were such as to create a general belief that no meeting would be held, and thereby induce the great body of the electors to disperse, and a few were afterwards to open the meeting and pass votes which could not have been passed except for the delay, it would be unjust to hold them legal and binding.³⁴ Postponement beyond the stated

²⁹ *Elkins v. Camden, etc. Co.*, 36 N. J. Eq. 467. *Vide supra*, § 667.

³⁰ *People v. Albany & S. R. Co.* (1869), 55 Barb. 346, 363.

³¹ *People v. Albany & S. R. Co.* (1869), 55 Barb. 346, 364, 365.

³² Where the charter of a corporation requires annual meetings for the election of directors, the directors can not by a by-law so change the time of the annual election as to continue themselves in office more than a year, against the wishes of the holders of a majority of the stock. *Elkins v. Camden & A. R. Co.* (1882), 36 N. J. Eq. 467. In Alabama the election and term of office of the directors and officers of street railway companies are governed by Code, §§ 1923, 1925, which contemplates only annual elections; and a majority of the directors of

such a corporation can not, by changing the time of the annual meeting of the stockholders, change the term nor authorize an election by the stockholders of a new board before the term as limited by the statute has expired. *Nathan v. Tompkins* (1887), 82 Ala. 437.

³³ *State v. Bonnell* (1878), 35 Ohio St. 10.

³⁴ *South School District v. Blakeslee* (1839), 13 Conn. 228, 234 (misprinted in original report as 238). In *State v. Bonnell* (1878), 35 Ohio St. 10, the certificate of incorporation of the company provided that the annual meeting for the election of directors should be held on the third Tuesday of January in each year; and it had been customary for the secretary to give the stockholders

day of meeting does not necessarily render the proceedings subsequently taken invalid.³⁵

§ 680. Adjourned meeting.—The proceedings of an adjourned meeting, at which only the unfinished business of the original meeting is transacted, are valid without the necessity of additional notice being served upon the members.³⁶ Thus, where notice of the purpose of a vestry meeting has been duly given, and the meeting was regularly held and adjourned to a subsequent time, leaving certain business unfinished, the matter may be lawfully taken up and completed at the adjourned meeting, although the notice summoning the latter does not state the purpose for which it is to be convened.³⁷ But in order that notice of a prior meeting may extend and apply to a subsequent meeting, the latter must be held merely for the purpose of completing the unfinished

notice of such meetings, stating the hour at which they would be held. Notice of the meeting for 1879 was in like manner issued; but owing to an injunction it was not held at the hour designated. A small number of the members, however, for the purpose of "saving the charter day," met at a later hour and adjourned to the following day, at which time they elected directors for the ensuing year. "No special pains were taken to give notice" to the other stockholders of these meetings, although they were in the vicinity and might easily have been notified. The court, expressing no opinion as to the force and effect of the injunction, decided that "to sustain an election held under such circumstances would, indeed, be a most dangerous precedent. The liberal rule which is extended to elections fairly but irregularly held has no just application to this case."

³⁵ *Beardsley v. Johnson* (1888), 49 Hun, 607. In New York it is provided by statute that in case an election of directors of any incorporated company be not held at the appointed time, it may be held within sixty days thereafter. 1

N. Y. Rev. Stat. 604, § 8. But this statute is held to be merely declaratory, and where an election was not held until more than two years after the time appointed it has been considered legal. *Beardsley v. Johnson* (1888), 49 Hun, 607. Provision is made in the statutes of New York for changing the time of holding the annual election of directors of railway companies. This may be done either by the directors (N. Y. Laws of 1875, ch. 586, § 1; N. Y. Laws of 1881, ch. 317, § 1) or by the stockholders. N. Y. Laws of 1885, ch. 498, § 1.

³⁶ *United States v. McKelden* (1879), 8 Fed. Rep. 778, 4 MacA. 318; *People v. Batchelor* (1860), 22 N. Y. 128; *Smith v. Law* (1860), 21 N. Y. 296; *Warner v. Mower* (1839), 11 Vt. 385; *Wills v. Murray*, 4 Ex. 843, 19 L. J. Ex. 209; *Rex v. Carmathen*, 1 Maule & S. 702; *Schoff v. Bloomfield*, 8 Vt. 472; *Garrar v. Perley*, 7 Me. 404; *Granger v. Grubb*, 7 Phila. 350; *Scadding v. Lorant* (1851), 3 H. L. Cas. 418; *Queen v. Grimshaw*, 10 Q. B. 747.

³⁷ *Scadding v. Lorant* (1851), 3 H. L. Cas. 418, 446.

business of the former.³⁸ And the hour to which it is adjourned should be definitely fixed, and should be entered upon the minutes in order to affect members, absent from the first, with notice of the adjourned meeting.³⁹ Thus, where a regular meeting of the board of directors, of which no notice was required, was adjourned to the next day, but the hour to which it was adjourned was not stated in the minutes thereof, and two directors, who were not present at the regular meeting, received no notice of the adjournment, and had no knowledge of it, an assessment levied at the latter meeting,—was held to be a nullity.⁴⁰ And if there be reason to believe that the adjournment was fraudulently designed to prevent some of the members from participating in the business to be transacted, as where notice of the subsequent meeting was not given them, although they were in the vicinity and might have been easily notified, the proceedings will be set aside.⁴¹

§ 681. Irregularities at meetings.—The courts will not readily listen to complaints respecting the regularity of the proceedings of corporate meetings. "Looking at the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them."⁴² If the thing complained of is a thing which, in substance, the majority of the members are entitled to do, or if something has been done irregularly which the majority are entitled to do regularly, or if something has been done illegally, which the majority are entitled to do legally, there can be no use in having a litigation about it, the end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. If it is a matter of that nature, it only

³⁸ *People v. Batchelor* (1860), 22 N. Y. 128, 133; *Scadding v. Loran* (1851), 3 H. L. Cas. 418. In England it is provided by the Companies Clauses Act of 1845 that no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which such adjournment took place. 8 Vic. ch. 16, § 74.

³⁹ *Thompson v. Williams* (1888), 76 Cal. 153, 9 Am. St. Rep. 187.

⁴⁰ *Thompson v. Williams* (1888), 76 Cal. 153, 9 Am. St. Rep. 187.

⁴¹ *State v. Bonnell* (1878), 35 Ohio St. 10.

⁴² *MacDougall v. Gardiner* 1 Ch. Div. 13, 25 (1875); *People v. Peck* (1834), 11 Wend. 604, 27 Am. Dec. 104; *In re Wheeler* (1886), 2 Abb. Pr. N. S. 361; *People v. Wickham* (1829), 1 Paige, 590; *Hughes v. Parker* (1849), 20 N. H. 58; *Downing v. Potts* (1851), 23 N. J. 66; *Hardenburgh v. Farmers', etc. Bank* (1834), 3 N. J. Eq. 68; *Gorham v. Campbell* (1852), 2 Cal. 135.

comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do, has been done irregularly.⁴³ Accordingly, in an action against a corporation upon a note signed by its officers, where it appears that the execution of the note was expressly authorized at a meeting of the board of directors, it will be presumed, in the absence of any proof to the contrary, that the board was rightfully in session, at the time the authority was given.⁴⁴ A shareholder, who has received notice of the purpose of a corporate meeting, by means of circulars, will not be heard to question the legality of proceedings taken thereat, on the mere ground that the company omitted to advertise the meeting in the public prints as required by the articles of association.⁴⁵ And it does not lie in the mouth of a member who has participated in the irregular proceedings to question their legality.⁴⁶ One who has failed at the time to challenge illegal votes, has no equitable right to have the result set aside.⁴⁷ And generally, the right to object to irregularities in the

⁴³ *MacDougall v. Gardiner*, 1 Ch. Div. 12, 25 (1875), citing *Mozley v. Alston*, 1 Phill. Ch. 790; *Foss v. Harbottle*, 2 Hare, 461.

⁴⁴ *Hardin v. Iowa Ry. & Const. Co.* (1889), 78 Iowa, 726. *Co.* (1857), 3 Kay. & J. 408, 417.

⁴⁵ *In re British Sugar Refining Co.* (1857), 3 Kay & J. 408; *Wiltz*

⁴⁶ *In re British Sugar Refining v. Peters*, 4 La. Ann. 339. Nor can his transferee raise the question. *In re Syracuse, etc. R. Co.*, 91 N. Y. 1. In *Reed v. Hayt* (1888), 109 N. Y. 659, a president of a corporation, to whom stock had been issued for services and advances, sold his stock, including the shares so issued, to defendant, who refused to pay the purchase money on the ground of defect of title, because only three of the five directors (of whom the president was one) were present at the meeting which ordered the issuing of the stock. Neither the company as then constituted, nor after the resignation of the president and the election of defendant as his successor, nor any stockholder, made any objection to the issue; and defendant, with full

knowledge of the facts, used the other stock purchased of plaintiff, the former president, took an extension of time for the performance of the contract of sale, and neither the president nor stockholders made any attempt to annul or avoid the acts of the board. It was held that the facts amounted to a ratification thereof by the company, and that defendant, by his conduct, was estopped from denying plaintiff's title to the stock. And it was further held in the same case that the stockholders and interested parties having full knowledge also of the fact that the directors not present had no notice of the meeting, and countenancing plaintiff's dealing with the shares as his own, and taking no steps to disaffirm the action of the board in issuing the stock, will be presumed to have ratified the action, and the title of plaintiff to the stock will be validated thereby.

⁴⁷ *In re Chenango, etc. Ins. Co.* (1838), 19 Wend. 635. *Cf. Schoharie Valley R. Case*, 12 Abb. Pr. N. S. 394.

proceedings of a corporate meeting may be lost by laches,⁴⁸ either by attending and remaining silent at the time, or by failing to protest promptly upon learning of the doings of the meeting.⁴⁹ And this rule applies not only to participating shareholders, but also to persons subsequently deriving their shares through them.⁵⁰ The proceedings of a meeting are not invalidated by the president requesting a person to call it to order and to preside over it in his absence therefrom. The request is a sufficient authority to that person to act in the president's stead.⁵¹

§ 682. **Trick, secrecy, surprise, bribery.**—While mere irregularities in the proceedings of corporate meetings do not necessarily constitute a ground for equitable interference, any acts done by a portion of the members, which bear the appearance of trick, secrecy or fraud, are invalid and will constitute grounds for avoiding an election,⁵² or other proceedings of the meeting. Accordingly, the members are entitled to full information concerning any matter upon which action is to be taken,⁵³ and to notice of

⁴⁸ *State v. Lehre* (1854), 7 Rich. 234, 325; *Prettyman v. Tazewell Co.*, 19 Ill. 406, 71 Am. Dec. 230; *King v. Trevenen* (1819), 2 Barn. & Ald. 339; *Musgrave v. Nevinston* (1737), 2 Ld. Ray. 1358.

⁴⁹ *State v. Lehre* (1854), 7 Rich. 234, 325; *Prettyman v. Supervisors* (1858), 19 Ill. 406; *King v. Trevenen* (1819), 2 Barn. & Ald. 332; *Musgrave v. Nevinston* (1737), 2 Ld. Ray. 1358.

⁵⁰ Where a plan for reorganization of a railroad company is not prohibited by law, one who purchases stock, after the plan is adopted, from a stockholder who voted for it, can not object that it is *ultra vires*. *Hollins v. St. Paul, M. & M. R. Co.* (1890), 9 N. Y. Supp. 909.

⁵¹ *People v. Albany & S. R. Co.* (1869), 55 Barb. 344, 361, holding that the person called to preside need not be a stockholder. It is sufficient if he hold a proxy to vote at the meeting.

⁵² *People v. Albany & S. R. Co.* (1869), 55 Barb. 344, 363, citing *Wilcox on Corporations*, 51; *Rex v. Gaborian*, 11 East, 77; *Grant on Corporations*, 204; *People v. Peck*

(1834), 11 Wend. 611; *In re Pioneer Paper Co.*, 36 How. 108.

⁵³ In a case in point in New York, there was a contract between two companies whose lines were parallel, by which tributary territory was preserved to each, to prevent an unprofitable war of construction. After the directors of one of the contracting companies had passed resolutions to construct branch lines in violation of the contract, a meeting of the stockholders passed a resolution ratifying all the acts of the directors during a period of time covering the dates of the resolutions referred to, but it did not appear that those resolutions were read at the meeting, or the attention of the stockholders called to them, and there was evidence that some of the assenting stockholders were actually misled. Accordingly, there was held to be no such ratification of the directors' resolutions as would preclude the stockholders from insisting that the contract be performed. *Ives v. Smith* (1889), 19 N. Y. St. Rep. 556.

the purpose for which the meeting is held;⁵⁴ unless it be a regular general meeting for the transaction of all or any business within the corporate powers;⁵⁵ and any variation from the usual course of business, or from such matters as have been mentioned in the notification, will render the proceedings *pro tanto* voidable.⁵⁶ Nor does a clause in the charter, declaring that all or any business of the corporation may be transacted or acted on at special meetings, nor a by-law, passed in pursuance of the charter, prescribing how notice of special meetings shall be served upon the stockholders, dispense with the necessity of specifying in such a case, the purpose in the notice of the meeting. Thus, an assessment upon shares already fully paid, can not be legally made at a special meeting, unless the stockholders have been duly notified of the proposed assessment as one of the objects of the meeting, so that they can attend and vote upon a matter of such importance.⁵⁷ And where the object of the meeting was to amend the by-laws, an election of officers can not be held at the same time.⁵⁸ But a notice of a corporate meeting, is not bad because it states as one of the purposes of the meeting, the consideration of a matter which the company could not lawfully act upon; and resolutions passed at the meeting in respect of things within the corporate powers, are not rendered invalid by reason of resolutions regarding other matters *ultra vires*.⁵⁹ In a well considered English case it is held that notice of an intention "to remove any of the present directors" would justify a resolution removing all of them.⁶⁰

⁵⁴ *Vide supra*, § 669.

⁵⁵ *Warner v. Mower* (1839), 11 Vt. 385, 391, 394.

⁵⁶ *Atlantic De Laine Co. v. Mason* (1858), 5 R. I. 463, 471, 472, *per* Ames, C. J. *Cf.* *People v. Albany & S. R. Co.* (1869), 55 Barb. 344; *Smith v. Erb*, 4 Gill, 437; *Warner v. Mower* (1839), 11 Vt. 385. At a meeting of pew-owners called by a justice of the peace, on application to him therefor, for the purpose of organizing a corporation, the pew-owners have no power to pass votes making repairs, or controlling the meeting-house, the meeting being called before the corporation was organized. *Mayberry v. Mead* (1888), 80 Me. 27.

⁵⁷ *Atlantic De Laine Co. v. Mason* (1858), 5 R. I. 463, 471, 472, *per* Ames, C. J.

⁵⁸ *People's Ins. Co. v. Westcott*, 14 Gray, 440.

⁵⁹ *Cleve v. Financial Co.* (1873), L. R. 16 Eq. 363, 377, 378.

⁶⁰ *Isle of Wight Ry. Co. v. Tauthordin* (1883), 25 Ch. Div. 320, 325. "I think," said Fry, L. J., "that any other form of requisition would have been embarrassing, because it is obvious that the meeting might think fit to remove a director or allow him to remain, according to his behavior and demeanor at the meeting with regard to the proposals made at it."

Where the constitution of a society prescribed a different order of business for different meetings, and further declared that any of those orders might be suspended at any time by the vote of the majority of the members present at any meeting, but with the proviso that this should not be construed so as to justify the introduction into any meeting of business which did not properly belong to it, and for which special provision was made in the constitution, it was held that the suspension of any particular order could take place only on the evening to which that order was specially assigned.⁶¹ The selling of votes or of proxies to vote at corporate meetings, is prohibited by statute in New York, and a person offering to vote may be required by the inspectors of the election to take an oath that he has neither directly nor indirectly received any promise or sum of money, or anything of value, to influence his vote.⁶² So, on the other hand, the person offering to vote as an agent, attorney or proxy, may be required to swear that he has not by bribery induced the giving of the authority.⁶³

§ 683. **Failure to hold meetings or elections.**—At the suit of stockholders, a writ of *mandamus* may be obtained to compel the calling of a meeting for the election of directors and other officers, if the officers, whose duty it is, fail at the proper time to summon a meeting for that purpose.⁶⁴ The original directors named in the charter or articles of association, generally continue in office until the first ordinary meeting held in the year next after that in which the charter was granted; and at that meeting the shareholders present, personally or by proxy, may either continue in office the directors appointed by the special act of incorporation, or any number of them, or may elect a new body of directors, or directors to supply the places of those not continued in office, the directors appointed by the special act of incorporation being eligible as members of the new board.⁶⁵ The suc-

⁶¹ *Weatherly v. Montgomery Co. Medical & Surgical Society* (1884), 76 Ala. 567.

⁶² N. Y. Laws of 1890, ch. 564, § 54.

⁶³ N. Y. Laws of 1890, ch. 564, § 54.

⁶⁴ *People v. Cummings* (1878), 72 N. Y. 433; *People v. Albany Hospital* (1871), 61 Barb. 397; *State v. Wright* (1875), 10 Nev.

167. *Cf. Brown v. Union Ins Co.*, 3 La. Ann. 177, 182; *Curry v. Woodward*, 53 Ala. 371, 375; *Knowlton v. Ackley*, 8 Cush. 93. Under N. Y. Laws of 1890, ch. 564, § 53, the stockholders themselves have power to call a meeting in such an event.

⁶⁵ The Companies Clauses Act of 1845, 8 Vic. ch. 16, § 83.

cessors of the original directors, are elected by the shareholders at the regular annual meetings.⁶⁶ If no election be held, the directors in office continue to serve until their successors are chosen.⁶⁷ And although an act may provide that the officers holding office at that time should not hold after the first Tuesday in May, on which day an election of their successors was to have been held, if no valid election be held, the former officers continue in office until their successors are legally elected and qualified.⁶⁸ When the inspectors of an election of corporate officers, chosen in conformity with the provisions of the New York statute, have been restrained by injunction from qualifying and acting, the stockholders may, at the time appointed for the election, choose other inspectors in their stead.⁶⁹ The failure or neglect of directors to hold meetings, does not dissolve the corporation. Though such failure has continued for years, the fact does not *ipso facto* work a dissolution. Though its active powers are dormant, the corporation is not civilly dead. But such failure is good ground for proceedings for dissolution.⁷⁰

§ 684. **Church meetings of trustees.**—The meetings of church bodies held for business purposes, such, for example, as the election of trustees, should be convened at their usual place of meeting for religious worship.⁷¹ Holding a meeting in a private house at a considerable distance from the regular place of worship, has been held to be a fatal objection to the validity of its proceedings, even where access to the latter was hindered by those having control of the building.⁷² If the door be locked, and

⁶⁶ N. Y. Laws of 1850, ch. 140, § 5; 8 Vic. ch. 16, § 83.

⁶⁷ This rule has been embodied in statutory form in England by the Companies Clauses Act of 1845, 8 Vic. ch. 16, § 84, which enacts that if at any meeting at which an election of directors ought to take place, the quorum prescribed by the act of incorporation shall not be present within one hour from the time appointed for the meeting, no election of directors shall be made, but such meeting shall stand adjourned to the following day at the same time and place; and if at the meeting so adjourned the quorum prescribed by the act of incorporation be not present within one hour

from the time appointed for the meeting, the existing directors shall continue to act and retain their powers until new directors be appointed at the first ordinary meeting of the following year.

⁶⁸ Cassell v. Lexington, etc. Turnpike Road Co. (Ky. 1888), 9 S. W. Rep. 701.

⁶⁹ People v. Albany & S. R. Co. (1869), 55 Barb. 344, 357, citing *In re Wheeler*, 2 Abb. N. S. 361.

⁷⁰ *Vide infra*, § 1315, DISSOLUTION.

⁷¹ American Primitive Soc. v. Pilling (1855), 24 N. J. 653, 661; Miller v. English (1848), 21 N. J. 317.

⁷² American Primitive Soc. v. Pilling (1855), 24 N. J. 653, 661.

those having control of it refuse to surrender the key, the meeting should be held at the nearest practicable place, as for instance, at the door of the meeting-house.⁷³ Under the New York statutes,⁷⁴ constituting the wardens, vestrymen and rector of an incorporated Episcopal church, the vestry and trustees of the church, and intrusting to them the management of the temporalities, estate and property of the church, the rector has the right to institute *mandamus* proceedings to compel the attendance of vestrymen who refuse to attend a meeting of the vestry; and, it being shown that a meeting is necessary, and can not be held without their presence, and the purpose sought to be obtained being merely to secure a meeting, a peremptory writ will issue.⁷⁵

§ 685. Minutes of meetings of directors, and of stockholders.—Resolutions of a meeting of directors of a private corporation may be shown by the record of the proceedings, if one is kept; otherwise parol evidence is admissible to show what was resolved, and by what vote.⁷⁶ Entries in the minutes made

⁷³ American Primitive Soc. v. Pilling (1855), 24 N. J. 653, 661; State v. Crowell, 9 N. J. 411.

⁷⁴ N. Y. Laws of 1813, ch. 60, § 3; N. Y. Laws of 1875, ch. 79, § 4; N. Y. Laws of 1876, ch. 176, § 1.

⁷⁵ People v. Winans (1890), 9 N. Y. Supp. 249.

⁷⁶ Ten Eyck v. Pontiac, O. & P. A. R. Co. (Mich. 1889), 41 N. W. Rep. 905. Cf. Monographic note by John D. Lawson, 15 Fed. Rep. 727; "Effect of Failure to Record Corporate Resolutions," 74 Am. Dec. 309, 312. With respect to the minutes of directors' meetings, the English Companies Clauses Act of 1845 provides that the directors shall cause notes, minutes or copies, as the case may require, of all appointments made or contracts entered into by the directors, and of the orders and proceedings of all meetings of the company, and of the directors and committees of directors, to be duly entered in books to be from time to time provided for the purpose, which shall be kept under the superintendence of the directors;

and every such entry shall be signed by the chairman of such meeting; and such entry, so signed, shall be received as evidence in all courts, and before all judges, justices and others, without proof of such respective meetings having been duly convened or held, or of the persons making or entering such orders or proceedings being shareholders or directors, or members of committees, respectively, or of the signature of the chairman, or of the fact of his having been chairman, all of which last-mentioned matters shall be presumed, until the contrary be proven. 8 Vic. ch. 16, § 98. The minutes need not be signed on the day on which they are entered. It is sufficient that they should be signed by the person who was the chairman of the meeting, and they may be signed, or signed as confirmed, at a subsequent meeting. West London Ry. Co. v. Bernard, 3 Nic. H. & C. 649; London, etc. Ry. Co. v. Fairclough, 2 Man. & G. 764, 2 Nic. H. & C. 544; Southampton Dock Co. v. Richards, 1 Man. & G. 448. And

by the officers of corporations are presumed to be true.⁷⁷ The presumption of regularity applies in favor of the proceedings of corporate meetings.⁷⁸ An entry in the minutes of a meeting of a corporation, or of its board of directors, that a certain proposition was adopted, is *prima facie* evidence that it received the number of votes necessary to legally adopt it.⁷⁹ An entry, that certain officers were elected, is *prima facie* evidence that enough votes were cast to elect them.⁸⁰ So also, if the minutes be silent as to the mode in which officers were elected, it will be presumed that they were chosen in the manner required by law, until evidence to the contrary be produced.⁸¹ If the minutes set forth that certain business was transacted at a special meeting duly called, and that proper notice was given, it will be presumed that a quorum was present.⁸² It has been held, however, that where it does not appear by the record, that a majority of the members of a corporation were present at a meeting, at which it was voted to repair a church building, to raise the money by assessment on the pews, and also to increase the sum thus assessed, the assessment is invalid.⁸³ While it is permitted to contradict the record of a voluntary society, or show that its records do not fully disclose all the proceedings which ought to be recorded, proof of that kind must be so convincing and satisfactory as to leave no doubt but that the matter attempted to be interpolated into the records of the proceedings actually occurred.⁸⁴ A certificate of the secretary

where a meeting for a particular purpose is adjourned, and the minutes of the adjourned meeting only are signed by the chairman, the whole of the minutes are admissible in evidence. *Miles v. Bough*, 3 Q. B. 345; *Inglis v. Great Northern Ry.* 16 Jur. 895; *Browne & Theobald's Ry. Law*, 114.

⁷⁷ *Chase v. Tuttle* (1887), 55 Conn. 455, 3 Am. St. Rep. 64.

⁷⁸ *Ashtabula, etc. R. Co. v. Gardiner*, 1 Ch. Div. 13; *Blanchard v. Dow* (1851), 32 Me. 557. Cf. *Chase v. Tuttle* (1887), 55 Conn. 455, 3 Am. St. Rep. 64.

⁷⁹ *Heintzelman v. Druids' Relief Assn.* (1888), 38 Minn. 138, 4 Ry. & Corp. L. J. 356; *McDaniels v. Flower Brook Manuf. Co.*, 22 Vt. 274; *Sanborn v. School Dis-*

trict, 12 Minn. 17; *Isbell v. Railroad Co.*, 25 Conn. 556.

⁸⁰ *Beardsley v. Johnson* (1888), 49 Hun, 607, 121 N. Y. 224.

⁸¹ *Beardsley v. Johnson* (1888), 49 Hun, 607, 121 N. Y. 224; *Hathaway v. Addison*, 48 Me. 440.

⁸² *Insurance Co. v. Sortwell* (1864), 8 Allen, 223; *Baile v. Educational Soc.*, 47 Md. 117.

⁸³ *Mayberry v. Mead* (1888), 80 Me. 27.

⁸⁴ *Hawkshaw v. Supreme Lodge of Knights of Honor* (1887), 29 Fed. Rep. 770. In a voluntary society in which the standing of its members, and the mode of suspending and reinstating them in membership, is regulated by its laws, if the records of the proceedings of the body show that a member is not in good standing,

of a railroad company, purporting to recite proceedings of a meeting of stockholders, which is not shown to come from any book of records, and as to its recital that the secretary, and a large stockholder, said to have acted as chairman, were present, is contradicted by the testimony of persons who were at the meeting, fails to prove any such proceedings by the company.⁸⁵ A corporation is not bound, as to third persons, by interpolations fraudulently inserted in its records, if the third persons have not acted on, or seen or known of the existence of the matters interpolated and appearing to be a part of the records.⁸⁶

he must be bound by these records and the action of his society in that regard; especially when he has exercised his right of appeal to a higher lodge, and the action of which he complains has been affirmed by the appellate tribunal. *Hawkshaw v. Supreme*

Lodge of Knights of Honor (1887), 29 Fed. Rep. 770.

⁸⁵ *Brown v. Dibble* (1887), 65 Mich. 520.

⁸⁶ *Holden v. Hoyt* (1883), 134 Mass. 181. *Vide supra*, §§ 108-117, CORPORATE RECORDS, MINUTES OF MEETINGS.

CHAPTER XXVII.

ELECTIONS.

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| <p>§ 686. Corporate elections may be held anywhere in the state.</p> <p>687. Qualifications of voters.</p> <p>688. Stockholders' right to vote at corporate meetings.</p> <p>689. Bondholders and other creditors cannot vote.</p> <p>690. Right of trustees to vote.</p> <p>691. Pledgor's and pledgee's right to vote.</p> <p>692. Executor's right to vote.</p> <p>693. Partners as voters.</p> <p>694. When a bankrupt may vote.</p> <p>695. The right of a corporation to vote its own shares.</p> <p>696. Right of other corporations to vote.</p> <p>697. Conduct of elections.</p> <p>698. What constitutes a <i>quorum</i> at corporate meetings.</p> <p>699. Inspectors of election.</p> <p>700. Casting vote. Acceptance of election or appointment is presumed.</p> <p>701. Voting by proxy.</p> <p>702. Cumulative voting.</p> <p>703. Judicial review of elections.</p> | <p>§ 704. Illegal or fraudulent elections.</p> <p>704a. Voting-trusts. Control of the corporation. Tying-up the stock. Restriction upon the right to vote stock.</p> <p>704b. (a) Legality of shareholder's voting-trusts. Agreements to pool and vote their stock as a unit. Agreement not to sell their stock except to one another.</p> <p>704c. (b) Irrevocable proxies. Revocable nature of voting-trusts.</p> <p>704d. (c) The right to vote stock is inseparable from its ownership.</p> <p>704e. (d) Deposits of stock with trustees. "Trusts" and certificates. Rights and powers of trustees as holders.</p> <p>704f. (e) "Holding" corporations. One corporation holding and voting stock of another.</p> |
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References:

Failure to elect officers as ground for dissolution, or forfeiture.
Chapter 55, Sections 1315, 683.

§ 686. Corporate elections may be held anywhere in the State.—If the charter allows the corporate elections to be held where fixed by the by-laws, such an election may be held anywhere in the State, whether or not at the company's principal place of business.¹

¹ Union, etc. Bank v. Scott, 53 N. Y. App. Div. 65 (1900).

§ 687. **Qualifications of voters.**—In companies and associations, not having capital stock, the qualifications of voters at corporate meetings are generally prescribed by the by-laws of the organization. It is not every "member" of such associations that is entitled to participate in its corporate meetings.² There are but few examples, however, of companies having capital stock where any other qualification than the *bona fide* ownership of shares and registration for a certain number of days prior to the corporate meeting, is required of persons offering to take part therein,³ the right to vote at corporate meetings being incident to the ownership of shares, both by natural persons,⁴ and by other companies or corporations, municipal or private.⁵ And this right is not to be impaired by any by-law of the corporation.⁶ But a railroad company, in issuing certificates of preferred stock, can stipulate that the holders shall not have, or exercise the right to vote at any meeting of the holders of the capital stock of the company.⁷ The best evidence of ownership is the registration of the stockholder upon the corporate books.⁸

² *Vide* cases cited in notes to §§ 555, 1411.

³ See, for example, the New York General Incorporation Act, N. Y. Laws of 1890, ch. 564, §§ 54 *et seq.*, and the General Railway Act, N. Y. Laws of 1850, ch. 140, § 5.

⁴ A stockholder is entitled to vote upon stock issued by way of dividend as well as upon his original shares. *Bailey v. Railroad Co.*, 22 Wall. 604, 637. As to whether scrip certificates issued by way of dividend can be voted, see *Bailey v. Railroad Co.*, 22 Wall. 604, 635. But see *State v. Hunton*, 28 Vt. 594, from which it would seem that a statutory restriction of the right to citizens of the state may be constitutional.

⁵ *Kreiger v. Shelby R. Co.*, 84 Ky. 66 (1886), *per* Pryor, J. As to votes upon stock held by partners, see *Kenton Furnace, Railroad & Manuf. Co. v. McAlpin*, 5 Fed. Rep. 737; *Hardy v. Norfolk Manuf. Co.*, 80 Va. 404; *Allen v. Hill*, 16 Cal. 113. In England if several persons be jointly entitled

to a share, the person whose name stands first in the register of shareholders as one of the holders of such share shall, for the purpose of voting at any meeting, be deemed the sole proprietor thereof; and on all occasions the vote of such first-named shareholder, either in person or by proxy, shall be allowed as the vote in respect of such share, without proof of the concurrence of the other holders thereof. 8 Vic., ch. 16, § 78. *Cf.* *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291; *In re St. Lawrence Steamboat Co.*, 44 N. J. 529; *Downing v. Potts*, 23 N. J. 66.

⁶ *Brewster v. Hartley* (1869), 37 Cal. 15, 24, 99 Am. Dec. 237; *People v. Kip*, 4 Cow. 382, n.; *Rex v. Spencer*, 3 Burr. 1827.

⁷ *Miller v. Batterman*, 24 N. E. Rep. 496 (Ohio, 1890).

⁸ Registration as owner of the shares being usually held conclusive of the right to vote thereon. *Ex parte Willcocks* (1827), 7 Cow. 402, 17 Am. Dec. 525; *Beckett v. Houston*, 32 Ind. 393; *State v.*

Stockholder having a personal interest.—The ownership of stock creates no fiduciary relation between the stockholder and the corporation.⁹ His right to vote upon any measure is therefore not affected by his personal interest in it; as, to vote himself a salary as an officer,¹⁰ or to purchase property from himself.¹¹

§ 688. **Stockholder's right to vote at corporate meetings.**—The manner of electing directors and officers of corporations, is regulated largely by custom, and in the absence of any positive law on the subject, all that is necessary is that the will of the members be accurately ascertained.¹² The presumption of regularity is applicable to corporate elections,¹³ and in the absence

Ferris, 42 Conn. 560, 568; *Vandenberg v. Broadway Ry. Co.*, 29 Hun, 348, 355; *In re Mohawk*, etc. R. Co., 19 Wend. 135; *In re Long Island R. Co.*, 19 Wend. 37, 32 Am. Dec. 429; N. Y. Rev. Stat., ch. 18, title 4, § 5; *McNeil v. Tenth National Bank* (1871), 46 N. Y. 325, 7 Am. Rep. 340; *People v. Robinson* (1883), 64 Cal. 373; *Mosseaux v. Urquhart*, 19 La. Ann. 482; *Savage v. Ball*, 17 N. J. Eq. 142; *Greenville*, etc. R. Co. v. *Coleman*, 5 Rich. 118; *State v. Leete*, 16 Nev. 242; *Pender v. Lushington*, 6 Ch. Div. 70; *Birmingham*, etc. Ry. Co. v. *Locke*, 1 Q. B. 256; *Johnston v. Jones* (1872), 23 N. J. Eq. 216, 228; *Downing v. Botts*, 23 N. J. 66; *Hoppin v. Buffum* (1870), 9 R. I. 510, 11 Am. Rep. 291; *State v. Pettineli* (1875), 10 Nev. 141. *Cf. In re North Shore Staten Island Ferry Co.* (1872), 63 Barb. 556; *Smith v. American Coal Co.*, 7 Lans. 317. But see *People v. Devin*, 17 Ill. 84, where it is held that the true owner must be allowed to vote whether registered or not. *Strong v. Smith*, 15 Hun, 222. *Cf. Allen v. Hill*, 16 Cal. 113. "In all cases where the right of voting upon any share or shares of the stock of any incorporated company of this state shall be questioned, it shall be the duty of the inspectors of the elections to require the transfer books of said company as evidence of stock held in the said company, and all

such shares as may appear standing thereon in the name of any person or persons shall be voted on by such person or persons directly by themselves, or by proxy, subject to the provisions of the act of incorporation." 2 N. Y. Rev. Stat. (7th ed.) 1535. See, also, N. Y. Laws of 1890, ch. 564, § 54.

⁹ *Gamble v. Queen's*, etc. Co., 123 N. Y. 91, 9 L. R. A. 527; *Bjorngaard v. Goodhue Co. Bank*, 49 Minn. 483.

¹⁰ *In re Rochester*, etc. Co., 40 Hun (N. Y.), 172. *Vide*, §§ 688, 788.

¹¹ *Gamble v. Queen's Co.*, 123 N. Y. 91, 9 L. R. A. 527.

¹² *In re Chenango County Ins. Co.* (1838), 19 Wend. 634; *Fox v. Allensville*, etc. Turnpike Co., 46 Ind. 31; *Philips v. Weckham*, 1 Paige, 590 (1829). At a meeting of stockholders called to elect directors under Ohio Rev. St., § 3246, the right to choose the inspectors of election is vested in the stockholders and not in the directors. *State v. Merchant* (1881), 37 Ohio St. 251.

¹³ *Hathaway v. Addison*, 48 Me. 440. In an election for directors, where there is no proof that there were not enough votes cast to elect, and the directors elected received all the votes cast, there is no presumption that the votes cast were not sufficient to elect. *Beardsley v. Johnson* (1888), 49 Hun, 607.

of positive proof of irregularities amounting to a suppression of the will of the electors, the courts are reluctant to question the validity of the proceedings.¹⁴ Although it is not lawful to open the poll at an election of directors, before the time fixed in the notice, yet, after the election has commenced, it is not improper for the inspectors to keep it open as long, within a reasonable discretion, as is necessary to receive the votes of all the stockholders present, ready and offering to vote.¹⁵ "Every principle of construction is in favor of full time, otherwise business may be badly done by being hurried, or embarrassed, and defeated by the raising of dilatory objections, and protracted examination and discussion."¹⁶ The rights of duly elected directors, whom the presiding officer declines to recognize as such, are not affected by an irregular and unofficial meeting, reorganized by those remaining after adjournment of the meeting at which they were elected, their rights being derived from the election alone.¹⁷ Where, at a stockholders' meeting for the election of directors of the corporation, certain persons receive the requisite number of votes, the fact that the presiding officer insists on counting certain votes otherwise than as they should be counted, announces the result of the election to be otherwise than as it really is, issues certificates of election to those not entitled to them, and declares the meeting adjourned, although a majority vote against adjournment, in no way affects the rights as directors of those in fact elected.¹⁸ The provision of the New York statute requiring directors of corporations to be elected annually, is applicable to all

¹⁴ On an information in the nature of a *quo warranto*, to test respondents' title to the office of trustees of an incorporated religious society, it appeared that notice was given for the regular election after the morning service; that, owing to some disturbance, the chairman of the board of trustees adjourned the meeting of his own motion; that several members announced that there would be a meeting in the afternoon; that in the afternoon respondents were elected at a meeting at which the regular chairman refused to preside. But it was held that, though the election may have been irregular, re-

spondents were at least entitled to hold their office until others, having a better right to the office, were chosen. *People v. Nappa*, 45 N. W. Rep. 355 (Mich. 1890). But *vide infra*, § 302.

¹⁵ *People v. Albany & S. R. Co.* (1869), 55 Barb. 344, 361, citing *In re Long Island R. Co.* (1838), 19 Wend. 37.

¹⁶ *In re Mohawk, etc. R. Co.*, 19 Wend. 135 (1838); *Rex v. Mayor, etc. of Carmathen*, 1 Maule & S. 697; *People v. Albany, etc. R. Co.* (1869), 55 Barb. 344.

¹⁷ *State v. Smith*, 15 Oreg. 98 (1887).

¹⁸ *State v. Smith*, 15 Oreg. 98, 14 Pac. 814, 15 Pac. 137.

corporations not excluded from its operation expressly, or by necessary implication. The omission of a corporation to provide, by a by-law, for an election, does not affect the case. Where, therefore, an election is had more than a year after a previous election, or after organization, shareholders who acquired their stock after the expiration of a year, are not entitled to vote upon it at the election.¹⁹ In an action by stockholders against the officers of the corporation, to oust the latter from office, the plaintiffs claimed that the capital stock had been illegally increased. It appeared that defendants were the legal officers prior to a meeting of stockholders in 1885, and had managed the affairs of the corporation since its creation. At the meeting in 1885 defendants received votes representing not only a majority of the capital stock after the increase, but also a majority of the original issue; and it was held that they were legally elected.²⁰ *At common law*, and before the creation of joint-stock corporations, each member of the corporation was entitled to only one vote, inasmuch as each member had an equal interest in the corporation.²¹ Now, whether or not it is so provided by statute, it is the common usage to allow the shareholder one vote for each share of stock he legally holds.²² A corporation may so change the common law rule by by-law.²³ *Prima facie*, the legal title to shares is in the person who appears on the books of the company as holder and owner, and he is entitled to vote such shares,²⁴ notwithstanding the fact may be that he is only trustee, or pledgee for the real owner;²⁵ or, that no such certificate has been issued to him for the shares; or, that he does not produce it;²⁶ or, that the stock is not paid for;²⁷ or, that he is a non-resident;²⁸ or, that he has made conditional sale of his stock.²⁹ The by-laws, without the stockholders' assent thereto, cannot restrict his right to vote his

¹⁹ *Vandenburgh v. Broadway Underground, etc. Ry. Co.* (1883), 29 Hun, 348, construing N. Y. Laws of 1850, ch. 140, § 5, as amended by N. Y. Laws of 1854, ch. 282.

²⁰ *Byers v. Rollins* (Colo. 1889), 21 Pac. Rep. 894.

²¹ *Taylor v. Griswold*, 14 N. J. Law, 222, 27 Am. Dec. 33.

²² *In re Rochester, etc. Co.*, 40 Hun (N. Y.), 172.

²³ *Commonwealth v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357.

²⁴ *In re Argus Printing Co.*, 1 N. D. 435, 26 Am. St. Rep. 639.

²⁵ *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

²⁶ *Beckett v. Houston*, 32 Ind. 393.

²⁷ *Dawning v. Potts*, 23 N. J. Law, 66.

²⁸ *Commonwealth v. Detwiller*, 131 Pa. St. 614.

²⁹ *State v. McDaniel*, 22 Ohio St. 354.

shares as provided by the charter, or impose unreasonable restrictions upon the exercise of his right.³⁰ At common law, each stockholder in a corporation, regardless of the number of shares he holds, has the right to only one vote.³¹ It follows that, in the absence of any statutory provision on the subject, the by-laws may fix the number of votes a shareholder may cast.³² The right of a stockholder to vote his stock upon any matter, is not affected by his personal interest therein, separate from that of other shareholders.³³ The right to vote stock in a corporation is in the legal owner of the stock as appears upon the books of the corporation.³⁴ While stockholders owe good faith to one another in the management of the corporate affairs, they do not stand toward each other in a fiduciary relation within the rule governing directors, that, having authority from another to purchase or sell they cannot purchase from, nor sell to themselves. Stockholders are not trustees or agents for one another, in the matter of voting upon any proposition that may come before a meeting of the stockholders. In voting, each must be guided by his own judgment as to what is for the best interest of the corporation. The fact that he may have a personal interest, separate from the others, or from that of the corporation, in the matter to be voted upon, does not affect his right to vote. But the majority can not use their power to vote for the purpose of defrauding the minority.³⁵

§ 689. Bondholders, and other creditors, cannot vote.—Bondholders, or other creditors, even with consent of all the stockholders, can not be given the right to vote at corporate meetings, if there is anything in the charter or general law inconsistent with or contrary thereto; as, to vote for directors, where it is provided that they shall be elected by the stockholders.³⁶

§ 690. Right of trustees to vote.—A trustee, while so appearing upon the books, has the right to vote the shares of his beneficiary.³⁷ It is against public policy to permit the holder of

³⁰ *People's, etc. Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147.

³¹ *Taylor v. Griswold* (1834), 14 N. J. L. 222.

³² *Proctor, etc. Co. v. Finley*, 98 Ky. 405 (1895), 33 S. W. 188.

³³ *Blinn v. Riggs*, 110 Ill. App.

37; *Blinn v. Gillett*, 208 Ill. App. 473.

³⁴ *Idem*.

³⁵ *Bjorngaard v. Goodhue Co. Bank* (1892), 49 Minn. 483.

³⁶ *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340.

³⁷ *Commonwealth v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640.

the bare legal title, having no interest in the prosperity of the enterprise, to participate in its management.³⁸ Exceptions, however, are made in the case of executors, administrators³⁹ and trustees.⁴⁰ But a trustee holding stock for the corporation itself, is not qualified to vote thereon.⁴¹ It is against public policy that the officers of the company, or persons holding shares of its own stock for it, in trust, should be permitted, by voting at corporate meetings, to influence the action taken or to control the election of officers and directors.⁴² Whoever appears by the corporate

³⁸ Thus, in New York, "every person offering to vote may be challenged by any other person authorized to vote at the same election; and to every person so challenged, one of the inspectors shall administer the following oath: You do swear (or affirm) that the shares on which you now offer to vote do not belong and are not hypothecated to (naming the corporation for which the election is held), and that they are not hypothecated or pledged to any other corporation or person whatever; that such shares have not been transferred to you for the purpose of enabling you to vote thereon at this election, and that you have not contracted to sell or transfer them upon any condition, agreement, or understanding in relation to your manner of voting at this election." N. Y. Rev. Stat. (7th ed.) 1369, 1370; N. Y. Laws of 1880, ch. 510, § 2. See, also, N. Y. Laws of 1890, ch. 564, § 54. In that state any person offering to vote as agent, attorney or proxy for another shall, if required by the inspector of election, take and subscribe an oath to the effect that he believes that the stock upon which he offers to vote, is truly and in good faith vested in and subject to the control of the person in whose name they stand. N. Y. Laws of 1880, ch. 510, § 2. And in Virginia when a vote is offered to be given upon stock transferred within sixty days before the meeting, if

any person present object to the vote, it cannot be counted, unless the stockholder make oath that the stock on which such vote is to be given is held by him *bona fide*. Va. Code (1873), p. 548.

³⁹ Under Revision of New Jersey, 184, § 39, authorizing executors or administrators holding stock to vote as stockholders, no formal transfer or entry on the company's books is necessary to enable them to do so. *In re Cape May & D. B. N. Co.* (N. J. 1889), 16 Atl. Rep. 191.

⁴⁰ *Vide infra*, §§ 704a, 704c, *et supra*, § 593. As to votes by trustees, see further *In re Barker*, 6 Wend. 509 (1831); *In re North Shore Staten Island Ferry Co.*, 63 Barb. 556 (1872); *Ex parte Holmes* (1826), 5 Cow. 426; *In re Mohawk & Hudson R. Co.* (1838), 19 Wend. 135; *Conant v. Millaudon* (1850), 5 La. Ann. 542; *Crease v. Babcock* (1846), 10 Metc. 525, 545; *Brewster v. Hartley*, 37 Cal. 15 (1869), 99 Am. Dec. 237; *Wilson v. Central Bridge* (1870), 9 R. I. 590; *Hoppin v. Buffum*, 9 R. I. 513 (1870), 11 Am. Rep. 291; *Pender v. Lushington*, 6 Ch. Div. 70. *Cf. Ex parte Holmes* (1826), 5 Cow. 426; *Stewart v. Mahoney Mining Co.* (1880), 54 Cal. 149.

⁴¹ *American Railway Frog Co. v. Haven* (1869), 101 Mass. 398, 3 Am. Rep. 377, holding that officers so elected may be removed by a court of equity.

⁴² *Ex parte Holmes* (1826), 5 Cow. 426; *Ex parte Desdoity*, 1

books to be absolute owner of stock has the right to vote it, and if the holder so appears upon the books as trustee, he may vote the stock until the beneficiary shall have it registered in his own name.⁴³ Unless otherwise provided, the corporate books are only *prima facie* evidence of title to the stock; the real owner, upon proof of his ownership, is entitled to vote the shares, as against the transferee on the books, who is only trustee or mortgagee.⁴⁴ Where no provision requires transfers to be made, only on the books, the transferee, producing evidence of the transfer, is entitled to vote, although the shares appear on the books in the name of the transferrer.⁴⁵

§ 691. **Pledgor's and pledgee's right to vote.**—In case of pledge of stock, the rule governs that the right to vote stock follows the ownership; so long as that remains in the pledgor, he has the right to vote the stock.⁴⁶ If upon the corporate books the pledgee appears as full owner, he may vote the stock, if no objection is made by the pledgor, otherwise the latter may vote it upon showing evidence of the pledge.⁴⁷ The pledged stock belonging to the corporation can not be voted.⁴⁸

§ 692. **Executor's right to vote.**—An executor is entitled to vote shares belonging to the decedent's estate, until its distribution to heirs, legatees or creditors.⁴⁹ It is immaterial whether the executor derives his letters of probate from a court of the incorporating State, or from a foreign court.⁵⁰

Wend. 98; *United States v. Columbian Ins. Co.*, 3 Cr. C. C. 266; *Vail v. Hamilton* (1881), 85 N. Y. 453; *Mosseaux v. Urquhart*, 19 La. Ann. 482; *American Railway Frog Co. v. Haven* (1869), 101 Mass. 398, 3 Am. Rep. 377; *State v. Smith*, 48 Vt. 266; *New England Mutual, etc. Ins. Co. v. Phillips* (1886), 141 Mass. 535; *McNeely v. Woodruff* (1833), 13 N. J. 352. *Cf. Taylor v. Miami Exporting Co.*, 6 Ohio, 176, 5 Ohio, 162, 22 Am. Dec. 785; *Frazer v. Whatley*, 2 Hem. & M. 10.

⁴³ *Commonwealth v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640.

⁴⁴ *Smith v. San Francisco, etc. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119.

⁴⁵ *People v. Devin*, 17 Ill. 84.

⁴⁶ *In re Argus Printing Co.*, 1 N. D. 435, 26 Am. St. Rep. 639.

⁴⁷ *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594.

⁴⁸ *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

⁴⁹ *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427.

⁵⁰ *In re Cape May & D. B. N. Co.* (N. J. 1889), 16 Atl. Rep. 191, holding that an executor having letters of probate granted at the testator's domicile is the holder of stock within the meaning of Revision of New Jersey, 184, § 39, and on producing, in another state, before the inspectors of an election for directors, an exemplified copy of such letters, is entitled by virtue of the principles of comity

§ 693. **Partners as voters.**—Partnership stock may be voted by either partner.⁵¹ A surviving partner is entitled to vote stock belonging to the partnership.⁵² Neither partner can vote such stock where they disagree as to the vote.⁵³

§ 694. **When a bankrupt may vote.**—A bankrupt may vote stock while it stands in his name on the books, although the title thereto, under the bankrupt law, has passed to the assignee in bankruptcy.⁵⁴ Partnership stock may be voted by either partner.⁵⁵

§ 695. **The right of a corporation to vote its own shares.**—Stock unissued, or purchased by the corporation, or otherwise belonging to it or pledged to it, can not be voted by the corporation, or by any trustee, until issued or reissued.⁵⁶

§ 696. **Right of other corporations to vote.**—A corporation, by its proper officers, may vote stock, absolutely owned by it in another corporation, when so authorized expressly by charter or statute.⁵⁷ A private corporation can not vote stock in another corporation, unless expressly authorized so to do by the legislature.⁵⁸

§ 697. **Conduct of elections.**—The chairman, secretary, clerks or inspectors, unless it be expressly required, do not need to be stockholders.⁵⁹

§ 698. **What constitutes a quorum at corporate meetings.**—When a majority of all the board is present at a meeting, that constitutes a *quorum*; a majority of that *quorum* is competent to act and bind the board, although of the whole board they are only a minority.⁶⁰ A quorum is presumed to have been present at a directors' meeting. One accepting in good faith a mortgage or other contract from a corporation will be protected, although

to vote on stock standing in the testator's name on the company's books. As to votes by executors and administrators, see further, *In re North Shore Staten Island Ferry Co.* (1872), 63 Barb. 556; *Middlebrook v. Merchants' Bank*, 3 Keyes, 135; N. Y. Laws of 1848, ch. 40, § 17.

⁵¹ *People v. Hill*, 16 Cal. 113.

⁵² *People v. Hill*, 16 Cal. 113.

⁵³ *Tunis v. Hestonville, etc. Co.*, 149 Pa. St. 70, 15 L. R. A. 665.

⁵⁴ *State v. Ferris*, 42 Conn. 560.

⁵⁵ *Kenton, etc. Co. v. McAlpin*, 5 Fed. 737.

⁵⁶ *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

⁵⁷ *Rogers v. Nashville, etc. Co.*, 33 C. C. A. 517, 91 Fed. 299.

⁵⁸ *McGinness, etc. Co. v. Boston, etc. Co.* (Mont. 1904), 75 Pac. 80.

⁵⁹ *Stebbins v. Merritt*, 64 Mass. 27.

⁶⁰ *Leavitt v. Oxford, etc. Co.*, 3 Utah, 265 (1883); *Buell v. Buckingham* (1864), 16 Iowa, 284; *State v. Dillon* (1890), 125 Ind. 65; *Rushville Gas Co. v. Rushville* (1889), 121 Ind. 206.

there were to him unknown irregularities in the calling or holding of the directors' meeting which voted the mortgage.⁶¹ A *quorum* is such a number of the members of a body as is necessary to the transaction of business at a meeting thereof.⁶² Less than that number may meet and adjourn from day to day, but can not bind the body by any action which they may take.⁶³ The number of directors or of members of a corporation, necessary to constitute a *quorum* for the transaction of business at corporate meetings, is frequently prescribed by the by-laws of the company, either expressly or by necessary implication, from such provisions as that a majority vote shall be necessary to determine the action of the body.⁶⁴ And under a by-law directing that no business shall be transacted at any meeting of the stockholders unless a majority of the stock is represented, it is held that even though the whole number of shares into which the capital stock is divided has not been taken, a majority of the whole number must be

⁶¹ Louisville, etc. Ry. v. Louisville T. Co. (1899), 174 U. S. 552; Schultze v. Van Doren (N. J. 1902), 53 Atl. 815.

⁶² Citizens' Mutual, etc. Ins. Co. v. Shortwell (1864), 8 Allen, 217; *In re* Homer District Consol. G. Mines, Limited (1888), 4 Ry. & Corp. L. J. 143, 39 Ch. Div. 546; Tennessee & Coosa R. Co. v. East Alabama Ry. Co. (1883), 73 Ala. 426.

⁶³ The English Companies Clauses Act of 1845 prescribes that in order to constitute a meeting (whether ordinary or extraordinary) there shall be present, personally or by proxy, the prescribed quorum, and if no quorum be prescribed then shareholders holding in the aggregate not less than one-twentieth of the capital of the company, and being in number not less than one for every five hundred pounds of such required proportion of capital, unless such number would be more than twenty, in which case twenty shareholders, holding not less than one-twentieth of the capital of the company, shall be the quorum; and if within one hour

from the time appointed for such meeting the said quorum be not present no business shall be transacted at the meeting, other than the declaring of a dividend, in case that shall be one of the objects of the meeting, but such meetings shall, except in the case of a meeting for the election of directors, hereinafter mentioned, be held to be adjourned *sine die*. 8 Vic., ch. 16, § 72.

⁶⁴ Foster v. Mullanphy Planing Mill Co. (1887), 92 Mo. 79; Ellsworth Woolen Mfg. Co. v. Faunce (1887), 79 Me. 440. "A majority of the directors of any corporation convened according to the by-laws, shall constitute a quorum for the transaction of business." Conn. Gen. Stat. 279, § 12. The provision of Conn. Sess. Laws of 1885, p. 493, that the assignment of any corporation may be made by the directors in legal meeting called for that purpose does not change this rule as to a quorum. "There can be no doubt that a majority of the directors could make a valid assignment." Chase v. Tuttle (1887), 55 Conn. 455, 3 Am. St. Rep. 64 66.

represented in order to constitute a *quorum*.⁶⁵ It is only necessary, however, even under these provisions that a majority shall be present; and if the larger number of that majority concur in any resolution, it is sufficient to bind the corporation.⁶⁶ And, generally, a majority constitutes a quorum, and a majority of the quorum may validly act and control the meeting, even though they be a minority of the whole number entitled to attend and vote,⁶⁷ or even a minority of those attending where all present do not vote. For members can not be present for purposes of obstruction, and yet be considered as absent when the vote is taken.⁶⁸ In the case of directors, who occupy a fiduciary relation to the company, it is essential that the majority of the quorum shall be

⁶⁵ *Ellsworth Woolen Mfg. Co. v. Faunce* (1887), 79 Me. 440. In this case the by-laws provided that "the capital stock of the company shall be ten thousand dollars, divided into four hundred shares of twenty-five dollars each," and that "no business shall be transacted at any meeting of the stockholders, unless a majority of the stock is represented, except to organize the meeting, and adjourn to some future time." And it was held that, although only two hundred and forty-three shares had been subscribed for, it required two hundred and one shares to constitute a majority, and that an election of directors at a meeting where less than that number was represented, was illegal.

⁶⁶ *Craig v. First Presb. Church*, 88 Pa. St. 42, 32 Am. Rep. 417; *Foster v. Mullanphy Planing Mill Co.* (1877), 92 Mo. 79.

⁶⁷ *Field v. Field* (1832), 9 Wend. 394; *Sargent v. Webster* (1847), 13 Met. 497, 46 Am. Dec. 743; *Ex parte Willcocks* (1827), 7 Cow. 402, 17 Am. Dec. 525; *People v. Walker* (1856), 2 Abb. Pr. 421, (1856) 23 Barb. 308; *St. Louis Colonization Assn. v. Hennessy*, 11 Mo. App. 555 (1882); *Angell & Ames on Corporations*, § 464; *Willcock on Municipal Corporations*, § 66; *King v. Whitaker*, 9

Barn. & C. 648; *Gowen's Appeal*, 10 Week. N. Cas. 85; *Commonwealth v. Wickersham*, 66 Pa. St. 134; *Brown v. Pacific Mail Steamship Co.* (1867), 5 Blatchf. 525; *Craig v. First Pres. Church*, 88 Pa. St. 42 (1878), 32 Am. Rep. 417; *In re St. Mary's Church*, 7 Serg. & R. 517 (1822); *Madison Ave., etc. Church v. Baptist Church* (1867), 5 Robt. (N. Y.) 649; *Dudley v. Kentucky High School* (1871), 9 Bush, 578; *Everett v. Smith*, 22 Minn. 53; *Gifford v. New Jersey R. Co.*, 10 N. J. Eq. 171 (1854); *Durfee v. Old Colony, etc. R. Co.* (1862), 5 Allen, 230, 242; *New Orleans, etc. R. Co. v. Harris* (1854), 27 Miss. 517, 537; *Columbia Bottom, etc. Co. v. Meier*, 39 Mo. 53. *Cf.* *Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 393 (1856), 66 Am. Dec. 490; *Stevens v. Rutland, etc. R. Co.* (1851), 27 Vt. 545; *Stevens v. South Devon Ry. Co.* (1851), 9 Hare, 313.

⁶⁸ *State v. Green*, 37 Ohio St. 227; *Gowen's Appeal*, 10 Week. N. Cas. 85. But see *Commonwealth v. Wickersham*, 66 Pa. St. 134, an earlier case than the *Pennsylvania* case cited above. *Cf.* *Speaker Reed's rulings in the first session of the 51st Congress*, Cong. Rec. of Feb. 13, 1890.

disinterested in respect of the matters voted upon.⁶⁹ Thus, a director in a corporation is disqualified to vote upon a resolution, authorizing the renewal of two notes, one of which is in his favor; and his vote can not be counted for the purpose of sustaining the resolution as to the other note in which he had no interest.⁷⁰ In directors' meetings the majority is counted *per capita*; and also in meetings of the body of members of companies and associations not having capital stock. But in companies having capital stock, it is a majority in interest, that is, persons holding a majority of the shares into which the capital stock is divided, who control the action of the meeting,⁷¹ with this qualification, however, that even though a person own enough shares to constitute a quorum, he can not hold a corporate meeting alone. There must be at least two to constitute a "meeting."⁷² He can not, even when owning an overwhelming majority of shares, bind the corporation by his individual acts.⁷³ Whether he may do so when holding the entire capital stock, has been differently decided.⁷⁴

§ 699. Inspectors of election.—A vote by bondholders for election of directors, is against public policy, and is void, where the charter provides for their election by stockholders only.⁷⁵ Inspectors of election are appointed by the stockholders and not by the directors.⁷⁶ The decision of inspectors may be set aside

⁶⁹ *Smith v. Los Angeles Immigration, etc. Assn.* (1889), 78 Cal. 289, 12 Am. St. Rep. 53.

⁷⁰ *Smith v. Los Angeles Immigration, etc. Assn.* (1889), 78 Cal. 289, 12 Am. St. Rep. 53.

⁷¹ *Granger v. Grubb* (1870), 7 Phila. 350; *Hays v. Commonwealth*, 82 Pa. St. 518. But see *Taylor v. Griswold*, 3 Green, 122, 27 Am. Dec. 33. In England "at all general meetings of the company every shareholder shall be entitled to vote according to the prescribed scale of voting, and where no such scale shall be prescribed [by the articles of association], every shareholder shall have one vote for every share up to ten, and he shall have an additional vote for every five shares beyond the first ten shares held by him up to one hundred, and an additional vote for every ten

shares held by him beyond the first hundred shares; provided always, that no shareholder shall be entitled to vote at any meeting unless he shall have paid all the calls then due upon the shares held by him." 8 Vic., ch. 16, § 75.

⁷² *England v. Dearborn* (1886), 141 Mass. 590; *Sharpe v. Dawes* (1876), 46 L. J. Q. B. 104; *Hopkins v. Roseclare Lead Co.* (1874), 72 Ill. 373.

⁷³ *England v. Dearborn* (1886), 141 Mass. 590.

⁷⁴ *Button v. Hoffman* (1884), 61 Wis. 20, 50 Am. Rep. 131, holds that he may not. But *Swift v. Smith* (1886), 65 Md. 428, 57 Am. Rep. 336, holds that he may.

⁷⁵ *Durkee v. People* (1895), 155 Ill. 354, 46 Am. St. Rep. 340.

⁷⁶ *Mitchell v. Colorado, etc. Co.* (1902), 117 Fed. 723.

for fraud in rejection of proxies.⁷⁷ Candidates for election may act as inspectors.⁷⁸ They may or may not be sworn.⁷⁹ Although required to be by ballot, the vote will be *viva voce*, or by show of hands, if no objection be made at the time.⁸⁰ Any voter may change his vote before final result is announced.⁸¹ All votes received by the inspectors unchallenged, must be counted. Any vote or resolution of the stockholders may be reconsidered and revoked, before rights have vested under it.⁸²

§ 700. Casting-vote. Acceptance of election or appointment is presumed.—If the president has already once voted he can not give the casting-vote, in case of a tie.⁸³ In the absence of evidence to the contrary, it is presumed that a corporate officer elected, or appointed, has accepted the office, and that he was legally elected or appointed.⁸⁴

§ 701. Voting by proxy.—As directors cannot delegate their powers, they can not vote by proxy.⁸⁵ A director present at a meeting and not voting, is counted as having voted in the negative.⁸⁶ Members of a corporation have no right to vote by proxy at a corporate election, unless that right is conferred by the charter or by-laws,⁸⁷ or by some statute of the incorporating State.⁸⁸

⁷⁷ Triesler v. Wilson (1899), 89 Md. 169.

⁷⁸ *Ex parte* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525.

⁷⁹ *In re* Mohawk, etc. Co., 19 Wend. (N. Y.) 135.

⁸⁰ San Joaquin, etc. Co. v. Beecher, 101 Cal. 70.

⁸¹ State v. McGann, 64 Mo. App. 225.

⁸² Terry v. Eagle Lock Co., 47 Conn. 141.

⁸³ Toronto, etc. Co. v. Blake, 2 Ont. (Can.) 175 (1882); State v. Curtis (1874), 9 Nev. 325.

⁸⁴ Danville, etc. Co. v. Brown, 90 Va. 340; State v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

⁸⁵ State v. Perkins (1901), 90 Mo. App. 603.

⁸⁶ Commonwealth v. Wickersham (1870), 66 Pa. St. 134.

⁸⁷ Commonwealth v. Bringham (1884), 103 Pa. St. 134, 49 Am. Rep. 119; Craig v. First Presbyterian Church (1878), 88 Pa. St. 42, 27 Am. Dec. 33; State v.

Tudor, 5 Day, 329, 5 Am. Dec. 162; Phillips v. Wickham (1829), 1 Paige Ch. 500; People v. Twaddell, 18 Hun, 427; Harben v. Phillips, 23 Ch. Div. 14, 22. *Cf.* Case of the Dean, etc. Fernes, Davies, 129; Attorney-General v. Scott, 1 Ves. 413; Brown v. Pacific Mail Steamship Co. (1867), 5 Blatchf. 525; Fisher v. Bush, 35 Hun, 641.

⁸⁸ McKee v. Home, etc. Co., 98 N. W. 609 (Iowa, 1904); N. Y. Rev. Stats. (7th ed.) 1369, 1370; *In re* Election of St. Lawrence Steamboat Co., 44 N. J. 529; General Railroad Act of New York, Laws of 1850, ch. 140, § 5; Me. Rev. Stats. (1871), p. 304, § 5; Mich. Comp. Laws (1871), p. 1148; Ind. Stats. (1870), p. 268; R. I. Pub. Stats. (1882), § 3; Del. Rev. Code (1874), p. 376. See, generally, Abbott v. American Hard Rubber Co., 33 Barb. 578; Harger v. McCullough, 2 Denio, 119, 122; Haywood, etc. Plank Road Co. v. Bryan, 6 Jones

But an injunction should not be granted in one State, to restrain officers of a corporation from voting upon proxies of the stockholders, at an approaching meeting of stockholders to be held in another State, upon an allegation that voting by proxy is only legal when expressly allowed by statute, and that there is no such statute in the latter State. For it is to be presumed that the officers of the corporation will proceed legally, and, if they do not, the plaintiff has another remedy.⁸⁹ It has been questioned whether it be within the province of the by-laws to confer the right of voting by proxy,⁹⁰ but it would seem that in the absence of any statute to the contrary, the right may be thus conferred.⁹¹ At common law, no vote at corporate election could be given, except in person, and this is still the rule. No by-law, without the consent of the stockholder, can deprive him of his right, or restrict his right to vote by proxy, when it is given by charter or general law.⁹² Only the legal owner of the stock has power to give a proxy to vote it;⁹³ or his trustee or pledgee of the stock, when he is entitled to vote it, may do so by proxy.⁹⁴ Proxy to vote stock belonging to a decedent's estate, before its distribution, can be given only by his executor.⁹⁵ A proxy may be in any form of words which show intention to empower the agent

(N. C.) 82; *Cumberland Coal Co. v. Sherman*, 30 Barb. 533. The General Incorporation Act of New York, Laws of 1890, ch. 564, § 54, provides that stockholders not in default in payment of their subscriptions, may vote by proxy upon shares in their possession or control; that proxies shall be revocable at pleasure, and shall expire eleven months after date, unless otherwise specified therein. No person shall be entitled to vote as a proxy unless the instrument appointing him have been transmitted to the secretary of the company for a period prescribed by the charter, or if no period be prescribed, then for not less than forty-eight hours before the time appointed for holding the meeting at which the proxy is to be used. 8 Vic., ch. 16, § 77. If any shareholder be a lunatic or idiot, he may vote by his committee; and if any shareholder be a

minor, he may vote by his guardian or any one of his guardians; and every such vote may be given either in person or by proxy. The Companies Clauses Act of 1845, 8 Vic., ch. 16, § 79.

⁸⁹ *Woodruff v. Dubuque & S. C. R. Co.* (1887), 30 Fed. Rep. 91.

⁹⁰ *Taylor v. Griswold*, 14 N. J. 222, 27 Am. Dec. 33, annotated.

⁹¹ *State v. Tudor*, 5 Day, 329, 5 Am. Dec. 162; *People v. Crossley*, 69 Ill. 195; *Philips v. Wickham*, 1 Paige, 598 (1829), 2 Kent's Com. 294.

⁹² *People's, etc. Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147; *In re Lighthall Mfg. Co.*, 47 Hun (N. Y.), 258.

⁹³ *Tunis v. Hestonville, etc. Co.*, 149 Pa. St. 70, 15 L. R. A. 665.

⁹⁴ *Scanlon v. Snow*, 2 App. D. C. 137.

⁹⁵ *Tunis v. Hestonville, etc. Co.*, 149 Pa. St. 70, 15 L. R. A. 665.

to vote the stock.⁹⁶ The inspectors can not determine its genuineness, or reject it for lack of date⁹⁷ or of witness, or of acknowledgment.⁹⁸ The proxy may be special to vote at a particular meeting, or general to vote at any and all stockholders' meetings; if only the former, the agent may vote only upon the ordinary corporate business, but not to vote for any radical change, or upon any unusual question.⁹⁹ A court of equity may compel the execution of a proxy to be made to the person entitled to vote,—by a trustee or pledgee, in whose name the stock stands on the corporation books, but who is not entitled to vote it.¹

Revocation.—Unless it is coupled with an interest in the agent,² a proxy is revocable at any time. The revocation does not need to be in writing, it may be oral, or by conduct, as, by appearing at a meeting and asserting the right to vote.³ It is not uncommon to make the written proxy in terms irrevocable, but that alone does not make it so. An irrevocable proxy is held to be void, as contrary to public policy,—except where it is coupled with an interest.⁴ The New York statute makes revocable, at pleasure, every proxy to vote corporate shares, and prohibits the stockholder from selling his vote, or giving proxy to vote for any money or thing of value.⁵ The inspectors of election should not reject proxies for trivial defects in matters of form; and it has even been held that an undated proxy should have been accepted where the person presenting it, offered to show a letter of instructions also from his principal in respect to his votes at the meeting about to be held.⁶ A deposit of corporate stock, made by a shareholder with the directors or their agent, to enable the stock to be voted on and to be sold, is revocable before sale.⁷ One stockholder is not entitled to have the officers of the corpora-

⁹⁶ *Smith v. San Francisco, etc. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119.

⁹⁷ *In re St. Lawrence, etc. Co.*, 44 N. J. Law, 529; *White v. New York, etc. Soc.*, 45 Hun (N. Y.), 580.

⁹⁸ *In re Cecil*, 36 How. Pr. (N. Y.) 477.

⁹⁹ *Abbott v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578.

¹ *Vowell v. Thompson*, 3 Cranch. C. C. 428; *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291; *In re*

Argus Printing Co., 1 N. D. 435, 26 Am. St. Rep. 639.

² *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427.

³ *Commonwealth v. Patterson*, 158 Pa. St. 476.

⁴ *Harvey v. Linville Imp. Co.*, 118 N. C. 693, 54 Am. St. Rep. 749.

⁵ *In re Germicide Co.*, 65 Hun (N. Y.), 606, 20 N. Y. Supp. 495.

⁶ *In re St. Lawrence Steamboat Co.* (1882), 44 N. J. 529.

⁷ *Woodruff v. Dubuque & S. R. Co.* (1887), 30 Fed. Rep. 91.

tion enjoined from voting upon the shares of other stockholders, deposited with them for that purpose, upon a plea that a trust for the corporation is thereby created, unless corporate funds were used in securing the deposit of the shares.⁸

§ 702. **Cumulative voting.**—While the manner of electing directors of corporations is one of the most important features of corporation law, yet it has received comparatively little attention from legislative bodies. Statutory provisions relating to elections, generally provide, among other things, for the number of votes to be cast on a single share of stock, but seldom prescribe any details as to the manner of conducting an election. With reference to the number of votes to be cast on a single share of stock, there are two classes of statutes. The one which prevails in a majority of States, gives but one vote to each share of stock. The other class of statutes, adopted in a number of States, expressly secures for each share, as many votes as there are directors to be elected. This is known as the cumulative method of election, and gives, in addition to the plural vote, the right to cast all for one candidate, or to distribute them at pleasure.⁹ Its intention is to give the minority, by their votes, representation on the board of directors,

⁸ *Woodruff v. Dubuque & S. C. R. Co.* (1887), 30 Fed. Rep. 91.

⁹ "Proportionate Representation," by Daniel S. Remsen, 8 Ry. & Corp. L. J. 183 (1890). "In all elections for directors or managers of corporations every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle, among as many candidates as he shall see fit, and such directors or managers shall not be elected in any other way." Cal. Const. (1879), art. xii, § 12; *Wright v. Central California, etc. Water Co.*, 67 Cal. 532. See, also, W. Va. Const. (1872), art. xi, § 4; Mo. Const. (1875), art. xii, § 6;

Ill. Const. (1870), art. xi, § 3; Neb. Const. (1875), art. xi, "Miscellaneous Provisions," § 5; Pa. Const. (1874), art. xvi, § 4; *People v. Kenney* (1884), 96 N. Y. 294; *People v. Crissey* (1883), 91 N. Y. 616; *State v. Greer*, 78 Mo. 188; *Hays v. Commonwealth*, 82 Pa. St. 518, 522; *Wright v. Commonwealth* (1885), 109 Pa. St. 560, 11 Am. & Eng. Corp. Cas. 609; *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 833. The provision of the Pennsylvania Constitution of 1874, providing "that in all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates as he may prefer," is held to be more than directory and not to require any legislative action to make it effective. *Pierce v. Commonwealth* (1884), 104 Pa. St. 150.

and voice in the management of the corporation to a certain extent, limiting the control of the majority over the business policy of the corporation. The typical provision is that of the constitution of Pennsylvania, that: "In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates;" of which the Pennsylvania Supreme Court says: "This section to us seems very plain and unambiguous. If there are six directors to be elected, the single shareholder has six votes and, contrary to the old rule, he may cast those six votes for a single one of the candidates, or he may distribute them to two or more of such candidates, as he may think proper. He may cast two ballots for each of three of the proposed directors, three for two, or two for one, and one each for four others, and finally he may cast one vote for each of the six candidates."¹⁰ This method of voting can not be forced on the corporation by the legislature, contrary to the will of a majority of stockholders, where the State has not reserved the power to alter, amend or repeal the corporate charter.¹¹ Under statutes of the single vote type, there is usually no express provision that the single vote given to each share shall be cast for all the directors. That, however, is the usual method of voting under such statutes, and seems to be necessarily implied in some cases.¹² The purpose of the system of cumulative voting is to enable a minority in interest of the stockholders to elect a minority of the directors; the greater the number of directors, the smaller is the minority which may elect one director. In the absence of reserved right to amend or repeal, constitutional or statutory provisions authorizing cumulative voting, have no retroactive operation; they apply only to corporations chartered after their enactment.¹³ Under

¹⁰ *Pierce v. Commonwealth*, 104 Pa. St. 150.

¹¹ *Hays v. Commonwealth*, 82 Pa. St. 518; *Commonwealth v. Butterworth*, 163 Pa. St. 55; *State v. Greer*, 78 Mo. 188; *Baker's Appeal*, 109 Pa. St. 461.

¹² "Proportionate Representation," by Daniel S. Remsen, 8 Ry. & Corp. L. J. 183 (1890). Ohio Rev. Stat., section 3245, which provides that directors of corporations "shall be chosen, by ballot, by the stockholders who attend

for that purpose, either in person or by lawful proxies; each share shall entitle the owner to as many votes as there are directors to be elected, and a plurality of votes shall be necessary for a choice,"—does not confer upon stockholders the right of cumulative voting at the election of directors held thereunder. *State v. Stockley*, 45 Ohio St. 304 (1887), 13 N. E. 279.

¹³ *Loewenthal v. Rubber, etc. Co.* (1894), 52 N. J. Eq. 440; *Looker v. Maynard* (1900), 179 U. S. 46;

this system of cumulative voting, it is possible for the minority stockholders to elect their board and control the majority.¹⁴

§ 703. **Judicial review of elections.**—An election will not be set aside except for grave disorder, bad faith, or lack of authority to hold the election.¹⁵ Where, by unanimous agreement of the stockholders, a surplus fund, as profit, was distributed among them as a dividend, without formal meeting, the action was sustained as valid.¹⁶ An illegal or fraudulent election will be set aside by a court of equity.¹⁷ Where, at an election of directors, votes wrongfully rejected would have given the persons for whom they were tendered, clearly a majority of the votes offered at the election, the election will be set aside, and a new election ordered.¹⁸ But where the persons for whom the votes wrongfully rejected were tendered, would, with those votes, have had a majority of all the shares of the capital stock of the company, the court will set aside the election certified, and order the admission of those persons who would have been elected if the rejected votes had been received.¹⁹ And persons, assuming to act as officers of a corporation under color of an illegal election, may be ousted by

Gregg v. Granby, etc. Co. (1901), 164 Mo. 616; *Smith v. Atchison, etc. R. R.* (1894), 64 Fed. 272.

¹⁴ *Schwatz v. State* (1900), 61 Ohio St. 497; *Cook on Corporations*, § 609a.

¹⁵ *Titusville, etc. Dissolution*, 8 Pa. Super. Ct. 304 (1898).

¹⁶ *Groh Sons v. Groh* (1903), 80 N. Y. App. Div. 85.

¹⁷ *Davidson v. Grange*, 4 Grant's Ch. (U. C.) 377; *Wandsworth, etc. Gas Light & Coke Co. v. Wright*, 18 Week. Rep. 728; *In re St. Lawrence Steamboat Co.*, 44 N. J. 529; 1 N. Y. Rev. Stat. 603, § 5; 1 N. Y. Rev. Stat. 598, §§ 47-50; *Schoharie Valley R. Case*, 12 Abb. Pr. (N. S.) 394; *Cal. Stat.* 1876, § 5315; *Putnam v. Sweet*, 1 Chand. 286; *Brewster v. Hartley* (1869), 37 Cal. 15, 99 Am. Dec. 237. *Cf. Wright v. Central California Water Co.* (1885), 67 Cal. 532, 13 Am. & Eng. Corp. Cas. 89; *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 32 N. J. Eq. 236; *Johnston v. Jones* (1872), 23 N. J. Eq.

216. But see *Mickles v. Rochester City Bank* (1845), 11 Paige, 118, 42 Am. Dec. 103; *New England, etc. Co. v. Phillips* (1886), 141 Mass. 535, 13 Am. & Eng. Corp. Cas. 104; *Owen v. Whitaker*, 20 N. J. Eq. 122. *Cf. Beecher v. Wells Flouring Co.*, 1 Fed. Rep. 276, 1 McCrary, 62; "Jurisdiction of Equity to Enjoin Corporate Elections," by James L. High, 3 So. L. Rev. (N. S.) 211.

¹⁸ *In re Cape May & D. B. N. Co.* (N. J. 1889), 16 Atl. Rep. 191. *Acc. People v. Phillips*, 1 Denio, 385; *In re Long Island R. Co.*, 19 Wend. 37 (1838); *State v. McDaniel*, 22 Ohio St. 354.

¹⁹ *In re Cape May & D. B. N. Co.* (N. J. 1889), 16 Atl. Rep. 191. *Cf. Ex parte Desdoity*, 1 Wend. 98; *McNeely v. Woodruff* (1833), 13 N. J. 352; *Mousseaux v. Urquhart*, 19 La. Ann. 482; *State v. Swearingen*, 12 Ga. 22; *Downing v. Potts*, 23 N. J. 66; *In re St. Lawrence Steamboat Co.*, 44 N. J. 529.

proceedings in the nature of *quo warranto*.²⁰ A statute in New York²¹ authorizes any person who "may be aggrieved by, or may complain of, any election," to make application to the Supreme Court to compel a new election; but it is held that this provision can not be invoked by anyone who was not a stockholder at the time of the election complained of, and who received his stock from one of the authors of the wrong.²² A similar statute in New Jersey²³ makes it the duty of the Supreme Court upon the application of persons complaining regarding any election, to give a hearing, and "thereupon establish the election so complained of, or to order a new election, or to make such order and give such relief in the premises, as right and justice may appear to said Supreme Court to require." This act has been held to apply to the election of officers of private corporations, and the court, having determined who would have been elected if all the legal votes tendered had been received, may put those persons in office and oust intruders.²⁴ But an election is not to be set aside and declared void merely because votes were received from persons not entitled to vote, if there were still a majority of legal votes for the ticket declared to be elected.²⁵ A court of equity may enjoin the holding of an election, but after it has been held the court has no power, unless by statute, to oust an officer who claims to have been elected.²⁶ Except that in case of gross fraud and usurpation of office, the court may enjoin the usurpers from taking possession of the corporate property in violation of justice.²⁷ The remedy by *quo warranto* is the proper remedy to test the title to corporate office.²⁸ Recognizing the delays of the remedy at law by

²⁰ *People v. Albany, etc. R. Co.* (1869), 55 Barb. 344, 385. *Cf. Ex parte Willcocks* (1827), 7 Cow. 402, 17 Am. Dec. 525; *Boardman v. Halliday*, 10 Paige, 228; *People v. Albertson*, 8 How. Pr. 363; *Weeks v. Ellis*, 2 Barb. 325; *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 32 N. J. Eq. 236.

²¹ 1 N. Y. Rev. Stat. 603, § 5.

²² *In re Syracuse, Chenango, etc. R. Co.*, 91 N. Y. 1.

²³ Revision of N. J. 184, § 44.

²⁴ *In re St. Lawrence Steamboat Co.* (1883), 44 N. J. 529.

²⁵ *People v. Tuthill*, 31 N. Y. 550; *School District v. Gibbs*, 2 Cush. 39; *First Parish in Sudbury v. Stearns*, 21 Pick. 148;

Christ Church v. Pope, 8 Gray, 140; *McNeely v. Woodruff* (1833), 13 N. J. 352; *People v. Devin*, 17 Ill. 84; *In re Chenango, etc. Ins. Co.* (1838), 19 Wend. 635; *Ex parte Murphy* (1827), 7 Cow. 153; *State v. Lehre* (1854), 7 Rich. 235, 325.

²⁶ *St. Patrick v. Byrne* (1899), 59 N. J. Eq. 26; *Kean v. Union Water Co.* (1895), 52 N. J. Eq. 813.

²⁷ *Johnston v. Jones* (1872), 23 N. J. Eq. 216; *Humboldt, etc. Assn. v. Stevens* (1892), 34 Neb. 528.

²⁸ *Place v. People* (1901), 192 Ill. 160; *In re Argus Co.* (1893), 138 N. Y. 557.

quo warranto, some States by statute have given power to courts of equity to review corporate elections.²⁹

§ 704. **Illegal or fraudulent elections.**—The receipt of illegal votes, or the rejection of legal votes, does not invalidate the election, where the candidates received a majority of the legal votes cast.³⁰ The court will not set aside the election, unless it is shown that the result would have been different.³¹ In case of illegal election, the court will enjoin the directors who illegally claim the office, and declare the election of those who received a majority of legal votes.³² Injunction will lie to enjoin the holding of an election, pending a suit to restrain the voting of stock illegally issued.³³

§ 704a. **Voting-trusts. Control of the corporation. Tying-up the stock. Restrictions upon the right to vote stock.**—A voting-trust is a delegation of the right to certain trustees to elect directors and officers of the corporation for a time certain or, contingent. These arrangements for “pooling” and tying-up stock in the hands of trustees, were the outcome of the numerous railroad reorganizations demanding large sums of money to buy up and extinguish the rights of dissenting stockholders. Capitalists, furnishing the money, required that they should retain the power to nominate the management for a time necessary to carry out their plans. For that purpose voting-trusts were formed of three or more trustees to continue three to five years, or until dividend had been paid, the voting trustees having power to terminate the trust at any time.³⁴ Stockholders of a majority of the stock may lawfully combine to obtain, and hold control of the corporation, and for a definite time may lawfully agree among themselves to vote as a unit, and to vote, as a majority of their own votes should agree. Such agreement is not contrary to public policy.³⁵ A

²⁹ *Brewster v. Hartley* (1869), 37 Cal. 15; *In re Election, etc. Co.* (1898), 61 N. J. L. 422.

³⁰ *In re Argus Co.*, 138 N. Y. 557.

³¹ *Craig v. First Presbyterian Church, etc.*, 88 Pa. St. 42.

³² *Humboldt, etc. Assn. v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654.

³³ *Way v. American, etc. Co.*, 60 N. J. Eq. 263 (1900); *Cox v. Huntsville, etc. Co.* (1900), 129 Ala. 496, 29 So. 867.

³⁴ “Bradstreets” of Sept. 6 (1902).

³⁵ *Ziegler v. Lake, etc. R. R.* (1895), 69 Fed. 176; *Baumgarten v. Nichols* (1896), 69 Hun. 216; *Beitman v. Stiner* (1893), 98 Ala. 241, 13 So. 87; *Smith v. San Francisco, etc. Ry.* (1897), 115 Cal. 584, 35 L. R. A. 309; *Havemeyer v. Havemeyer* (1878), 43 N. Y. Super. Ct. 506; *Barnes v. Brown* (1880), 80 N. Y. 527.

court of equity will decree specific performance of such a contract.³⁶ An agreement is lawful, all the stockholders assenting, whereby the directors owning a majority of the stock, are to sell it, and the purchasers are to be substituted as the directors.³⁷ But an agreement of the officers, being a majority of stockholders, is contrary to public policy and illegal when it provides for re-election of themselves to the board of directors, and their own re-election as officers holding lucrative positions.³⁸ A voting agreement, if unfair between two corporations having directors in common, may be set aside at the suit of any dissenting stockholder.³⁹

Restriction upon the right to vote.—It is not contrary to law or public policy for stockholders, by unanimous consent, to restrict in any manner, the voting power of the corporate stock, and courts will enforce such restrictions.⁴⁰ Preferred stock, by unanimous consent of stockholders, may be issued upon the condition that it shall not be voted at any corporate election.⁴¹ An agreement of stockholders to hold and sell their stock, is legal.⁴² An agreement that before any stockholder shall sell his stock, he will first offer it to the other stockholders, is legal and will be enforced by the courts, where specific performance is practicable,⁴³ but it does not bind a *bona fide* purchaser.⁴⁴ The right of stockholders to sell their stock, can not be prohibited or restricted by the by-laws of a corporation.⁴⁵ It is the general rule, sanctioned by the policy of the law, that those who have the largest interest in corporations, may control them, since they have the greatest interest that the enterprise shall be well managed.⁴⁶ The owners of shares may enter into agreements, as between themselves, to elect the officers of the company and to manage its affairs as they, or a majority of

³⁶ *Stewart v. Pierce*, 89 N. W. 234 (Iowa, 1902).

³⁷ *Raymond v. Colton*, 104 Fed. 219 (1900).

³⁸ *Withers v. Edwards* (1901), 62 S. W. 795; *Wood v. Manchester*, 54 N. Y. App. Div. 522 (1900); *Flaherty v. Cary* (1901), 62 N. Y. App. Div. 116; *Snow v. Church* (1897), 13 N. Y. App. Div. 108.

³⁹ *Goodell v. Verdugo, etc. Co.* (Cal. 1903), 71 Pac. 354.

⁴⁰ *Curtis v. Producers' Oil Co.* (1897), 182 Pa. St. 551.

⁴¹ *Miller v. Ratterman* (1890), 47 Ohio St. 141.

⁴² *Scruggs v. Cotterill* (1902), 67 N. Y. App. Div. 583; *Williams v. Montgomery* (1896), 148 N. Y. 519.

⁴³ *Jones v. Brown*, 171 Mass. 318 (1898).

⁴⁴ *Brinckerhoff-Farris, etc. Co. v. Home, etc. Co.* (1893), 118 Mo. 447; *New Eng., etc. Co. v. Abbott* (1894), 162 Mass. 148.

⁴⁵ *Morgan v. Strothers*, 131 U. S. 246 (1889); *Ireland v. Globe, etc. Co.* (1898), 21 R. I. 9.

⁴⁶ *Barnes v. Brown* (1880), 80 N. Y. 527, 537.

them, shall determine, and it is held that agreements of that character are not illegal nor void as against public policy; for, as was said by the court in a leading case, their interests are identical with the interests of the minority of shareholders. If they increase the value of their own stock by their prudent management of the corporate affairs, they also increase the value of all other stock. If they destroy the stock of others, they also, by the same act, destroy their own.⁴⁷ The selection of candidates must precede an election, and it would often be difficult, if not impossible, to make the selection without comparison of views, combinations, concession and concerted action.⁴⁸ There is nothing in these combinations which tends to defeat the rights of stockholders generally, or of the interests of the public at large, as defined by statutes declaring that the directors "shall be chosen annually by the majority of the votes of the stockholders voting at such elections."⁴⁹ No formidable and effective opposition to an existing board, however obnoxious, could be organized without combination.⁵⁰ The combining shareholders may legally transfer their stock to trustees with a power of attorney to vote thereon, accepting transferable trust certificates as convenient vouchers or receipts in lieu of their shares.⁵¹ Agreements of this character are clearly distinguishable from cases in which one of the parties

⁴⁷ *Faulds v. Yates* (1870), 57 Ill. 416, 11 Am. Rep. 24; *Barnes v. Brown* (1880), 80 N. Y. 527, 537.

⁴⁸ *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506, 512 (1878), affirmed without opinion, 86 N. Y. 618.

⁴⁹ *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506, 512 (1878).

⁵⁰ *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506, 512, 513 (1878).

⁵¹ *Griffith v. Jewett* (Cin. Super. Ct. 1866), 15 Week. L. Bul. 419, where speaking of such an arrangement the court said: "The entire beneficial interest in the stock is severally vested in the certificate-holders, the voting power in the trustees, and the situation does not differ materially from what it would be if the stockholders retaining their shares had simply united in a proxy authorizing the trustees to cast the vote of

all of them for directors." *Hafer v. New York, L. E. & W. R. Co.* (1885), 14 Week. L. Bul. 68, which appears to be *contra* and in which a similar agreement between shareholders was pronounced unlawful, turns upon the point that the object of the agreement was to place the control of one railway company in the hands of the directors of another, who had no interest in the successful operation of the former. "It is the duty," said the court, "of each stockholder to vote for directors of the company with an eye singly to its best interests. . . . Both on the ground that the power is denied to one corporation thus to acquire control of another, and that the stockholder can not barter away the right to vote upon his stock, we hold these contracts void."

stipulates to accord or secure to the other, for a consideration, some private or personal advantage not shared by the stockholders at large.⁵² But, of course, where there is a preconceived scheme, combination or conspiracy to carry an election of directors, as for example, by the use and abuse of injunctions to restrain other stockholders from voting, by efforts and contrivances to prevent a fair election of inspectors, the premature convening of the meeting, and a preoccupation of the room by hired ruffians, the proceedings are undoubtedly void.⁵³ Where the purpose and intention are lawful, stockholders, by agreement for valuable consideration, may suspend, for a time, the right to vote their stock, and vest it in others who have a beneficial interest in it, or in the corporate business; as, in corporate creditors, or in a trustee for them, where the charter does not limit the right to vote to stockholders.⁵⁴ Stockholders may lawfully combine to elect certain persons as directors or other officers, for the purpose of obtaining or retaining corporate control, but any agreement among a majority of stockholders to vote for any corporate officer, or measure to place such stockholders' personal interests in opposition to those of the corporation, tends to the perpetration of fraud upon minority stockholders, and is contrary to public policy, and illegal and void.⁵⁵ The right to vote stock follows its ownership, and it is the policy of the law that the ownership of stock shall control the property and the management of the corporation. This is necessary for its welfare, and for the protection of the general interest of its stockholders. But any agreement among them, unsupported by other consideration than their mutual promise not to transfer their stock without consent of the parties to the agreement, or that they will not give proxies, is held to be contrary to public policy, and void.⁵⁶ And the agreement is illegal and void if the purpose is to enable the majority to conduct the

⁵² *Havemeyer v. Havemeyer* (1878), 43 N. Y. Super. Ct. 508, 513, 514, distinguishing *Fremont v. Stone*, 42 Barb. 170; *Gurnsey v. Cook*, 120 Mass. 501, and *Card v. Hope*, 2 B. & C. 661.

⁵³ *People v. Albany & Susquehanna R. Co.* (1869), 55 Barb. 344, 381, 382.

⁵⁴ *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340; *Smith v. San*

Francisco, etc. Ry. Co., 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309.

⁵⁵ *West v. Camden*, 135 U. S. 507; *Noel v. Drake*, 28 Kan. 265, 42 Am. St. Rep. 162.

⁵⁶ *Fisher v. Bush*, 35 Hun (N. Y.), 641; *Moses v. Scott*, 84 Ala. 608; *Harvey v. Linville Imp. Co.*, 118 N. C. 693, 54 Am. St. Rep. 749.

business in their own exclusive interest, or otherwise in fraud of the rights of the minority.⁵⁷

§ 704b. **Legality of shareholder's voting-trusts. Agreements to pool and vote their stock as a unit. Agreement not to sell their stock except to one another.**—It is not contrary to public policy for any two or more shareholders, by agreement to pool their stock certificates or shares, by placing them in hands of a trustee or pledgee, as a voluntary and active trust.⁵⁸ Such persons, so acting on joint account and interest, become partners therein, as much so as if the venture had been in grain or coal.⁵⁹ Pending such trust, or pledge or mortgage of stock, the trustee may vote the stock under direction of the owners. They severally may vote the same under proxies from the trustee. No third party, shareholder, has any right to appeal to equity to set aside the agreement.⁶⁰ Thus, shareholders may agree among themselves, to deposit the stock for a period, and agree not to sell it in the meantime.⁶¹ It is not *per se* unlawful for a number of persons, by previous agreement, to buy shares of the stock of a corporation for the purpose of controlling its policy, electing its officers, etc.⁶² An agreement by directors, owning a majority of the capital stock, to sell it and make the purchasers directors of the company, is not illegal where all the stockholders assent thereto.⁶³ But an agreement that the purchaser of shares shall be elected to a profitable corporate office, is void.⁶⁴ Such an agreement is contrary to public policy, and void.⁶⁵ An agreement for sale of shares, and that the purchaser shall become a director and receive a fixed salary, is void.⁶⁶ An agreement among shareholders that any one of them before selling his stock shall offer it to the other shareholders, is legal and enforceable as a contract.⁶⁷ The

⁵⁷ Gurnsey v. Cook, 120 Mass. 501; White v. Thomas, etc. Co., 52 N. J. Eq. 178.

⁵⁸ Stone v. Hackett, 12 Gray, 230.

⁵⁹ Weed v. Little Falls, 31 Minn. 154.

⁶⁰ Vowell v. Thompson, 3 Cranch, C. C. 428.

⁶¹ Havemeyer v. Havemeyer, 43 N. Y. S. C. 506, 86 N. Y. 618; Fisher v. Bush, 35 Hun, 641; State v. Smith, 28 Vt. 290.

⁶² Beitman v. Steiner (1893), 98 Ala. 241.

⁶³ Raymond v. Colton (1900), 104 Fed. 219.

⁶⁴ Withers v. Edwards (Tex. 1901), 62 S. W. 795.

⁶⁵ Collins v. Russell 1891), 48 N. J. Eq. 208.

⁶⁶ Fennessy v. Ross (1895), 90 Hun, 289; Gage v. Fisher (1895), 5 N. D. 297; Witham v. Cohan (1897), 100 Ga. 670; Delano v. Rice (1897), 23 N. Y. App. Div. 327.

⁶⁷ Jones v. Brown (1898), 171 Mass. 318; Rigg v. Reading, etc. R. R. (1899), 191 Pa. St. 298.

grounds upon which proceedings of corporations have been held void, as beyond their charter powers, have been: First, because the charter, when accepted, constitutes a contract between the stockholders that the corporation shall be confined to its proper business, and that a majority can not change it;⁶⁸ second, because public policy requires that they should be confined to the business and the mode of managing business prescribed by the charter, which is their law.⁶⁹ It is evident that neither of these reasons is applicable to stockholders' voting trusts, unless, as in the North River Sugar Refinery Case, the corporations, by ratifying their shareholders' private agreement, become parties to the contract.⁷⁰ For it is not against the policy of the law to accord to the owners of the larger interests in the stock a right to control the corporation.⁷¹ It is not against the policy of the law, for two or more persons to hold shares of stock jointly as partners.⁷² It is not against the policy of the law, for owners of stock to place their

⁶⁸ Potter, J., in *Allen v. Woonsocket Co.* (1876), 11 R. I. 288, 300, where the court further said: "A minority have been held bound in some cases by the fact of the acquiescence in or ratification of the acts of the majority. In the present case there was no one who had a right to complain on this ground, Crawford Allen being sole stockholder."

⁶⁹ Potter, J., in *Allen v. Woonsocket Co.* (1879), 11 R. I. 288, 300, continuing, said: "No portion of the act specifies even by implication the business to be done, and nothing can be implied even from its name." In *Allen v. Woonsocket Co.* (1876), 11 R. I. 288, 301, the court said: "In this case the contention is that the respondent had no right to form a partnership; that a corporation must transact its business through its proper officers, and can not delegate its powers in such a manner as to put its business beyond its control. If the partnership had been for a definite period, it might well be argued that the respondent had no right to make such a contract. But it was a mere partnership at will, terminable at any

moment by either party. The respondent, therefore, did no more part with the control of the business than if it had employed Philip Allen & Sons simply as agents, and its right to do that can not very well be denied."

⁷⁰ *Vide infra*, § 951; Voting Trusts, 5 Railw. & Corp. L. J. (1889) 597; 19 Abb. N. C. (1888) Note of Cases, p. 449; 84 Ala. (1888) 608; 6 Pa. Co. Ct. Rep. (1889) 193; 7 Railw. & Corp. L. J. (1890) 87; *The Atchison*, 6 Railw. & Corp. L. J. (1889), 501; *Beach* (Charles F., Jr.), 7 id. (1890) 21-22; *The Reading*, N. Y. Star, Jan. 11, 1890; 7 Railw. & Corp. L. J. (1890) 87; 47 Leg. Int. (1890) 26—cited by Wm. H. Winters in "The Bibliography of Commercial Trusts" (1890), 7 Ry. & Corp. L. J. 23d.

⁷¹ *Barnes v. Brown*, 80 N. Y. 527.

⁷² If a purchase for joint account be made, those severally interested therein become partners, precisely as they would have become partners had the venture been in grain or coal. *Weed v. Little Falls*, 31 Minn. 154.

shares in trust.⁷³ And if the trustee and beneficiary, or the pledgor and pledgee, agree as to which of the two shall cast the vote, their decision is binding and conclusive, and third party stockholders have not a right to appeal to equity to set aside the agreement.⁷⁴ To secure the continuance of the copartnership, shareholders may agree *inter sese* to deposit the stock by way of pledge to and with and in the name of a trust company, until the objects of the copartnership be accomplished;⁷⁵ taking receipts or trust certificates therefor.⁷⁶ Such an agreement, so lawfully formed at the outset, and for a proper consideration, and for a limited period, is binding upon the holders of the trust certificates, claiming only under and by virtue of the stock deposited in

⁷³ Such a trust or pledge may be lawfully entered into, and when so perfected is in the hands of the trustee or pledgee known as a voluntary and active trust, and such trust may be created with regard to stock certificates and shares. *Stone v. Hackett*, 12 Gray, 230.

⁷⁴ *Hoppin v. Buffum*, 9 R. I. 518; *Vowell v. Thompson*, 8 Cranch, C. C. 428; *Strong v. Smith*, 15 Hun, 222, cited by Clarence A. Seward in Brief for Defendants in *Starbuck v. Shepang*, L. & N. R. Co. (Super. Ct. Fairfield Co. Conn. 1890). The right of suffrage may be lawfully dissociated from that to which the exercise of the right appertains, and one may lawfully hold the property and another may lawfully exercise the right of suffrage. This has been so from time immemorial. An advowson or a right of presentation to a vacant living reposes in the owner of the manor; if he mortgages the manor, and the mortgagee enters and takes possession, equity, if the circumstances justify the exercise of the power, will direct the mortgagee to vote as the mortgagor may require, or to give the mortgagor a proxy. *Craft v. Powel*, Comyn's Rep. 609; *Amburst v. Dowling*, 2 Vernon, 401; *MacKenzie v. Robin-*

son, 3 Atkyns, 559. The same principle has been established as law in this country with relation to corporate stock since 1829. Thus, in *Vowell v. Thompson*, 3 Cranch, C. C. 428, where three hundred shares of stock had been transferred to the defendant in trust as collateral security for a debt, the court said, the question was whether before forfeiture and foreclosure the mortgagor is not entitled to vote and for that purpose to obtain a proxy of power from the trustees, and it asserted the analogy between an elective franchise and the advowson, and said that they were of the opinion that the defendant should be ordered to give the plaintiff a power of attorney to vote upon the stock until it had been sold under the mortgage or deed of trust.

⁷⁵ The law permits this. Such a pledge is the legal equivalent of an agreement *inter sese* not to sell for a like period and for corresponding purposes, and for a division of profits at the close of the copartnership; and such an agreement the law asserts to be valid. *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. Rep. 506; affirmed 86 N. Y. 618; *Fisher v. Bush*, 35 Hun, 641.

⁷⁶ As to the validity of trust certificates, see *Crawford v. Gross*, 7 Ry. & Corp. L. J. 123.

pursuance thereof, and all the terms of which are, by appropriate statement, made a portion of the trust certificates. Even if one of the motives which led to the creation of the trust, was to enable either the trustee or the beneficiary to vote in a given manner at an approaching election, that motive will not invalidate the transfer.⁷⁷ Voting trusts, then, not being illegal upon any principle peculiar to corporation law, can be attacked only on the ground of public policy. What agreements are void as against public policy, is very well defined in the law, and contracts which have been held to be so void, arrange themselves in five classes: (a) those founded upon corrupt considerations or moral turpitude; (b) those in violation of a public trust; (c) those in restraint of trade; (d) those in restraint of marriage; (e) those to influence persons in authority.⁷⁸ But an agreement by all the members of a copartnership, owning one or more shares of stock, that the same shall be conveyed to a trustee for the benefit of the copartnership and until its objects are accomplished, and that the trustee shall vote thereon in accordance with the instructions of the copartners, is not such an agreement as falls within any one of these five classes of contracts which are void upon grounds of public policy. Some new class must be invented, and some new definition of public policy be found, before such a voting trust can be said to fall within any of the recognized rules which avoid a contract as being against public policy.⁷⁹

Deposit of shares with trustees.—Shareholders may tie up their stock by agreement to deposit for a definite time their certificates of stock with trustees, either with or without a transfer to the trustees, and agree not to sell the stock during that time, the stockholder being left free to vote on his stock. The State courts quite uniformly hold that such deposit is legal and not in violation of statutes against restraints of alienation of personal property.⁸⁰ A statute in New York of 1901 provides for the pooling of stock.⁸¹

⁷⁷ *State v. Smith*, 48 Vt. 290, cited by Clarence A. Seward in Brief for Defendants in *Starbuck v. Shepang, L. & N. R. Co.* (Super. Ct. Fairfield Co. Conn. 1890).

⁷⁸ 4 Bouvier's Inst., § 3854.

⁷⁹ Clarence A. Seward's Brief for Defendants in *Starbuck v. Shepang, L. & N. R. Co.* (Super. Ct. Fairfield Co. Conn. 1890). The de-

cision in the case of the Reading Trust, *Shelmerdine v. Welsh* (Pa. Com. Pl. 1890), 47 Leg. Int. 26, shows that such a trust will not be adjudged to be void upon the grounds of public policy.

⁸⁰ *Sullivan v. Parks* (1902), 69 N. Y. App. Div. 221; *Williams v. Montgomery* (1896), 48 N. Y. 519.

⁸¹ Laws of 1901, chapter 255.

The right of the stockholders to tie up their stock in the hands of trustees for a limited time, is upheld in New Jersey,⁸² and in Massachusetts. "We know nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote upon it. . . . A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one he can not terminate it at will; and the attempt to cut himself off by contract, (instead of by the imposition of duties) from ending it, certainly is not enough to poison the covenant with the plaintiff. It might be held that the duty of voting, incident to the legal title, made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other States show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together."⁸³

§ 704c. Irrevocable proxies. Revocable nature of voting-trusts.—Though in terms made irrevocable, a proxy is revocable at any time. Where stock certificates are deposited with trustees with irrevocable proxy to vote the shares, without transfer upon the books, the courts hold the power to be, nevertheless, revocable.⁸⁴ So long as all the parties to a voting trust comply with the terms of the agreement, it can not be successfully attacked either by the State or by shareholders of the company not parties thereto.⁸⁵ For, ordinarily, a court of equity will not interfere by injunction to restrain a portion of the stockholders from voting upon their shares, even upon the ground that they are about to gain control of the company to the injury of the corporate enterprise;⁸⁶ unless an illegal combination in the nature

⁸² *Chapman v. Bates* (N. J. 1900), 47 Atl. 638; *Clowes v. Miller* (1900), 60 N. J. Eq. 179.

⁸³ *Brightman v. Bates* (1900), 175 Mass. 105.

⁸⁴ *Matter of Brandreth* (1901), 58 N. Y. App. Div. 575; *Clowes v. Miller* (1900), 60 N. J. Eq. 179.

⁸⁵ "We can perceive no reason why any number of shareholders, either by means of a proxy or by vesting the legal title in another, may not authorize him to vote

upon their stock, and as such is the substance of this agreement, we consider it not illegal. So long as the parties to it, or their successors in interest, are satisfied with it, no other person may complain." *Griffith v. Jewett*, (Cin. Super. Ct. May, 1866), 15 Week. L. Bul. 419. But see *Fisher v. Bush*, 35 Hun, 641.

⁸⁶ *Camden, etc. R. Co. v. Elkins* (1883), 37 N. J. Eq. 273. *Cf. Hilles v. Parish* (1862), 14 N. J. Eq.

of a conspiracy to defraud the plaintiffs can be shown.⁸⁷ The legal difficulties which arise, grow out of stipulations in the agreement by which it is sought to restrain any recalcitrant member from transferring his shares to the opposition, or from voting against the trust. For, ordinarily, any stockholder may withdraw from such a contract, although it be expressly agreed that it shall be irrevocable.⁸⁸ Thus, where certain stockholders for mutual protection, and to prevent a sale of the company's property by the directors who were,—and who represented a minority in interest, entered into a sealed agreement not to sell their stock nor to vote by proxy without the consent of all the parties to the agreement, it was held that the contract was void as in restraint of trade, against public policy, and because an agreement not to vote by proxy is a pernicious and unlawful provision.⁸⁹ The agreement not to vote by proxy was said to be pernicious, in that it tends to concentrate in the hands of a few shareholders the power of selecting the executive and managing officers of the corporation, and deprives the owner of shares of one of the attributes of ownership, that is, of selecting agents and attorneys to counsel and aid him in the prudent and intelligent management of his property.⁹⁰ The right of alienation, it was said, is an incident of the property represented by shares of stock, and any restraint placed thereon by a contract which has no other consideration to uphold it than the mutual promise of the parties, is contrary to public policy and can not be recognized by the courts.⁹¹ Mutual prom-

380; *Ryder v. Alton, etc. R. Co.*, 13 Ill. 516. Thus where steps had been taken by the officers of a corporation to obtain from the shareholders a deposit of their stock, together with powers of attorney, with themselves or their agents, in order that they might vote on them at a meeting of the shareholders, an injunction to restrain them from so doing, on the ground that a trust was created by the transaction in behalf of the company, was refused, as it did not appear that corporate funds had been employed. *Woodruff v. Du-buque & S. C. R. Co.* (1887), 30 Fed. Rep. 91.

⁸⁷ *Brown v. Pacific Mail Steamship Co.* (1867), 5 Blatchf. 525;

People v. Albany, etc. R. Co. (1869), 55 Barb. 344; *Webb v. Ridgely*, 38 Md. 364; *Hafer v. New York, etc. R. Co.* (1885), 14 Week. L. Bul. 68; *Beach on Railways*, § 451; *Hoppin v. Buffum* (1870), 9 R. I. 513, 11 Am. Rep. 291; *Griffith v. Jewett* (Cin. Super. Ct. 1886), 15 Week. L. Bul. 419. *Cf. Reed v. Jones*, 6 Wis. 680.

⁸⁸ *Griffith v. Jewett* (Cin. Super. Ct. 1886), 15 Week. L. Bul. 419.

⁸⁹ *Fisher v. Bush* (1885), 35 Hun, 641, distinguishing *Havemeyer v. Havemeyer*, 45 N. Y. Super. Ct. 464.

⁹⁰ *Fisher v. Bush* (1885), 35 Hun, 641, 644.

⁹¹ *Fisher v. Bush* (1885), 35 Hun, 641, 642.

ises, alone, do not constitute a good and sufficient consideration in contracts in restraint of trade.⁹² And contracts of that character are not to be upheld, unless they are made upon a real and *bona fide* consideration,⁹³ actual, adequate and not colorable.⁹⁴ But contracts in partial restraint of trade are not obnoxious to the law. Accordingly, where the agreement does not place an absolute restraint upon alienation, but merely provides that the parties to it shall not sell their stock without having first offered it to their associates at the market price, there is nothing which can be said to be contrary to public policy, or anywise open to objection.⁹⁵

§ 704d. The right to vote stock is inseparable from its ownership.—While a person who votes upon stock at a corporate election must be an owner thereof, it does not follow that he must be the only owner.⁹⁶ On general principles, the right to

⁹² Fisher v. Bush (1885), 35 Hun, 641, 645.

⁹³ Collins v. Locke, 4 App. Cas. 674.

⁹⁴ Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Fisher v. Bush (1885), 35 Hun, 641, 646.

⁹⁵ In Brown v. Pacific Mail S. S. Co. (1867), 5 Blatchf. 525, 527, Blatchford, J., said: "The provisions of the agreement substantially are, that the parties to it are not to sell their stock without having first offered to sell it to the rest of their associates, at a price not above the then current market value, and in case of their declining to take it, without next offering it to Brown Brothers & Co.; but any one of the parties is to be at liberty to withdraw on those terms at any time. The agreement also takes the shape of an irrevocable power of attorney to Brown Brothers & Co. to vote upon the stock; and all increase of such shares of stock, by dividends, until the 1st of December, 1868, is to come under the same agreement. In this respect, the agreement seems to differ very little from a mere power of attorney, or proxy, to Brown Brothers & Co., to vote

upon these shares, with the addition that the power is irrevocable, and that there are certain privileges reserved to the owners of the stock, in regard to the manner of dealing in it, and withdrawing from the arrangement. I am unable to perceive anything in this agreement contrary to public policy or anywise open to objection."

⁹⁶ Ervin v. Philadelphia & Reading R. Co. (Ct. Com. P. Phila. 1890), 7 Ry. & Corp. L. J. 87, where the court, while not deciding whether the trustees of the Reading voting trust of 1887 representing shareholders and creditors could elect one of their own number a director of the road, denied an injunction to stay or regulate a corporate election and to restrain the trustees of the voting trust from voting. The main outlines of the Reading voting trust as stated in the case above cited are these: The creditors' securities and the certificates of the stockholders were to be placed in the keeping or under the control of persons selected with the consent of all concerned, and known as the Reconstruction Board, with power to adjust priorities, fix or

vote on stock can not be separated from the ownership, in such sense that the elective franchise shall be in one man and the entire beneficial interest in another; nor to any extent, unless the circumstances take the case out of the general rule. It matters not that the end is beneficial and the motive good, because it is not always possible to ascertain objects and motives, and if such a severance were permissible, it might be abused. The person who votes, must, consequently, be an owner, but it does not follow that he must be the only one.⁹⁷ If, for instance, stock is pledged as collateral, whether the debtor or creditor shall vote depends on the terms on which the pledge is made. The power is, under these circumstances, necessarily, to some extent severed from the ownership, and the parties may, consequently, determine on which side it shall lie.⁹⁸ The question then arises, whether the debtor and creditor may agree to lodge the vote in some one who is to act for both, so long as the debt remains and the stock is held as security for its payment. And this has been decided in the affirmative so far as to deny a preliminary injunction seeking to restrain the trustees of the Philadelphia and Reading Railroad Voting Trust from participating in the election of directors for that company.⁹⁹

reduce the rates of interest, execute mortgages, give liens in lieu of those surrendered, and issue new certificates of stock. The plan was made known to the stockholders and creditors, who for the greater part, ratified it by depositing their securities and certificates, but the Board was armed with a large discretion in the choice of the means of carrying it into effect. They were, however, to act with the advice and consent of another body designated collectively as the "Voting Trust." This consisted of four persons named by syndicates representing different interests, who were to complete their number and guard against the possibility of a tie, by adding a fifth.

⁹⁷ *Ervin v. Philadelphia & Reading R. Co.* (Ct. Com. P. Phila. 1890), 7 Ry. & Corp. L. J. 87.

⁹⁸ *Ervin v. Philadelphia & Read-*

ing R. Co. (Ct. Com. P. Phila. 1890), 7 Ry. & Corp. L. J. 87.

⁹⁹ *Ervin v. Philadelphia & Reading R. Co.* (Ct. Com. P. Phila. 1890), 7 Ry. & Corp. L. J. 87, where the court said: "The counsel for the Reading Railroad contend that such a course is not forbidden by any rule or principle. In their opinion there is no reason that forbids a stockholder to transfer his shares to one man as a security for a debt due to another, with the stipulation that the holder shall have the right to vote, and the case would be the same although the intermediary gave the debtor a certificate that the equitable ownership was in him subject to the payment of the amount due. No authority directly in point has been cited on either side, but we incline to think that this view is correct and rules the case in hand. It has, in-

§ 704e. Deposits of stock with trustees. "Trusts" and certificates. Rights and powers of trustees as holders.—In the management of voting "trusts," the trustees' duties correspond to those of directors of a corporation. They are elected by the certificate holders. "The person who creates the trust may mould it into whatever form he pleases; he may, therefore, determine in what manner, in what event, and upon what condition the original trustees may retire, and new trustees may be substituted. All this is fully within his power, and he can make any legal provisions which he may think proper for the continuation and succession of trustees, during the continuation of the trust.¹ Their powers are set out in the instrument creating the trust.² They are trustees, and not vendees of the stock they hold in the corporations con-

deed, been argued for the complainants that the power conferred on the members of the Voting Trust is not coupled with an interest; that they have a dry legal title, with no active duties to perform, and that they should be compelled to transfer the shares standing to their names to the persons who are the beneficial owners. We think that this view errs in looking solely towards the stockholders. They are not the only persons beneficially interested in the railroad; the lien creditors are also owners, and if harmony be not preserved, may possess the whole. It was therefore necessary to have some arbiter to reconcile interests which were jarring and might diverge, and the want was supplied by the Voting Trust. To decide that the election must be held exclusively on behalf of the holders of the stock certificates would frustrate rather than give effect to the principle that the votes should be cast by those who have a substantial interest in the result. It is not easy to discern how the position of the members of the Trust differs from that of an individual to whom stock is transferred as a security for a debt to a third person. The only duty of such a holder is to keep the certificate

safely until the debtor pays or is in default, and then hand it over to whichever party is equitably entitled. Had the duties of the Reconstruction Board and Voting Trust been confided to a single body, with authority to secure the creditors by executing mortgages and then hold the stock, with a right to vote in the way best calculated to promote the common good, it could hardly have been said that there were no active duties to uphold the Trust or that it came to an end when the mortgages were executed. If this would have been the rule in the circumstances above supposed, it does not, we think, vary the case that the end was sought to be obtained through two closely related Boards, one supplementing and operating as a restraint on the other. Without pronouncing an opinion on a point which remains open for consideration on the final hearing, it is enough to say that the case is not sufficiently clear to warrant a preliminary injunction that would prevent an election on the day named in the charter, and might cause the irreparably injury which such remedies are given to prevent."

¹ Perry, Trusts, § 287.

² Perry, Trusts, §§ 454, 463.

stituting the trust.³ They have no power to sell the stock unless the power is expressly conferred.⁴ The Wisconsin Central Voting Trust, in successful operation for a number of years, serves as an example of such trusts. It is a personal contract between each certificate-holder and the trustees, and no other certificate-holder is privy to it. The only relation is between the trustees and beneficiary, and is limited to the single purpose declared in the certificate. The fact that the trustees may have ten thousand similar trusts does not concern the individual who holds a certificate. His rights depend alone upon his contract with the trustees, and by the acceptance of his certificate he expressly consents to their trust. He has no right, title or interest in or to the stock itself other than what appears on the face of the certificate, which he therein agrees to be subject to the trustees' perpetual right to vote the stock as its legal owner.⁵

³ *People v. North River, etc. Co.* (1890), 121 N. Y. 582.

⁴ *Gould v. Head* (1889), 38 Fed. 886.

⁵ The certificate is as follows: "Trustees certificate for common stock. Shares \$100 each. — shares. Wisconsin Central Company. No. —. This is to certify that Charles L. Colby, Edwin A. Abbot and Colgate Hoyt, trustees, own and hold for the benefit of —, of —, — shares of the common stock of the Wisconsin Central Company, a corporation duly organized under the laws of Wisconsin for the purpose of acquiring either by purchase of the capital stock or acquisition of leases or purchase of right of way or other property, real, personal or mixed, or by some or all of these methods, as well as by every other lawful method, ownership and control of the railroads already constructed and known as the Wisconsin Central Associated Lines, and of thereafter maintaining and operating them, subject to the following and irrevocable trust, to wit: *First.* Said trustees, their survivors, survivor, successors and successor, shall hold said shares with full power to fill

from time to time each and every vacancy in their number upon the joint nomination of the surviving trustees, approved in writing by the holders of a majority of the stock in said company covered by said trustees' certificate, both common and preferred. Each new trustee shall from and after the filing of said nomination, so approved, in the office of the Farmers' Loan and Trust Company, be as fully vested with said trust as if he was one of the original trustees above named. *Second.* Said trustees above named, their survivors, survivor, successors and successor, shall vote on said shares for all purposes whatsoever upon every question raised at each and every meeting of said company, whether annual or special, as the majority of them shall in their discretion from time to time determine. Said shares are transferable only upon surrender of this certificate by a conveyance in writing signed by the person above named, or his attorney thereunto lawfully authorized, and recorded in the trustees' books therefor by the Farmers' Loan and Trust Company of the city of New York; and every person accepting any trans-

While the trustees are the legal owners of the stock, they retain for themselves simply a naked power to vote as they or a majority of them shall, in their discretion, think best. The party to whom the certificate is issued, has never received and has not any power of control over that discretion. He accepts his interest in the stock subject to that reserved right and to the lawful exercise of the discretion of the trustees. The relation, therefore, between the certificate-holder and the trustee grows out of and rests upon the certificate alone and is governed by the general rules of equity only. The trustee must faithfully vote, but is only governed by his own discretion. He can not vote to give himself anything, because the rules of equity prohibit a trustee from doing any such thing, but there is no additional, private relation or private contract between him and the beneficiary. Under the peculiar circumstances of the Wisconsin Central Voting Trust, two of the trustees who were office holders in the company, continued to be the active managers of the property; but their successors are to be disqualified to hold any office in the company except that of director, and the continued ownership of a certain, considerable, specified amount of the stock in their own right is deemed a necessary qualification for the position of trustee. The trustees have power to nominate their own successors, subject to the approval of the holders of a majority of the trust-certificates. The power of ultimate control is thus vested permanently in the body of trustees instead of in an irresponsible body of stockholders necessarily ignorant of the corporate affairs. It has been argued in support of this voting trust that when directors have once been selected, whether by trustees or by stockholders, it is they, in either case, who control and manage the corporation, subject only to the visitatorial power of the trustees or the stockholders; that in the trustees that visitatorial power is intelligent and real, while in ordinary stockholders it is shadowy and practically ineffective, the individual stockholders, regarding only their own pecuniary interest, and feeling no responsibility for or to any one else; that,

fer hereof declares, by so doing, that he receives said shares subject to said trust. This certificate is not valid until signed by any two of the said trustees, and registered by the Farmers' Loan and Trust Company. Dated New York, —, 18—. Registered this —

day of —, 18—. The Farmers' Loan and Trust Company. Registrar, by —, Secretary. Countersigned. New York, —, 18—. —, Transfer Agent. — and —, Trustees."

if directors manage well, they acquire such strength before the public that it would expose the trustees to obloquy if they turned out faithful and efficient officers; that on the other hand, the directors and officers themselves would know that, the visitatorial power being vested in an efficient body of visitors, it would be impossible for unfaithful officers to perpetuate themselves in power and build up a ring inside the corporation for their private advantage. No restraint against alienation is imposed by the Wisconsin Central Voting Trust agreement. The certificates are transferable like ordinary shares of stock, and each of them is endorsed with a suitable form of power of attorney for that purpose.⁶ The question whether this voting trust is within the rule against perpetuities was submitted to Mr. John C. Gray, author of the work on Perpetuities, and the highest living authority upon this subject, and the trust embodied in the certificate was pronounced by him to be free from any objection on the ground of remoteness.⁷

§ 704f. "Holding" corporations. One corporation holding and voting stock of another corporation.—The new method of securing corporate control, especially where it is intended to merge the control of two or more competing railroad corporations, is by interposing another corporation, specially organized for the purpose of holding and voting the stock of the former corporation.⁸

⁶ Endorsement. "For value received ——— hereby sell, assign and transfer unto ———, ——— shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint ——— attorney to transfer the said stock on the books of the within named trustees with full power of substitu-

tion in the premises. Dated ———, 18—. ———. In presence of ———."

⁷ Manuscript opinion by John C. Gray, to Edwin H. Abbott, one of the trustees above named.

⁸ But see this subject in CHAPTER 37, TRUSTS AND MONOPOLIES, §§ 937 and 941.

CHAPTER XXVIII.

DIRECTORS, OFFICERS AND AGENTS.

A.

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| <p>§ 705. Qualifications.</p> <p>706. Power to elect officers and appoint agents.</p> <p>707. Directors, eligibility and election.</p> <p>708. (a) A married woman may be a director.</p> <p>709. (b) Residence or citizenship.</p> <p>710. (c) Ownership of stock is generally required of directors.</p> | <p>§ 711. (d) May hold more than one office.</p> <p>712. (e) Oath of office of director.</p> <p>713. (f) Eligibility to corporate office.</p> <p>714. (g) Stockholders elect the directors.</p> <p>715. (h) Directors must act as a board.</p> <p>715a. Executive committee of board of directors.</p> |
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E.

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References:

- Liability of directors, officers and agents. Sections 746-767a.
- Liability of the corporation for acts and contracts of its officers and agents. Sections 768-791.
- Ministerial and executive officers. Sections 793-808.
- Promoters' acts and contracts. Sections 809-818.
- Ultra vires* acts and contracts of directors, officers and agents. Sections 887-921.
- Torts by directors, officers and agents. Sections 958-981.
- Crimes and criminal prosecution of directors, etc. Sections 1015-1031.
- Certain powers of railroad directors. Section 1361.
- Knowledge by, and notice to directors, etc., when imputable to the corporation. Sections 769-772.
- Ratification by the corporation of unauthorized acts of directors, etc. Sections 772a-780, 907, 1006a.
- Admissions by directors, officers and agents, when binding upon the corporation. Section 781.
- Misrepresentations by directors, officers and agents. Sections 782, 255-266a.
- Frauds by directors, etc. Section 783.
- "Dummy" directors. Sections 140, 787.

§ 705. **Qualifications.**—In the absence of any qualifications prescribed by charter, statute or by-law, any person may be elected as director or other corporate officer, because the directors are

only agents of the corporation, while the stockholders are the corporation itself.¹ Votes cast for a candidate who is disqualified for the office, will not be thrown away, so as to make the election fall on a candidate having a minority of votes, unless the electors casting those votes had knowledge of the facts.² And a corporation acquiescing in the election of a person who is not qualified to hold the office of director, thereby acknowledges him as a *de facto* officer, and is bound by his acts and engagements.³ His title, however, may be contested and a new election ordered.⁴ So also, if after his election he sells the shares that qualify him for the office, he may be removed.⁵ This has been expressly provided by statute in England.⁶ But a pledge of his qualification shares, or bare equitable assignment thereof, not completed by notice to the company, is no ground for removal.⁷ A director of a corporation, who ceases to be a stockholder during the term for which he was chosen, but continues to act as director, no judgment of ouster having been pronounced against him, is a director *de facto*, and his acts are valid as to third persons.⁸ But in a former case in New York it was held that a director who sells all his stock and is thereafter superseded at a special stockholders' meeting held pursuant to notice, ceases to be a director either *de jure* or *de facto*, though the by-laws provide that directors shall be elected at the regular annual meeting; and a judgment by default against the company, in pursuance of service of process on him, is a nullity.⁹ Where any qualification is pres-

¹ *People v. North River, etc. Co.*, 121 N. Y. 619; *White v. Springfield, etc. Co.*, 117 Mass. 226, 19 Am. Rep. 412.

² *In re St. Lawrence Steamboat Co.* (1882), 44 N. J. 535.

³ *Kuser v. Wright*, 52 N. J. Eq. 825; *Beardsley v. Johnson*, 121 N. Y. 224; *Dispatch Line of Packets v. Bellamy* (1841), 12 N. H. 205. *Of. Easterly v. Barber*, 65 N. Y. 252; *Crain v. Easterly*, 54 N. Y. 679. But under the English Companies Clauses Act, holding the requisite number of shares is a condition precedent to election as director, and the election of one without such qualification is void. *Jenner's Case* (1877), 7 Ch. Div. 132; following *Hamley's Case*, 5

Ch. Div. 705; and *Barber's Case*, 5 Ch. Div. 963.

⁴ *In re St. Lawrence Steamboat Co.* (1882), 44 N. J. 529; *Hamley's Case*, 5 Ch. Div. 705; *Barber's Case*, 5 Ch. Div. 963.

⁵ *Nathan v. Tompkins* (1886), 82 Ala. 447; *Easterly v. Barber*, 65 N. Y. 252; *Crain v. Easterly*, 54 N. Y. 679.

⁶ Companies Clauses Act of 1845, 8 Vic. ch. 16, § 86.

⁷ *Cumming v. Prescott*, 2 Young & C. 488; *Ex parte Littledale*, 24 L. J. Q. B. 9.

⁸ *San Jose Savings Bank v. Sierra Lumber Co.* (1883), 63 Cal. 179.

⁹ *Beardsley v. Johnson* (N. Y. 1890), 24 N. E. Rep. 380, 49 Hun.

cribed, one who is ineligible if elected, will not become even a *de facto* officer;¹⁰ but, as to third persons, the corporation will be liable for his acts in its behalf, if it permits him to act. Without express authority to do so, it is not for the inspectors of a corporate election to report upon the question of eligibility of a candidate for election as director or officer.¹¹ There is no authority in the board of directors to prescribe the qualifications of its directors.¹²

§ 706. **Power to elect officers and appoint agents.**—The stockholders constitute the corporation, to the extent to which they have the power to act. This power is only to choose the directors. Directors derive all their power and authority from the charter and laws, and none from the stockholders. The power to appoint agents and to elect directors and other officers, rests primarily in the body of the incorporators, unless some particular body within the corporation is legally vested with the power.¹³ It need not be expressly conferred, but is implied.¹⁴ The power to elect or appoint directors and other officers and agents, is in the stockholders, unless otherwise provided in the charter; and at such times and in such manner as they may choose, but in compliance with the charter.¹⁵ In a few States these officers are called trustees. Although boards of directors, managers, etc., are themselves only agents of the corporation,¹⁶ they are now usually empowered to appoint most other agents of the corporation, even including the president himself.¹⁷ And, if so empowered by the charter, they can not be elected or appointed by the stockholders.¹⁸ The directors, in exercising the power, must themselves have been legally elected,¹⁹ and must act legally at a

607; *Richards v. Attleborough Nat. Bank*, 148 Mass. 187.

¹⁰ *Richards v. Attleborough Nat. Bank*, 148 Mass. 187.

¹¹ *In re St. Lawrence Steam Boat Co.*, 44 N. J. Law, 529.

¹² *Vide infra*, § 714.

¹³ *Angell & Ames on Corp.*, § 277.

¹⁴ *Wright v. Commonwealth*, 109 Pa. St. 560, 2 Atl. 294; *Beardsley v. Johnson*, 121 N. Y. 224.

¹⁵ *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *State v. McCullough*, 3 Nev. 202.

¹⁶ *Angell & Ames on Corp.*, § 280.

¹⁷ So on the death of the president, it has been held, that the

vice president might act in his stead, though that officer was not provided for by name in the by-laws, the directors simply being authorized to create other offices, and they having created that of vice president. *Coleman v. West Virginia Oil & Oil Land Co.*, 25 W. Va. 148 (1884).

¹⁸ *Walsenburg Water Co. v. Moore*, 5 Colo. App. 144, 38 Pac. 60; *In re St. Helen Mill Co.*, 3 Sawy. 88, 21 Fed. Cas. 161.

¹⁹ *Waterman v. Chicago, etc. Co.*, 139 Ill. 658, 32 Am. St. Rep. 228, 15 L. R. A. 418.

meeting duly called,²⁰ and as required by the charter or statute,²¹ and the number of directors to constitute the board must be as so required.²² In New York, the presidents of railroad companies are elected by the directors from their own number.²³ The appointment of agents of a corporation need not be under seal;²⁴ nor even by a formal vote of the board or body having the power of appointment.²⁵ An appointment of an agent, by a general officer who would naturally have power to make it, will bind the company, especially if acquiesced in by accepting the services of the appointee.²⁶ A corporation which has recognized and ratified the acts of one assuming to be its agent, can not afterwards dispute his authority on the ground that he was not regularly appointed by the directors.²⁷ So it is immaterial, as against strangers, whether

²⁰ *Hancock v. Holbrook*, 9 Fed. 353.

²¹ *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763.

²² *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380.

²³ N. Y. Laws of 1850, ch. 140, § 6.

²⁴ *Randall v. Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193; *Bank of Columbia v. Patterson*, 7 Cranch, 299, 305; *Faviell v. Eastern Counties Ry. Co.*, 2 Ex. 344; *Brown & Theobald's Ry. Law*, 108; *Angell & Ames on Corporations*, § 283. A statute of Indiana requires that the appointment of a person by a foreign corporation to act as its agent in 'Indiana be made a matter of record. Ind. Rev. Stat. (1881), § 3022; *Morrow v. United States Mortgage Co.*, 96 Ind. 21 (1884). And in this case, an instrument showing that A. had been appointed a foreign corporation's "agent for transacting business at I.," filed in accordance with said statute, was held to make A. the company's general agent at that place.

²⁵ Thus, where each stockholder of a joint-stock corporation organized under the laws of Connecticut was also a director, and in that capacity, united in appointing one of their number agent of the corporation to enter into and

perform contracts in its name, although no formal meeting had been called for that purpose, no formal vote taken, and no records made, it was decided that the appointment was valid and the acts of the agent in pursuance of the authority thus conferred were binding on the corporation. *Wood v. Wiley Construction Co.* (1888), 56 Conn. 87.

²⁶ *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299; *Sherman v. Fitch*, 98 Mass. 59; *Sherman, etc. v. Swigart*, 43 Kan. 292, 19 Am. St. Rep. 137.

²⁷ As where plaintiff is appointed to an office unknown to the constitution and by-laws of the defendant corporation by two officers termed, respectively, "General Agent" and "State Agent," who supposed they had authority to so appoint him, and who would naturally be understood by the public as having authority to employ persons to assist in defendant's work, and there is evidence that the paper making the appointment was shown to the president of defendant, and plaintiff thereafter renders such services as are required in the regular course of defendant's business, a finding by a jury that defendant is bound by the appointment will not be disturbed. *Equi-*

the person acting as managing director of a corporation received a specific appointment to that position from the board of directors, if he has long acted in that capacity without objection, and if his services as such have been invariably accepted.²⁸ The authority given an agent may be shown by parol,²⁹ and by proof of the corporation's continuous acquiescence in his acts.³⁰ So, likewise, the acceptance of an office may be inferred by acts of acquiescence. As where the clerk of a corporation is present when a vote approving his election is passed, and he himself records the vote.³¹

§ 707. **Directors. Eligibility and election.**—The power to have a board of directors is inherent in all private corporations. No special power need be conferred by statute,³² although the common law in this respect has been frequently embodied in gen-

table Endowment Assn. v. Fisher (Md. 1890), 18 Atl. Rep. 808; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Flynn v. Des Moines & St. Louis Ry. Co. (1884), 63 Iowa, 490. But a fire insurance company which sends a premium note to the postmaster at a town where it has a risk for collection, in ignorance of the fact that the insured is also postmaster, does not thereby make the insured its agent, and the payment by the postmaster to himself of the premium, and the cancellation by him of the note after the policy has become suspended, does not bind the company. Harle v. Council Bluffs Ins. Co. (1887), 71 Iowa, 401.

²⁸ Walker v. Detroit Transit Ry. Co. (1881), 47 Mich. 338.

²⁹ Even though conferred at a meeting of directors. Morrill v. Segar Manuf. Co., 32 Hun, 543. The testimony of one of a railroad's directors as to the official position and activity of a certain person as member of the executive committee, coupled with evidence that he was recognized and acted as such, is competent and sufficient to show his authority to act for the corporation, as to third persons. St. Louis & C. Ry. Co. v. Drennan (1889), 26 Ill.

App. 263. But declarations of director as to whether a certain person is the agent of the company, are not sufficient to bind the company. Florida, etc. R. Co. v. Varnedoe (1888), 81 Ga. 175.

³⁰ Fifth Ward Sav. Bank v. First Nat. Bank (1887), 48 N. J. 513. For instance, an insurance company's recognition of one's open and notorious transaction of its general business as its secretary, his custody of its books, and his borrowing money entered thereon. Talladega Ins. Co. v. Peacock (1882), 67 Ala. 253. And it has even been held that where a corporation paid a bill for furniture contracted by A., and subsequently used other furniture also bought by him, they were liable therefor, as having made A. their agent, though he had never been appointed by any act under the corporate seal. Bancroft v. Wilmington Conference Academy (1883), 5 Del. 577.

³¹ Delano v. Smith Charities (1884), 138 Mass. 63.

³² Hurlbut v. Marshall (1884), 62 Wis. 590; Commonwealth v. Gill, 3 Whart. (Pa.) 228; Beardsley v. Johnson, 121 N. Y. 224; Wright v. Commonwealth, 109 Pa. St. 560; Protection Life Ins. Co. v. Foote, 79 Ill. 361.

eral statutes relating to corporate bodies,³³ which generally prescribe also the number of directors or trustees to whom the corporate management shall be committed.³⁴ Provision has also been made by statute for reducing the number of trustees.³⁵ As

³³ *E. g.* N. Y. Laws of 1850, ch. 140, § 5, relating to railway companies; N. Y. Laws of 1875, ch. 611, § 6, the Business Corporation Act of that State. It is provided by New Hampshire Gen. St., ch. 134, § 3, that the business of every dividend-paying corporation "shall be managed by the directors thereof, subject to the by-laws and votes of the corporation, and under their direction by such officers and agents as shall be duly appointed by the directors or by the corporation." It is held under this act that the corporation cannot join another officer with the directors. *Charlestown Boot & Shoe Co. v. Dunsmore* (1884), 60 N. H. 85.

³⁴ Thus, the Manufacturing Corporations Act of New York fixes the number of directors at not less than three nor more than nine. N. Y. Laws of 1848, ch. 40, § 3. The number of trustees under the act of 1865, cannot exceed thirteen, and cannot be less than three; under the act of 1875 there cannot be more than twenty, nor less than five. *Snyder's Club Soc. & Assn. Laws*, 1 (1881). And the board of directors of corporations formed under the General Railroad Act of that state, consists of thirteen members. N. Y. Laws of 1850, ch. 140, § 5. A provision in a railroad company's articles of association, that the total length of the road "and its branches" shall be thirty-five miles, is not evidence that its main route exceeds fifteen miles; and, in the absence of other proof, a reduction of the directors from thirteen to seven in number, under Laws N. Y. 1864, ch. 582, § 3, authorizing such action by "any railroad company whose

main route does not exceed fifteen miles," will be presumed to be regular. *Beardsley v. Johnson* (1890), 24 N. E. Rep. 380, 121 N. Y. 224. Except in the case of roads not exceeding twenty miles in length which may have but seven. N. Y. Laws of 1864, ch. 582, § 3, as amended by Laws of 1883, ch. 46. But in England it is enacted that where the company is authorized by the special act of incorporation to increase or to reduce the number of the directors, it may, from time to time, in general meeting, after due notice for that purpose, increase or reduce the number of the directors within the prescribed limits, if any, and may determine the order of rotation in which such reduced or increased number shall go out of office, and what number shall be a quorum at their meetings. 8 Vic., ch. 16 § 82.

³⁵ Laws N. Y. 1848, ch. 40, § 12, as amended by laws 1875, ch. 510, requires an annual report to be published, signed by a majority of the trustees of a corporation, containing certain statements relative to its financial condition, and imposes a penalty on the trustees for non-compliance. Laws 1860, ch. 269, as amended by Laws 1878, ch. 316, provides that the majority of the trustees of any corporation may reduce the number of trustees by signing a certificate declaring what number shall constitute the board, copies of which shall be filed with the secretary of state, etc. Under these acts it was held where a corporation had, by its certificate of incorporation, twelve trustees; and vacancies occurring, the remaining trustees determined to reduce the number of trustees to nine, but no certifi-

a rule, all corporate business must be carried on by the agency, and under the administration, supervision and management of those officers whom the stockholders elect for that purpose.³⁶

§ 708. (a) **A married woman may be a director, or other corporate officer.**—At common law a married woman was ineligible to be a director or other corporate officer, but where, as is now generally the case in the United States, her common law disability to contract has been removed by statute, she may be a director or other corporate officer.³⁷ *Bankruptcy* does not render anyone ineligible to be a director, unless so provided by the charter or by-laws.³⁸ One who is a director may, at the same time, hold any other office in the corporation, in the absence of any contrary provision of law or by-law.³⁹

§ 709. (b) **Residence or citizenship of director.**—Residence, or citizenship in the State, of the director or other officer, is unnecessary unless expressly required by statute.⁴⁰ There are provisions in the constitutions and statutes of several of the American States, requiring that a certain proportion of the directors or trustees of corporations shall be residents of the State from which they derive their corporate existence.⁴¹ In the absence of a requirement of this nature, however, there is no principle of common law imposing that qualification.⁴² A statutory provision by which a minority of the directors of a railway company are al-

cate of the reduction was made, as provided by the act; and a majority of the nine elected thereafter signed reports complying with the statute first mentioned, the reports being honestly designed to conform to the law, and not intended to deceive any one, that the law authorizing the reduction was substantially complied with, and that, therefore, a majority of the trustees had signed the reports within the meaning of the law. *Wallace & Sons v. Walse* (1889), 5 N. Y. Supp. 351.

³⁶ "Directors of Corporations," by Joseph A. Joyce, 19 Cent. L. J. 305, citing *Cass v. Manchester*, etc. Co. (U. S. C. C. Pa. 1881), 13 The Reporter, 167; *Morse on Banks and Banking*, 90.

³⁷ *People v. Webster*, 10 Wend. (N. Y.) 554.

³⁸ *State v. Ferris*, 42 Conn. 560; *Kuser v. Wright*, 52 N. J. Eq. 825; *Atlas Nat. Bank v. F. B. Gardner Co.*, 8 Biss. 537.

³⁹ *Sargent v. Webster*, 54 Mass. 497, 46 Am. Dec. 43.

⁴⁰ *North, etc. Stock Co. v. People*, 147 Ill. 234, 24 L. R. A. 462; *Commonwealth v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357.

⁴¹ *Horton v. Wilder*, 48 Kan. 222, 29 Pac. 566; *E. g.* Ill. Const. (1870), art. xi, § 11; N. Y. Laws of 1848, ch. 40, § 3; Cal. Civ. Code, § 285. *Of Ohio & M. Ry. Co. v. People* (1888), 123 Ill. 467; *State v. Smith* (1887), 15 Oreg. 98.

⁴² *Kerchner v. Gettys*, 18 S. C. 521; *North, etc. Stock Co. v. People*, 147 Ill. 234, 24 L. R. A. 462; *Commonwealth v. Detwiller*, 131 Pa. St. 643, 7 L. R. A. 357.

lowed to reside without the State, will apply equally as well to a company owning a very short line, which they operate for their own private purposes, as to a company owning a more extended line, operated in the interest of the public.⁴³ And these provisions do not apply to domestic railroads, consolidated with railroads in other States.⁴⁴

§ 710. (c) **Ownership of stock is generally required of directors.**—Unless expressly prescribed, the ownership of capital stock in the corporation is unnecessary to the eligibility of any such officer.⁴⁵ Such ownership is sometimes required by statute, as in New York,⁴⁶ and where it is required, it is not necessary that the transfer of the stock to the officer shall be registered upon the corporate books, unless required by statute.⁴⁷ If the statute requires such ownership by the director or other officer, he ceases to be an officer, whenever he altogether ceases to be a stockholder, and without any proceeding to remove him.⁴⁸ At common law it was not necessary that a director should be a stockholder in the corporation.⁴⁹ Any one competent to act as an agent, might be elected a director.⁵⁰ It is contrary, however, to the spirit of modern legislation to permit the affairs of these great enterprises to be governed by persons having no pecuniary interest therein; accordingly, it is generally required by the corporation laws of the several States that directors shall be chosen only from among members or stockholders of the company.⁵¹

⁴³ *State v. Smith* (1887), 15 *Oreg.* 98, 14 *Pac.* 814.

⁴⁴ *Ohio & M. Ry. Co. v. People* (1888), 123 *Ill.* 467.

⁴⁵ *Schmidt v. Mitchell*, 101 *Ky.* 570, 72 *Am. St. Rep.* 427.

⁴⁶ *Despatch, etc. v. Bellamy Manuf.*, 12 *N. H.* 205, 37 *Am. Dec.* 203; *Chemical Nat. Bank v. Colwell*, 132 *N. Y.* 250.

⁴⁷ *State v. Smith*, 15 *Oreg.* 98, 15 *Pac.* 137, 386.

⁴⁸ *Orr Water Ditch Co. v. Reno, etc. Co.*, 17 *Nev.* 166, 30 *Pac.* 695.

⁴⁹ *Wight v. Springfield, etc. R. Co.*, 117 *Mass.* 226, 19 *Am. Rep.* 412; *In re, etc. St. Lawrence Steamboat Co.*, 44 *N. J.* 529; *State v. McDaniel*, 22 *Ohio St.* 354, 367; *Ex parte Stock*, 33 *L. J. Ch.* 731. *Cf. Despatch Line v. Bellamy Manuf. Co.*, 12 *N. H.* 205, 37 *Am.*

Dec. 203; *Bartholomew v. Bentley*, 1 *Ohio St.* 37; *Taylor on Corporations*, § 614, note.

⁵⁰ As a married woman. *People v. Webster*, 10 *Wend.* 554; *White v. Springfield, etc. Co.*, 117 *Mass.* 226, 19 *Am. Rep.* 412.

⁵¹ *Bartholomew v. Bentley*, 1 *Ohio St.* 37; *State v. Smith*, 15 *Oreg.* 98 (1887); *State v. Leete*, 16 *Nev.* 242. A director of one company which holds stock in another is a "stockholder" in the latter within the meaning of an act prescribing such qualifications. *Chase v. Tuttle* (1887), 55 *Conn.* 455; construing *Conn. Laws of 1876*, p. 117, together with *Conn. Laws of 1880*, p. 561. In New York it is provided by the *General Railroad Act of 1850*, that no person shall be a director unless

Such requirements contemplate, of course, only a *bona fide* holder of stock.⁵² But under these acts, a person who "holds" shares of stock issued in his name, is recognized as a stockholder, as well as one who "owns" them.⁵³ Accordingly, the competency of a director is not impaired by the fact that his qualification shares were transferred to him in trust for the very purpose of enabling him to act.⁵⁴ So, also, it has been decided that the holder of stock under a power of attorney, being entitled to vote at corporate meetings, is competent to act as a director.⁵⁵ The transfer books of the company are not conclusive, that one is not a stockholder and eligible to election as director.⁵⁶ And the inspectors

he shall be a stockholder, owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen. N. Y. Laws of 1850, ch. 140, § 5. By the Companies Clauses Act of 1845, in England, no person shall be capable of being a director unless he be a shareholder, nor unless he be possessed of the number of shares prescribed by the act of incorporation, if any; and no person holding an office or place of trust or profit under the company, or interested in any contract with the company, shall be capable of being a director; and no director shall be capable of accepting any other office or place of trust or profit under the company, or of being interested in any contract with the company, during the time he shall be a director. 8 Vic., ch. 16, § 85. Under the English act it is held that only elected directors are required to be qualified as shareholders and not directors named in the special act of incorporation. Browne & Theobald's Ry. Law, 101, citing Portal v. Emmens, 1 C. P. Div. 664, 667; Chemical Nat. Bank v. Colwell, 132 N. Y. 250.

⁵² *In re St. Lawrence Steamboat Co.* (1882), 44 N. J. L. 529. In this case a husband bought stock with his wife's money as an investment for her, but the certifi-

cate was accidentally made out to him. At first he ordered it to be changed, but afterwards concluded to take the stock himself, and countermanded the order, and transferred the cost from his wife's account to his own; and he was held to be a *bona fide* holder of stock and eligible as director.

⁵³ *State v. Leete*, 16 Nev. 242.

⁵⁴ *State v. Leete*, 16 Nev. 242; *Budd v. Monroe*, 18 Hun, 316. *Contra*, *Bartholomew v. Bentley*, 1 Ohio St. 37. In the Nevada case cited above, a stockholder owning certain shares of stock in a corporation organized for the purpose of maintaining an irrigating ditch, gave them to his son with the request that new certificates should be issued in the son's name, and transferred upon the books of the company. This request was complied with. The son paid nothing for the stock, the transfer being made in order that he might be eligible to the office of trustee; and it was held, on a review of the statutes of Nevada, that the transaction constituted the son a stockholder, and made him eligible to office. *State v. Leete*, 16 Nev. 142; *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427.

⁵⁵ *State v. Ferris*, 42 Conn. 560.

⁵⁶ *In re St. Lawrence Steamboat Co.* (1882), 44 N. J. 529; *State v. Smith*, 15 Oreg. 98, 15 Pac. 137, 386.

of election have no power to decide that question. It can only be raised in the courts.⁵⁷ Persons elected to the office of director may go upon the market and purchase their qualification shares, and are not bound to take them of the company itself.⁵⁸ Upon sale of the stock of a stockholder, elected director and president of the corporation, he does not *ipso facto* vacate his office.⁵⁹ If one of the three directors, required by statute as necessary to execute a mortgage, assigns his stock and thus becomes disqualified, and the other two directors alone execute the corporate mortgage, the mortgagee without knowledge of the facts, is protected.^{59a}

§ 711. (d) **May hold more than one office.**—If not forbidden by the charter, statute or by-law, several offices may be held at the same time by any director or other corporate officer.⁶⁰

§ 712. (e) **Oath of office of director.**—If so required by charter, statute or by-law, an officer must take an oath to faithfully perform his duties, and until so sworn, he is not *de jure* an officer; but failing to take the oath will not prevent his being an officer *de facto*.⁶¹ It is often provided that a director, before entering upon his duties, shall be sworn to faithfully perform them. If he fail to take the oath he will, nevertheless, be a director *de facto*,⁶² and his acts will be binding upon the corporation.⁶³

⁵⁷ *In re St. Lawrence Steamboat Co.* (1882), 44 N. J. 529. Under a statutory provision, that the directors of a corporation shall be elected from the shareholders, and a provision in the by-laws that transfers of shares shall be made only on the corporate books, and that for a designated time before the annual meeting the transfer book shall be closed, it has been held that although the privilege of voting or of receiving dividends may be denied a purchaser of shares, who has not procured his transfer to be recorded, yet that he is eligible to the office of director. *State v. Smith*, 15 Oreg. 98.

⁵⁸ *State v. Leete*, 16 Nev. 242; *Jenner's Case*, 7 Ch. Div. 132; *Dent's & Forbes' Case*, L. R. 8 Ch. 768; *Chapman's Case*, L. R. 2 Eq. 567; *Brown's Case*, L. R. 9 Ch.

102; *Caruth's Case*, L. R. 20 Eq. 506; *In re Peninsular Bank*, *Austin's Case*, L. R. 2 Eq. 435 (1862). *Contra*, *Fowler's Case*, L. R. 14 Eq. 316; *Hayward's Case*, L. R. 13 Eq. 30. *Cf.* *Hamley's Case*, 5 Ch. Div. 705.

⁵⁹ *Howle v. Scarbrough* (Ga. 1903), 35 So. 113.

^{59a} *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397.

⁶⁰ *Sargent v. Webster*, 54 Mass. 497, 46 Am. Dec. 743. *Vide supra*, § 708.

⁶¹ *Simpson v. Garland*, 76 Me. 203.

⁶² *Schwab v. Frisco, etc. Co.*, 21 Utah, 258, 60 Pac. 940; *Simpson v. Garland*, 76 Me. 203; *Hastings v. Blue, etc. Corp.*, 26 Mass. 80.

⁶³ *Hudson v. J. B. Parker Machine Co.*, 173 Mass. 242, 53 N. E. 867.

§ 713. (f) **Eligibility to corporate office.**—Any person is eligible to appointment as director or other corporate officer, if no qualification is prescribed in the charter, general statute or by-laws.⁶⁴ Votes cast for a candidate who is ineligible, will not be discarded, so as to give the election to a candidate having a minority of votes, unless the electors knew of the ineligibility of the candidate voted for.⁶⁵ Where a statute declares that no person shall be eligible to the office of director of a corporation unless he is a stockholder therein, and where the by-laws of a corporation provide that transfers of stock shall be made only on the corporate books, and that the transfer-book shall be closed for ten days previous to the day of the annual meeting of the stockholders, although the purchaser of stock, who has not caused his transfer to be recorded, might be refused permission to vote, or to receive dividends, yet he may be elected a director by the vote of a majority of the stockholders.⁶⁶ The Oregon statute, permitting a minority of the directors of corporations constructing railroads or canals to reside out of the State, applies to a corporation whose railroad, running from its furnace to its mine, is only three miles long, and whose short canal is not navigable.⁶⁷

§ 714. (g) **Stockholders elect the directors.**—In the absence of contrary provision, the power to elect directors and other corporate officers is in the stockholders.⁶⁸ Not all such power extends to a board of management by whatever name it may be called, whether board of trustees, vestry, executive committee or what not. This inherent function of companies is the representative principle under which their chosen managing bodies, are, in law, held to represent the company or organization in all acts done in conformity to the by-laws and rules of the company respecting their office. In the absence of charter or statutory regulation thereof, the shareholders may, in the by-laws adopted by them, prescribe the qualifications of the managing board.⁶⁹ There is no authority, however, in the board itself to prescribe the qualifications of its members.⁷⁰

⁶⁴ *Wight v. Springfield, etc. Co.*, 117 Mass. 226, 19 Am. Rep. 412.

⁶⁵ *In re St. Lawrence Steamboat Co.* (1883), 44 N. J. 529.

⁶⁶ *State v. Smith* (1887), 15 Oregon, 98.

⁶⁷ *State v. Smith*, 15 Oregon, 98.

⁶⁸ *In re Griffing Iron Co.*, 63 N. J. Law, 168.

⁶⁹ *People v. Northern R. Co.*, 42 N. Y. 217; *Cammayer v. United Church*, 2 Sandf. Ch. 186.

⁷⁰ *In re British Provident Life, etc. Assn.*, 5 Ch. Div. 306.

§ 715. (h) **Directors must act as a board.**—Although a director, like any other person, may be appointed by the board of directors to act as their agent,⁷¹ no single director has authority, by virtue of his office, to bind the company by his acts or engagements.⁷² Thus, a single director can not sell the bonds of his company unless expressly authorized to do so.⁷³ Nor can he bind his company to responsibility for goods furnished by a merchant to an employe of the company.⁷⁴ Thus, a director of a railroad company, though owning a majority of the stock, can not bind the company by a contract for the construction of its road-way. No estoppel arises against the company, having a contract with one of its directors for the construction of a portion of its road-way, where it had no knowledge of the latter's contract in its name with plaintiffs, at the time the work sued for was done, though it had been garnisheed in a suit against plaintiffs, and the estimates, furnished by the director's engineer, showed the work to have been done by plaintiffs.⁷⁵ Even a majority of the directors or all of them acting separately, can not bind the corporation

Cf. Lord Hamilton's Case, L. R. 8 Ch. 548.

⁷¹ Northampton Bank v. Pepoon (1814), 11 Mass. 288.

⁷² Titus v. Cairo, etc. Co., 37 N. J. 98; People's Bank v. St. Anthony's R. C. Church (1886), 39 Hun, 498.

⁷³ Titus v. Cairo, etc. R. Co., 37 N. J. 98.

⁷⁴ Rice v. Peninsular Club (1884), 52 Mich. 87.

⁷⁵ Allemon v. Simmons (Ind. 1890), 7 Ry. & Corp. L. J. 416. The argument in this case is as follows: "It is true Crawford was one of the directors of the company, and held a majority of the stock, but the existence of these facts conferred upon him no power to make contracts for the corporation. It could only be bound by the action of its board of directors. The board could have conferred on Crawford this power, but there is no evidence that it had done so. Crawford, as one of the directors, had no more authority or power than any other director. The board consisted of five members, and three consti-

tuted a quorum; less than three could make no binding contract for the corporation. (Harris v. Manufacturing Co., 4 Blackf. 267; Gashwiler v. Willis, 35 Cal. 11.) Section 9 of the act under which the Chicago & Indianapolis Air Line Railway Company was organized provides that the directors shall have power to make by-laws for the management and disposition of stock, property, and business affairs of the company, not inconsistent with the laws of the state of Indiana, and of prescribing the duties of the officers and servants that may be employed, and for the appointment of all officers for carrying on the business, within the object and purpose of such company. (Rev. St. 1881, § 3897.) This, of course, means a majority of the directors. There is no provision in the statute giving to the stockholders any such power. (Mor. Priv. Corp., §§ 243-337; Pierce on Railways, 30.) The contract which Simmons and Ayleshire executed with Crawford was the mere personal engagement of Crawford with the

in regard to matters which they are only authorized to act upon as a board.⁷⁶ They are agents of the corporation only when they act as a board. They have no power to bind the corporation by their individual action. Unless otherwise authorized by charter or general law, or by fixed custom to act separately,⁷⁷ the act does not bind the corporation unless it is the act of a board at an authorized meeting; as, in conveying land;⁷⁸ making calls or assessments on stock;⁷⁹ borrowing money;⁸⁰ making a mortgage;⁸¹ making assignment for the benefit of creditors, etc.⁸² Thus, a majority of the directors signing separately, and not as a board, can not bind the company upon a promissory note.⁸³ A director, however, will not be heard to deny his authority to contract for the company in an action upon a contract whereby he agreed to purchase land for the corporation, the title to be conveyed to him personally and to be reconveyed by him to the company.⁸⁴ They can not separately assent to any corporate act,⁸⁵ except where all

said parties. (*Tileston v. Newell*, 13 Mass. 406; *Harris v. Manufacturing Co.*, 4 Blackf. 267; *Roberts v. Button*, 14 Vt. 195; *Wheelock v. Moulton*, 15 Vt. 519, 522.)"

⁷⁶ *People's Bank v. St. Anthony's R. C. Church* (1886), 39 Hun, 498; *Edgerly v. Emerson*, 23 N. H. 555, 567, 55 Am. Dec. 207; *Despatch Line v. Bellamy Manuf. Co.*, 12 N. H. 205, 224, 37 Am. Dec. 203; *First National Bank v. Christopher*, 40 N. J. 435, 437, 29 Am. Rep. 262; *Junction R. Co. v. Reeves*, 15 Ind. 236; *Williams v. Chester*, etc. Ry. Co., 15 Jur. 828; *Yellow Jacket, etc. Manuf. Co. v. Stevenson*, 5 Nev. 224; *Gashwiler v. Willis*, 33 Cal. 12, 91 Am. Dec. 607; *Stoystown, etc. Co. v. Craver*, 45 Pa. St. 386; *Baldwin v. Canfield*, 26 Minn. 43; *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 536, 539; *Hillyer v. Overman*, etc. Manuf. Co., 6 Nev. 51; *D'Arcy v. Lamar*, etc. Ry. Co. L. R. 2 Ex. 158, 4 Hurl. & C. 463. *Cf.* *Stephenson v. Polk*, 71 Iowa, 278; *East London Water Works Co. v. Bailey*, 4 Bing. 283. *Contra, In re Bonelli's Electric Telegraph Co.*, 40 L. J. Eq. 567; *Browne & Theobald's Ry. Law*, 108.

⁷⁷ *Longmont, etc. Co. v. Coffman*, 11 Colo. 551, 19 Pac. 508; *American, etc. Bank v. First Nat. etc. Bank*, 27 C. C. A. 274, 82 Fed. 961; *Tenney v. East Warren, etc. Co.*, 43 N. H. 343; *Powers v. Blue, etc. Assn.* (1898), 86 Fed. 705; *Ohio, etc. Co. v. State* (1892), 49 Ohio St. 668; *Stanley v. Luse* (1899), 36 Oreg. 25, 58 Pac. 75.

⁷⁸ *Baldwin v. Canfield*, 26 Minn. 43; *Morrison v. Wilder Gas Co.*, 91 Me. 492, 64 Am. St. Rep. 257; *Henry Woods Sons Co. v. Schaefer*, 173 Mass. 443, 73 Am. St. Rep. 305.

⁷⁹ *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128.

⁸⁰ *Calumet Paper Co. v. Haskell, etc. Co.*, 144 Mo. 331, 66 Am. St. Rep. 425.

⁸¹ *Dennison v. Austin*, 15 Wis. 334.

⁸² *Calumet, etc. Co. v. Haskell, etc. Co.*, 144 Mo. 331, 66 Am. St. Rep. 425.

⁸³ *People's Bank v. St. Anthony's R. C. Church* (1886), 39 Hun, 498.

⁸⁴ *Einsphar v. Wagner* (1881), 12 Neb. 458.

⁸⁵ *West Jersey T. Co. v. Camden, etc. Co.* (1895), 53 N. Y. Eq. 163; *North Hudson, etc. v. Childs* (1892), 82 Wis. 460.

the stockholders acquiesce in separate action by the directors, and where such action is carried out by the corporation.⁸⁶ "It is a board duly convened and acting as a unit that is made the representative of the company. The assent or determination of the members of the board acting separately and individually is not the assent of the corporation. The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination, affecting the corporation, shall only be arrived at and expressed, after a consultation at a meeting of the board, attended by at least a majority of its members."⁸⁷

§ 715a. **Executive committee of board of directors. Authority delegated by directors.**—The powers of the board of directors may be delegated to its executive committee. The acts and contracts of an executive committee under delegation of power by the board of directors, will bind the corporation.⁸⁸ Notwithstanding the rule against the delegation of discretionary powers, the affairs of many great corporations are largely conducted by executive committees appointed by the directors from among themselves. These committees perform most, if not all, the ordinary functions of the board itself, and legality is imparted to their acts through subsequent ratification thereof by the board at its regular meetings.⁸⁹ It has even been held that a

⁸⁶ *Limer v. Traders' Co.* (1897), 44 W. Va. 175, 28 S. E. 730; *Morissetti v. Howard* (1901), 62 Kan. 463.

⁸⁷ *Kansas City Hay Press Co. v. Devol*, 72 Fed. 717; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98; *Despatch, etc. v. Bellamy Manuf. Co.*, 12 N. H. 205, 37 Am. Dec. 303; *First Nat. Bank of Ft. Scott v. Drake*, 35 Kan. 564, 57 Am. Rep. 193.

⁸⁸ *Kelsey v. New England, etc. Ry.* (1900), 60 N. J. Eq. 230; *Union, etc. Ry. v. Chicago, etc. Ry.* (1896), 163 U. S. 564; *Salem, etc. Co. v. Lake Superior, etc.* (1901), 112 Fed. 239.

⁸⁹ *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *Black River Imp. Co. v. Holway*, 85 Wis. 344, 55 N. W. 418. Cf. *Sheridan Electric Light Co.*

v. Chatham Nat. Bank (1889), 59 Hun, 575; *Burrill v. Nahant Bank* (1840), 2 Metc. 163; *Ives v. Smith* (1890), 8 N. Y. Supp. 46; *Hoyt v. Thompson* (1859), 19 N. Y. 205. This is regulated in England by the Companies Clauses Act of 1845, by which the directors of a corporation are authorized to delegate their powers to one or more committees of their own number; and they may grant to those committees respectively power on behalf of the company to do any acts relating to the affairs of the company which the directors could lawfully do, and which they shall from time to time think proper to intrust to them. 8 Vic. 16, § 95. The power which may be granted to any committee to make contracts as well as the power of the directors to make contracts on behalf of the company, may lawfully

committee could delegate its authority to one of its number.⁹⁰ But knowledge on the part of an executive committee of the directors of a corporation that a purchaser of its mortgage bonds made the purchase under a belief that the proceeds were to be used for particular purposes, is not sufficient to bind the corporation to a trust limiting the use of the proceeds.⁹¹

be exercise with respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, and the committee or the directors may make such a contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge it. 8 Vic. ch. 16, § 97. Committees thus appointed may meet from time to time, and may adjourn from place to place, as they think proper, for carrying into effect the purposes of their appointment; but no committee shall exercise the powers intrusted to them except at a meeting at which there shall be present the quorum prescribed in the act of corporation, or if no quorum be prescribed thereby, then a quorum to be fixed for that purpose by the general body of directors; and at all meetings of the committees one of the members present shall be appointed chairman, and all questions at any meeting of the committee shall be determined by a majority of votes of the members present, and in case of an equal division of votes, the chairman shall have a casting vote in addition to his vote as a member of the committee. 8 Vic. ch. 16, § 96.

⁹⁰ A trading corporation had five trustees, one of whom never qualified or acted, and another of whom attended only the first meeting of the board. Three of the trustees were appointed, by resolution, as an executive committee of the company, such appointment being sanctioned by statute, with power to transact the usual busi-

ness of the corporation. The stock of the company was substantially owned by the members of the committee and one other person. And it was decided that the committee had power to authorize one of their number, by power of attorney, to indorse the name of the company on certain negotiable paper payable to its order, and it was immaterial that no former resolution defining the limits of the authority was passed, and that in other respects the power of attorney exceeded the committee's authority. *Sheridan Electric Light Co. v. Chatham Nat. Bank* (1889), 59 Hun, 575. This case further held that a bank which accepts and discounts the negotiable paper in good faith, on an indorsement executed under such power of attorney, can not be held liable for a conversion of the paper, on the ground that the proceeds are misappropriated by the trustee, acting under the power of attorney, which misappropriation is afterwards ratified at a meeting of the board of trustees at which a majority are present, and where the company receives and uses a part of the proceeds, knowing how it was obtained. Nor is the bank liable for paper discounted by it on the indorsement, concerning the disposition of the proceeds of, which no ratification is made, where the trustees and executive committee acquiesced in the indorsement and transfer to the bank. *Sheridan Electric Light Co. v. Chatham Nat. Bank* (1889), 59 Hun, 575.

⁹¹ *Ives v. Smith* (1890), 8 N. Y. Supp. 46.

B.

TERM OR TENURE OF OFFICE.

§ 716. **Term of office of directors.**—In the American States, directors are usually elected annually to serve one year.⁹² But in England under the Companies Clauses Act of 1845, they serve three years, one-third retiring from office annually.⁹³ In case of no election, or failure to elect new directors, the incumbents continue in office until an election may be held.⁹⁴ When the term is fixed by statute, the directors have no power either to prolong or shorten their tenure of office,⁹⁵ either directly or indirectly, as by changing the time of the annual meeting for the election of their successors.⁹⁶

§ 717. **Officers and agents serve till election or appointment of successor.**—It is a general rule that officers and directors of a corporation shall continue to perform the duties of their

⁹² *E. g.* N. Y. Laws, 1850, ch. 140, § 5; Ala. Code, §§ 1923, 1925.

⁹³ 8 Vic. ch. 16, § 88. The Companies Clauses Act of 1845, provides that at the ordinary annual meetings of shareholders, the shareholders, present personally or by proxy, shall elect persons to supply the places of the directors then retiring from office, agreeably to the provisions thereafter contained; and that the several persons elected at any such meeting, being neither removed or disqualified, nor having resigned, shall continue to be directors until others are elected in their stead, as thereafter mentioned. 8 Vic. ch. 16, § 83.

⁹⁴ N. Y. Laws, 1848, ch. 40, § 4. In New York it is enacted with respect to directors holding over after the expiration of their term that, whenever the directors named in the articles of association of any corporation organized under any general law of that state, neglect or refuse during the first year of the corporate existence to adopt the by-laws required by law to enable the stockholders to hold the annual election for di-

rectors, whereby the directors hold over after the expiration of the first year, all their acts and proceedings while holding over, done for and in the name of the company, designed to charge upon it any liability or obligation for the past services of any holding-over director, or for the past services of any officer or attorney, or counsel appointed by them, shall be considered fraudulent and void. N. Y. Laws of 1885, ch. 491, § 1. And upon an action brought to enforce any such demand where the company has by the connivance of the holding-over directors made default in the action or consented to the validity of the claim, any stockholder may apply to the court for a stay of proceedings and set aside or vacate the same, provided the rights of no innocent third party without notice, acquired for a valuable consideration, be injuriously affected thereby. N. Y. Laws of 1885, ch. 489, § 2.

⁹⁵ *Nathan v. Tompkins* (1887), Ala. 437.

⁹⁶ *Nathan v. Tompkins* (1887), Ala. 437.

office until their successors, duly appointed or elected, have qualified. This is the rule, even where the election or appointment is for a definite term.⁹⁷ And the authority of officers and agents, who are appointed by the board of directors, is not terminated by the election of a new board.⁹⁸ An officer's term does not expire by reason of failure to elect or appoint his successor.⁹⁹

§ 718. **Removal of directors and other officers.**—In the absence of any authority in the statutes, charter or by-laws, a director can not be removed by the stockholders,¹ or by directors, or by a court.² There seems to be no well defined power to remove corporate officers from office.³ If the term of office is fixed by the charter or general statute, or by law adopted before the officer's election or appointment, he can not be removed except for cause,⁴ otherwise, if his term is not prescribed or fixed by any contract, he is removable any time at the pleasure of the appointing power, without any corporate liability to him.⁵ The directors have no power, unless expressly conferred, to remove an officer or agent appointed by the stockholders.⁶ Every officer holds his office subject to the power of removal, conferred by charter, statute, or by-law, upon the corporation, as where a by-law authorized the board of directors to declare a vacancy in office, and to elect or appoint the officer's successor, by reason of his absence from the State, refusal to attend meetings or other circumstance.⁷

Resignation.—An officer cannot be removed by mere notice to resign, but appropriate proceedings must be taken to remove him.⁸

⁹⁷ *Smith v. Silver Valley Mining Co.*, 64 Md. 85; *Moses v. Tompkins*, 84 Ala. 613, 4 Ry. & Corp. L. J. 268; *State v. Bonnell*, 35 Ohio St. 10. Where the power of election was vested in a board of directors, who were accustomed to elect their cashier annually, according to a resolution to that effect, but the charter provided that, before he entered upon the duties of his office, he should give bond, it was held that his term of office did not expire at the end of the year, but that the old cashier continued in office until a new one was qualified by giving a bond. *Sparks v. Farmers' Bank* (1882), 3 Del. Ch. 274; *Jenkins v. Baxter*, 160 Pa. St. 199.

⁹⁸ *Anderson v. Langdon*, 1

Wheat. 85; *Germania, etc. v. Flynn*, 92 Wis. 201.

⁹⁹ *Younce v. Home, etc. Co.* (1904), 79 S. W. 175.

¹ *Powers v. Blue, etc. Assn.*, 86 Fed. 705 (1898); *Johnston v. Jones* (1872), 23 N. J. Eq. 216.

² *Deposit Bank v. Hearne*, 104 Ky. 819 (1898); *Neall v. Hill*, 16 Cal. 145 (1860).

³ *Taylor on Corporations*, § 649.

⁴ *Powers v. Blue, etc. Assn.*, 86 Fed. 705.

⁵ *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

⁶ *Mobile, etc. R. Co. v. Owen*, 121 Ala. 505, 25 South. 612.

⁷ *Regents, etc. v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

⁸ *Granger v. Am. etc. Co.*, 25 Misc. Rep. (N. Y.) 302.

Any officer may resign at will, notwithstanding the charter or other provision that he shall continue in office until his successor is elected or appointed and qualified.⁹ Statutory remedies, in many States, are provided for removal of corporate officers, generally for misfeasance or malfeasance.¹⁰ In some States a remedy is expressly given in equity,¹¹ and in others the statutory remedy is exclusive.¹²

Jurisdiction in Equity.—When there is an adequate remedy at law by *quo warranto*, or under a statute, a court of equity, in the absence of a statute, can not assume jurisdiction, where the mere right to corporate office is in question.¹³ But it may enjoin wrongful interference by others claiming title to such office, when in possession of an incumbent who has been either legally elected or appointed thereto, or who is only a *de facto* officer.¹⁴ Agents holding office at the pleasure of superior officers, may be dismissed without cause.¹⁵ And it has been held that a corporation, notwithstanding a by-law fixing the term of his office, may enter into a special contract with a clerk, under which he shall be removable at pleasure.¹⁶ But if elected or appointed under contract for a fixed term, an officer can be removed only for violation of his contract, or for utter incompetency.¹⁷ If removed without cause, his authority ceases, but he may hold the corporation liable for breach of contract.¹⁸ Mr. Taylor, in his work on corporations, expresses the belief that whatever implied power to remove officers for cause there may be in a corporation, would seem to exist in that body which appointed or elected the officer in question, and that very likely any officer appointed by the board of directors or trustees, could, for cause, be removed by them from the office to which they had appointed him.¹⁹ To remove an officer of a priv-

⁹ Briggs v. Spaulding, 141 U. S. 132.

¹⁰ People v. Ballard, 134 N. Y. 269; Wickersham v. Brittan, 93 Cal. 34, 15 L. R. A. 106.

¹¹ *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

¹² Hudson River, etc. Co. v. Kay, 14 Abb. Pr. (N. S., N. Y.) 191.

¹³ New England, etc. Ins. Co. v. Phillips, 141 Mass. 535; Bedford Springs Co. v. McMeen, 161 Pa. St. 639.

¹⁴ Reis v. Rohde, 34 Hun (N. Y.), 161.

¹⁵ Hunter v. Sun Mutual Ins. Co., 26 La. Ann. 13. And in that case it was intimated that the by-laws might, and to avoid controversy should, provide for removals from office.

¹⁶ Martin v. Commerce Fire Ins. Co. (1881), 47 N. Y. Super. Ct. 520.

¹⁷ State v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

¹⁸ Douglass v. Merchants' Ins. Co., 118 N. Y. 484.

¹⁹ Taylor on Corporations, § 650.

ate corporation, on the ground that the meeting at which he was elected was illegal, and that as to the time for holding the meeting he deceived the relators, the information need not necessarily contain an averment that, had the relators been present they would have voted against him.²⁰ As removal of mere private or ministerial officers of corporations is a right which belongs to the corporation alone, the assistance of the courts can not be invoked against such officers as are intrusted by law with the management of the affairs of the corporation.²¹ In consequence of this lack of authority equity has no jurisdiction or power, by injunction, to suspend a corporator or officer from the exercise of his corporate or official privileges, and thus do indirectly that which may not be done directly.²² Stated differently, a court of equity will not interfere by injunction, in matters relating merely to the internal government of a corporation so as to restrain a director *de facto* from acting as such, on the sole ground of the alleged invalidity of his titles to the offices.²³ There would seem to be no case, in which the right to an office in a corporation was ever heard or determined in a court of equity.

Remedies to determine title to office.—In the absence of statute, the remedy is by *quo warranto*, and it will lie at the suit of any stockholder, or person entitled to the office,²⁴ to determine the title to, and to remove the incumbent, in case of usurpation of office by any one not entitled thereto.²⁵ And *mandamus* will lie to seat him, but not until the question of right has been adjudicated.²⁶

Directors.—Directors themselves have no implied power to remove one of their own number from office even for cause; nor to exclude him from taking part in their proceedings;²⁷ and one

²⁰ *Armington v. State*, 95 Ind. 421.

²¹ *Neall v. Hill* (1860), 16 Cal. 145. In a suit to remove the governors of Harrow School, the court refused to interfere, and Sir William Grant, the Master of the Rolls, said: "By the letters patent of Queen Elizabeth, the governors all constituted a body corporate. This court, I apprehend, has no jurisdiction with regard either to the election or amotion of corporators of any description." *Att'y-Gen. v. Earl of Clarendon*, 17 Ves.

491; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

²² *Bayless v. Orne*, 1 Freem. Ch. 171.

²³ *Mozley v. Alston*, 1 Phil. 790.

²⁴ *Commonwealth v. Stevens*, 168 Pa. St. 582.

²⁵ *Jenkins v. Baxter*, 160 Pa. St. 199; *Creek v. State*, 77 Ind. 180.

²⁶ *American, etc. Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377.

²⁷ *Archer v. Peoples' Sav. Bank*, 88 Ala. 249; *Commonwealth v. Detwiler*, 131 Pa. St. 614, 7 L. R. A. 357; *Halpin v. Mutual Brewing*

whom they attempt to exclude is entitled to an order restraining them from so doing.²⁸ It has been said also that the members of the company have no inherent power to remove the directors from office;²⁹ that their election is a contract between the members and themselves, that they shall continue in office throughout the term.³⁰ It would certainly seem unreasonable, however, to hold the members of the company to any such implied engagement, where the directors have broken the condition upon which it must be presumed to have been made by failing to faithfully perform the duties of their office.³¹ Accordingly, it has been held that the power of removal for cause, is incident to the power of appointment, even where the tenure of office is fixed for a definite period.³² And the court will not interfere, where the stockholders, having power to remove directors for reasonable cause, have acted upon a cause which the court might not have thought reasonable.³³ Nor, on the other hand, when the stockholders have the power of removal, will the court restrain the directors from performing the functions of their office.³⁴ The stockholders will be left to such remedy within the corporation, as is provided by the charter or by-laws.³⁵ Under the English Companies Clauses

Co., 20 App. Div. N. Y. 583; Taylor on Corporations, § 650.

²⁸ Pulbrook v. Richmond, etc. Co. (1878), 9 Ch. Div. 610.

²⁹ Imperial Hydropathic, etc. Co. v. Hampson (1882), 23 Ch. Div. 1, 7; State v. Bryce (1836), 7 Ohio (pt. 2d), 82.

³⁰ There is no doctrine of common law, and there is no statutory provision which enables you to vary the contract entered into between the members that the directors shall hold office for a given period if that contract does not contain that power of removal. Imperial Hydropathic, etc. Co. v. Hampson, 23 Ch. Div. 1, 7.

³¹ Mr. Taylor, in § 650 of his work on Corporations, very justly says that it would seem that for good grounds the majority of shareholders, in a duly summoned meeting of the corporation, should be competent to remove a director. At the same time he says that, in the ordinary case of directors

elected annually to serve for a year, there is no power in the corporation to remove them arbitrarily before the expiration of their term of office.

³² People v. Higgins, 15 Ill. 101; Stobo v. Davis Prov. Co., 54 Ill. App. 440; Taylor v. Hutton, 43 Barb. (N. Y.) 195; Bayless v. Orne (1840), Freem. Ch. 161, 176. *Acc. dicta* in Burr v. McDonald (1846), 3 Gratt. 206, 224. So in Adamantine Brick Co. v. Woodruff, 4 MacArthur (D. C.), 318, it was held that the stockholders of a corporation, in which the general public has no interest, may depose its directors and other officers without notice and trial.

³³ Inderwick v. Snell, 2 Macn. & G. 217; Brown & Theobald's Ry. Law, 104.

³⁴ Hattersley v. Earl of Shelburne, 10 Week. Rep. 881.

³⁵ Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Hedges v. Paquett, 3 Ore. 77. In Moses v. Tompkins.

Act of 1845, accepting or continuing to hold any other place of trust or profit under the company, or being either directly or indirectly concerned in any contract with it, or participating in any manner in the profits of any work to be done for it, or ceasing at any time to hold the required number of shares in the company, vacates the office of a director, and it is enacted that he shall thenceforth cease from voting or acting as a director.³⁶ It would seem to be self-evident that illegal acts by newly elected directors, can not operate to reinstate their predecessors.³⁷ In the absence of contract entitling an officer to hold his office, the directors may discharge him at any time, if the charter or articles of incorporation give them the power to appoint and remove officers.³⁸

§ 719. **Power to fill vacancy in board of directors.**—This matter is frequently provided for by statute.³⁹ By such statutes, the matter may be left to be regulated by the by-laws of the company.⁴⁰ Where the directors are themselves authorized to supply vacancies in the board, their power to do so is held to be exclusive of any action on the part of the shareholders.⁴¹ The power to fill vacancies may be lost by the reduction of the number of directors below the number necessary to constitute a board.⁴²

(1887), 84 Ala. 622, the court refused to enjoin directors from acting, where to have done so would have been tantamount to their amotion from office. And it was said that since the complainants held a majority of the capital stock, they had no excuse for not seeking a remedy within the corporation.

³⁶ 8 Vic. ch. 16, § 86. The provision, however, that if a director contract with his company his office shall become vacant does not avoid the contract. *Foster v. Oxford, etc. Ry. Co.* (1853), 13 C. B. 200.

³⁷ *Beardsley v. Johnson* (1888), 49 Hun, 607, 121 N. Y. 224.

³⁸ *O'Neal v. Neider* (Ky. 1904), 80 S. W. 451.

³⁹ Ala. Code, § 1424, authorizes the board to fill them until the next regular election. By the Companies Clauses Act of 1845, if any director die, or resign, or become

disqualified and incompetent to act as a director, or cease to be a director by any other cause than that of going out of office by rotation, as therein provided, the remaining directors, if they think proper so to do, may elect in his place some other shareholder, duly qualified to be a director; and the shareholder so elected to fill up any such vacancy shall continue in office as a director so long only as the person in whose place he shall have been elected would have been entitled to continue if he had remained in office. 8 Vic. ch. 16, § 89.

⁴⁰ As in N. Y. Laws of 1850, ch. 140, § 5.

⁴¹ *Moses v. Tompkins* (1887), 84 Ala. 613.

⁴² As where five of seven directors designated by the act of incorporation became disqualified to serve, it was held that the two remaining directors could not fill

C.

SALARIES, ATTORNEYS' FEES, OTHER COMPENSATION.

§ 720. Directors are remunerated only for extra service.—

It is not customary to compensate directors for services rendered by them to the company in the regular course of their duty, and they can not recover therefor, except upon some express agreement entered into between them and the company, before the rendition of the services, or under a previously existing charter, provision or by-law.⁴³ But for services beyond the scope of their official duty, directors, like other persons, may demand a *quantum meruit* compensation.⁴⁴ Thus a director of a railroad company, who at its request rendered services as attorney, and in procuring aid notes, right of way, and in enlisting capitalists in the enterprise, may recover the reasonable value of his services, on an implied contract.⁴⁵ So, also, the managing director of a steamboat company, acting as captain of one of the boats, is entitled, without express contract, to compensation, according to custom

the vacancies thereby occasioned. *Moses v. Tompkins* (1888), 84 Ala. 613. And where the vacancies have reduced the directors to a number less than the minimum prescribed by the articles of association, as necessary to constitute a board, although there remain a ciation, as necessary to constitute a board, although there remain a board were in existence, they can not validly elect new directors to fill the vacancies. *Faure Electric Accumulator Co. v. Phillipart* (Q. B. Div. 1888), 4 Ry. & Corp. L. J. 319, 322, citing *Bottomley's Case*, 16 Ch. Div. 681.

⁴³ *Corinne Mill, etc. Co. v. Toponce*, 152 U. S. 405; *Brown v. Republican, etc. Mines*, 17 Colo. 421, 16 L. R. A. 426; *St. Louis, etc. Co. v. O'Hara*, 177 Ill. 525; *Henry Woods Sons v. Schaefer*, 173 Mass. 443, 73 Am. St. Rep. 305; *Brown v. Valley, etc. Co.*, 127 Cal. 630; *Shattuck v. Oakland Smelting & R. Co.* (1881), 58 Cal. 550; *Barstow v. City R. Co.*, 42 Cal. 465; *Loan Assn. v. Stonemetz*, 29 Pa. St. 534; *Carr v. Chartiers Coal Co.*,

25 Pa. St. 337; *Maux Ferry, etc. Co. v. Branegan*, 40 Ind. 361; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *American Central Ry. Co. v. Miles*, 53 Ill. 174; *Lafayette, etc. Ry. Co. v. Cheeney*, 87 Ill. 446, 68 Ill. 570; *Citizens' National Bank v. Elliott*, 55 Iowa, 104; *Barstow v. City R. Co.*, 42 Cal. 465; *State v. People's Mut. Ben. Assn.* (1884), 44 Ohio St. 579, holding that trustees of a mutual benefit insurance association who have received compensation for past years of services have no authority to vote themselves "back pay" for those years. *Blatchford v. Rose*, 54 Barb. 42; *Gardner v. Butler*, 30 N. J. Eq. 702, 721; *Butts v. Wood*, 37 N. Y. 317; *State v. People's, etc. Assn.*, 42 Ohio St. 579; *Kelsey v. Sargent*, 40 Hun, 150, where it was held that corporate officers have no authority to determine upon their own salaries.

⁴⁴ *Bartlett v. Mystic River Corp.*, 151 Mass. 433; *Ten Eyck v. Pontiac, etc. Co.*, 74 Mich. 226, 16 Am. St. Rep. 633, 3 L. R. A. 378.

⁴⁵ *Idem.*

and value, for laborious and responsible services.⁴⁶ But it has been held that a company is under no obligation to pay for the services of a director in efforts to form another corporation in another State, rendered in pursuance of an unofficial arrangement between himself and the other directors, without any agreement as to remuneration, and for the general corporate advantage.⁴⁷ A court of equity may review the reasonableness of salary to corporate officers, although fixed by the stockholders. 'As, where the salary was for the benefit of a voting majority stockholder.⁴⁸ In the absence of contract or authority of by-law, the directors can not vote themselves compensation for prior services.⁴⁹ Without express authority of charter or by-laws, the executive committee has no power to vote themselves compensation for attendance at committee meetings.⁵⁰ The vice president, without any contract, may recover payment for service which is not a part of his duties.⁵¹ Where a majority of the directors of each of two corporations were directors of both, a mortgage by one of the corporations, it being insolvent, made to the other, its creditor, was held to be illegal.⁵² It is the rule that a director is entitled to no salary, in the absence of express agreement.⁵³ A salary illegally paid to the director, may be recovered back at the suit of a stockholder.⁵⁴ A by-law, authorizing the board of directors to fix the salary of officers, gives the directors no power to vote salaries to themselves.⁵⁵ Directors can not vote themselves back pay as directors, or pay for extra services that have been performed without any previous authority for compensation.⁵⁶ Directors are entitled to pay for services, rendered in addition to their duties as directors.⁵⁷ The directors can not fix their own salaries or com-

⁴⁶ *Idem.*

⁴⁷ *Eakins v. American White Bronze Co.* (1889), 95 Mich. 568.

⁴⁸ *Lillard v. Oil, etc. Co.* (N. J. 1903), 56 Atl. 254.

⁴⁹ *Grafner v. Pittsburg, etc. Co.* (Pa. 1903), 56 Atl. 426.

⁵⁰ *Marshall v. Industrial Federation, etc.* (1903), 84 N. Y. S. 866.

⁵¹ *Brown v. Creston Ice Co.* (1901), 113 Iowa, 615.

⁵² *Sutton Mfg. Co. v. Hutchinson* (1894), 63 Fed. 496.

⁵³ *McMullen v. Ritchie* (1894), 64 Fed. 253; *Blue v. Capital Nat. Bank* (1896), 145 Ind. 518; *St.*

Louis, etc. R. R. v. O'Hara (1898), 177 Ill. 525.

⁵⁴ *Elias v. Schweyer* (1898), 27 N. Y. App. 69; *Blair v. Telegram, etc. Co.* (1898), 172 Mass. 201; *Strouse v. Sylvester* (Cal. 1901), 66 Pac. 660.

⁵⁵ *Schoening v. Schwenk* (1901), 112 Iowa, 733.

⁵⁶ *Pfeiffer v. Lansberg, etc. Co.* (1891), 44 Mo. App. 59.

⁵⁷ *Ruby, etc. Co. v. Prentice* (1898), 25 Colo. 4; *Bagley v. Cart-hage, etc. R. R.* (1900), 165 N. Y. 179.

pensation fee, where the by-laws make no such provision.⁵⁸ The court will pass upon the reasonableness of compensation voted to themselves by directors for their services.⁵⁹ A director is entitled to pay for service in acting as general manager, although not agreed upon in advance.⁶⁰ Officers can not recover for back salary never in advance agreed to be paid.⁶¹ They may recover compensation for service performed outside of their regular duties.⁶² The attempt of four of the directors to vote three of their number salaries and back pay, where based upon by-laws previously passed by the board of five directors, including the mentioned four, is fraudulent and void. Directors have no authority to vote a salary to any of their number, without express authority by statute or authorized by-laws. Unless empowered by statute or by-laws, the directors of a corporation have no authority to vote a salary to any one of the directors.⁶³ A director who also acts as general manager, is entitled to recover a salary where it was so agreed by contract between the promoters of the corporation, and by resolution of the board of directors after organization of the corporation.⁶⁴

§ 721. **Compensation of officers and agents.**—The authorities are not uniform upon the question of the right of executive officers of a corporation, to compensation for their services. It has been held in Illinois, and in Pennsylvania, that a treasurer can not, in the absence of any express agreement, recover a salary from the corporation for services rendered to it.⁶⁵ In Iowa an officer of a corporation can recover payment only where there is a special contract therefor, and it is there held that no contract to pay for his services can be implied as against the corporation.⁶⁶ So, in a lower court in New York, it was said that one is not necessarily entitled to a salary from the fact that he was chosen secretary of a corporation, and rendered services as such, especially

⁵⁸ *National, etc. Co. v. Rockland Co.* (1899), 94 Fed. 335.

⁵⁹ *Davis v. T. A. Davis Co.* (N. J. 1902), 52 Atl. 717.

⁶⁰ *Fitzgerald v. Fitzgerald* (1890), 137 U. S. 98.

⁶¹ *Pyper v. Salt Lake, etc. Assn.* (1892), 20 Utah, 9, 57 Pac. 533.

⁶² *Baines v. Coos Bay* (Oreg. 1902), 68 Pac. 387.

⁶³ *McConnell v. Combinations,*

etc. Co. (Mont. 1904), 76 Pac. 194.

⁶⁴ *Bevier, etc. Co. v. Watson* (Mo. App. 1904), 80 S. W. 287.

⁶⁵ *Holder v. Lafayette, etc. Ry. Co.*, 71 Ill. 106, 22 Am. Rep. 89; *Kilpatrick v. Penrose Ferry Bridge Co.*, 49 Pa. St. 118, 88 Am. Dec. 497.

⁶⁶ *Citizens' Bank v. Elliott*, 55 Iowa, 104 (1881), 35 Am. Rep. 167.

where the facts rebut the presumption of a promise of payment.⁶⁷ The New York case, however, was reversed in the court of last resort, where the ground was taken that if the secretary were neither a director nor a stockholder, an agreement to compensate him for his services would be presumed from the fact of his appointment.⁶⁸ And this is probably the general rule in respect of executive officers other than the president or vice president of the company.⁶⁹ So the board of directors of a railroad company by resolution at one of their meetings, can fix the salaries, and order payment of the officers of the company, who commenced to work for the success of the enterprise at a time when the company had no funds, with a common understanding and agreement that, if they succeeded in building any portion of the road sufficient to produce a revenue, a fair compensation should be paid them out of the revenue so produced; such compensation and payment being fixed and ordered paid, long after the services were performed.⁷⁰ Directors can not bind the corporation to pay for services rendered at their instance, beyond the ordinary business of the company.⁷¹ A director is not entitled to, and can not recover compensation for, performance of his duties as director, or other officer of the corporation, in the absence of express agreement.⁷² But he may recover the reasonable worth of any service

⁶⁷ *Smith v. Long Island R. Co.*, 32 Hun, 38.

⁶⁸ *Smith v. Long Island R. Co.*, (1885), 102 N. Y. 190.

⁶⁹ *First National Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646; *Edwards v. Fargo, etc. Ry. Co.* (1887), 4 Dak. 549, 33 N. W. Rep. 100; *Cincinnati, etc. R. Co. v. Clarkson*, 7 Ind. 595; *Smith v. Long Island R. Co.* (1885), 102 N. Y. 190; *Hall v. Vermont, etc. R. Co.*, 28 Vt. 404; *Law v. Connecticut, etc. R. Co.*, 45 N. H. 370; *Bee v. San Francisco, etc. R. Co.*, 46 Cal. 248; *Bill v. Darenth Valley Ry. Co.*, 26 L. J. Ex. 81, 1 Hurl. & N. 305.

⁷⁰ *St. Louis, F. S. & W. R. Co. v. Tiernan* (1887), 37 Kan. 606, distinguishing *Bank v. Drake*, 29 Kan. 311. But where persons organize a corporation, elect them-

selves officers, and proceed to business, in the course of which they contract debts, the corporators are not entitled to retain amounts drawn by them from corporate assets under the name of "salary" to themselves as officers, it not appearing that the corporation made any profits out of which to pay salaries, and nothing having been paid in on the capital stock. *Burns v. Beck* (1889), 83 Ga. 471.

⁷¹ *Eakins v. American White Bronze Co.* (1889), 95 Mich. 568, 6 Ry. & Corp. Law J. 31, citing *Kalamazoo Novelty Manuf. Co. v. McAlister*, 36 Mich. 327.

⁷² *Fitzgerald, etc. Co. v. Fitzgerald*, 137 U. S. 98; *St. Louis, etc. Ry. Co. v. O'Hara*, 177 Ill. 525; *Henry Wood's Sons v. Schaefer*, 173 Mass. 443, 73 Am. St. Rep. 305.

other than that pertaining to an officer of the company, if the services be rendered at the request of the corporation, and with the understanding that they are to be paid for.⁷³ Examples are, service as a director employed as counsel in a pending suit to which the corporation is a party,⁷⁴ or service as general counsel,⁷⁵ or as a steamboat captain in a navigation corporation.⁷⁶ But the rule as to director acting as such, or as other officer of the corporation, that he is not entitled to compensation, unless by express agreement, does not apply to any other officer or employe of the corporation, performing services for the corporation. If no salary is provided by by-law or other express agreement, each of them is entitled to recover a reasonable compensation,⁷⁷ unless it appears that no salary or other compensation was intended to be paid.⁷⁸ The power to fix salaries or other compensation of directors, unless otherwise conferred, vests in the stockholders, to be expressed in the by-laws, or by vote, or by resolution at a stockholders' meeting.⁷⁹ It has been held that a company is bound by no implied promise to compensate its promoters for their services in furthering its organization.⁸⁰ But, on the other hand, where after the charter, and before the organization of a corporation, services are rendered which are necessary to complete that organization, and, after it has been perfected, the corporation elects to take the benefit of such services, knowing that they were rendered with the understanding that compensation was to be made, it will be held liable to pay for the services, upon the

⁷³ *Eales v. Cumberland Black Lead Mine Co.*, 6 Hurl. & N. 481; *Fitzgerald v. Fitzgerald*, 137 U. S. 98; *Bartlett v. Mystic River Corp.*, 151 Mass 433; *Wood v. Lost Lake Manuf. Co.*, 23 Oreg. 20, 37 Am. St. Rep. 651.

⁷⁴ *Santa Clara, etc. Assn. v. Meredith*, 49 Md. 389, 33 Am. Rep. 264.

⁷⁵ *Watts v. West Va. etc. Co.*, 43 W. Va. 262.

⁷⁶ *New Orleans, etc. Co. v. Brown*, 36 La. Ann. 138, 51 Am. Rep. 5.

⁷⁷ *Cheaney v. Lafayette*, 68 Ill. 570, 18 Am. Rep. 584; *Pew v. First Nat. Bank of Gloucester*, 130 Mass. 391.

⁷⁸ *Smith v. Long Island R. Co.*, 102 N. Y. 190.

⁷⁹ *Miner v. Belle Isle Ice Co.*, 93 Mich. 97.

⁸⁰ *Bell's Gap R. Co. v. Christy*, 79 Pa. St. 54, 21 Am. Rep. 39; *New York, etc. R. Co. v. Ketchum* (1858), 27 Conn. 171; *Rockford, Rock Island & St. L. R. Co. v. Sage* (1872), 65 Ill. 328, 16 Am. Rep. 587. It is soon enough for corporate bodies to enter into contracts, incumbering their property, when they are duly organized according to their charters and have their chosen and impartial directors to conduct their business. *New York, etc. R. Co. v. Ketchum*, 27 Conn. 171.

ground that it must take the burden with the benefit; and a suit at law will lie to recover such compensation.⁸¹

§ 722. **Remuneration of officers for extra service.**—Officers of a corporation can not fix their own salaries.⁸² Nor can they bind the company, by what is in effect a gratuitous and unnecessary payment,⁸³ especially where their action amounts to fraud.⁸⁴

⁸¹ *Low v. Connecticut & Passumpsic Rivers R. Co.* (1864), 45 N. H. 369, following *Hall v. Vermont & Massachusetts R. Co.*, 28 Vt. 401.

⁸² *Kelsey v. Sargent* (1885), 40 Hun, 150. So where an officer whose duties do not require any special knowledge, ability, or attention presides at a meeting of the trustees in which a resolution voting him a salary is passed, though he testifies that he did not vote, and it is not recorded that he did, no dissent appearing, the resolution is invalid. Here where the only testimony that the services were of any value being that of the officer himself, he can not be held to be entitled to the salary on the *quantum meruit*. *Ashley v. Kinnan* (1888), 18 N. Y. St. Rep. 791. An to the same effect is *Smith v. Woodville Consolidated Mining Co.*, 66 Cal. 398, holding that evidence of a resolution of the board of directors that the salary of an officer was during the preceding year fixed at a certain amount, does not show a contract for a salary prior to that time. But it was held that the act of the managing officer of a railway company in ordering the payment in part of a claim by one of its officers for salary for services rendered is an admission of liability as against the company. *St. Louis, F. S. & W. R. Co. v. Tiernan*, 37 Kan. 606 (1887). And, in the same case, which was an action against a railway company on a note given in return for services rendered, it was held no defense thereto that in the execution of the note all the requirements of

the by-laws had not been strictly complied with, as recovery ought not to be defeated by matter of inert form and not of substance.

⁸³ *Kelsey v. Sargent* (1885), 40 Hun, 150.

⁸⁴ As where plaintiff owned less than half the stock in a corporation, and the three defendants owned the residue. For many years plaintiff was one of the three trustees constituting the board, but the defendants, who were all of one family, were elected the trustees, and they elected themselves respectively president, secretary and treasurer. One of the defendants sought to buy plaintiff's stock, but he declined to sell, whereupon said defendant threatened to raise the salaries of the officers, which was done. In the next year another refusal to sell was followed by another raise of salaries, so that instead of \$1,800 each per year—the salaries which had been paid for many years—the officers were to receive respectively \$50,000, \$30,000 and \$6,000, and a further increase was threatened, with the statement that the power of the trustees to increase the salaries was unlimited. Another company was controlled by the corporation, and the same officers were chosen, and they voted themselves salaries respectively of \$7,500, \$6,000 and \$1,000, though previously the officers of that company had served without pay. The business was very profitable. The salaries voted were shown to have been greater than the service were worth. And it was decided that the trus-

A. fraudulent appropriation of funds for compensation of an officer who agreed to discharge his duties without compensation, can not be ratified by implication.⁸⁵ Although it was held that an officer who receives a salary as such, may recover for other services beyond the duties of his office;⁸⁶ but if the extra service of a salaried officer is in the course of his employment or official duties, he can not recover additional compensation where the salary is fixed by by-law, or otherwise prescribed, although such extra service may not have been originally contemplated.⁸⁷ As the appointing officers, the directors as a board, fix the salaries of the officers elected or appointed by them, although from their own number; they fix extra compensation for any extraordinary service, when performed by them.⁸⁸ But when a director's salary, as the incumbent of another office, is fixed by the board, although he may be present at the meeting, he must not pre-
side, or vote to fix such salary,⁸⁹ if his vote is necessary to constitute a majority.⁹⁰ The power to fix the compensation for services of corporate officers, is incident to the power to appoint them, unless such power is withheld or elsewhere conferred.⁹¹ If the directors, or a majority of the stockholders, vote excessive

tees' action was fraudulent, and equity would restrain the payment of more than the real value of the officers' services. *Ziegler v. Hoagland* (1889), 52 Hun, 385, 6 Ry. & Corp. Law J. 323.

⁸⁵ *Fort Scott Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646.

⁸⁶ Where a corporation has construed the duties of its secretary to include a field of arduous work, not strictly within the ordinary interpretation of the functions of that office, the secretary can recover a reasonable compensation for the performance of such duties, and will not be held to distinguish between ordinary and extraordinary services. *Edwards v. Fargo & S. Ry. Co.* (Dak. 1887), 32 N. W. Rep. 100, 4 Dak. 549. In the same case, however, it was held that it is competent for plaintiff to testify that he rendered specific services "as secretary," without producing the by-laws of the corporation to show that such services pertained to the duties of the

secretary. And that Dak. Civil Code, § 404, authorizing a corporation, in the absence of special provision, to provide in its by-laws "the compensation and duties of its officers," creates no presumption that the duties are prescribed when the by-laws are silent as to compensation, but rather a presumption that they are equally silent as to the duties. *Edwards v. Fargo & S. Ry. Co.* (Dak. 1887), 32 N. W. Rep. 100, 4 Dak. 549.

⁸⁷ *Martindale v. Wilson-Cass Co.*, 134 Pa. St. 348, 19 Am. St. Rep. 706.

⁸⁸ *Waite v. Windham County Mining Co.*, 37 Vt. 608; *Bagley v. Pittsburgh, etc. Iron Co.*, 146 Pa. St. 478.

⁸⁹ *Beers v. New York Life Ins. Co.*, 66 Hun (N. Y.) 75.

⁹⁰ *Clark v. American Coal Co.*, 86 Iowa, 436, 17 L. R. A. 557.

⁹¹ *Waite v. Windham County Mining Co.*, 37 Vt. 608.

salaries or other compensation, the minority stockholders may obtain relief in equity by injunction or decree for accounting.⁹² The power of the directors to appoint officers and fix their salaries, is limited to reasonable compensation, and to perform the appropriate duties of the office, but not to allow any acts beyond the powers conferred on the corporation.⁹³ It is agreed, or understood, that an officer shall be compensated for his service, and if no amount is fixed, he may recover a reasonable compensation.⁹⁴ Where the charter or by-laws empower the stockholders or directors to fix the salary of officers, they may or may not exercise the power, and until they do so, it is not presumed that any compensation was intended.⁹⁵

Compensation for past service.—Where official or other services are rendered to the corporation upon the previous understanding that compensation is to be paid therefor, it may be recovered upon the implied promise, but, on the contrary, if there be no such previous promise made by the stockholders or directors, at any authorized meeting, any undertaking of the directors or stockholders to pay for such past service, is without consideration, and void.⁹⁶ Any dissenting stockholder may enjoin such payment, and where paid, it may be recovered by appropriate action by stockholders, or in behalf of creditors.⁹⁷ No corporate officer has right to salary, if he has been illegally elected or appointed. In such case he is neither *de jure* nor *de facto* officer,⁹⁸ nor if another person has legal title to the office.⁹⁹

Termination of officers' right to salary.—All right to further salary may be lost by a corporate officer, by reason of fraud, gross neglect or other misconduct in office, in prejudice to the rights of the corporation or its creditors,¹ or by insolvency and bankruptcy of the corporation,² or by transfer of all the corporate

⁹² Decatur Mineral Land Co. v. Palm, 113 Ala. 531, 59 Am. St. Rep. 140; Miner v. Belle Isle Ice Co., 93 Mich. 97.

⁹³ McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203.

⁹⁴ Stewart v. St. Louis Ry. Co., 41 Fed. 736; Rosborough v. Shasta River, etc. Co., 22 Cal. 556.

⁹⁵ Crumlish's Adm'r v. Central Imp. Co., 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120; Illinois Linen Co. v. Hough, 91 Ill. 63.

⁹⁶ Martindale v. Wilson-Cass Co., 134 Pa. St. 348, 19 Am. St. Rep. 706; Ellis v. Ward, 137 Ill. 509.

⁹⁷ Ellis v. Ward, 137 Ill. 509.

⁹⁸ Kuser v. Wright, 52 N. J. Eq. 825.

⁹⁹ Waterman v. Chicago, etc. Ry. Co., 139 Ill. 658, 32 Am. St. Rep. 228, 15 L. R. A. 418.

¹ Eaton v. Robinson, 19 R. I. 146, 29 L. R. A. 100.

² Lenoir v. Linville Imp. Co., 126 N. C. 922, 51 L. R. A. 146.

property and business with his consent; but the right to continuance of the officer's salary does not cease because of his absence, acquiesced in by the corporation,³ or absence by reason of his sickness, where he has provided for the discharge of his duties during his absence, by another officer authorized to act,⁴ or because he is acting as officer in another corporation,—if his duties as such do not prejudice, or conflict with those he owes to the former corporation.⁵

§ 723. **Attorney's fees.**—An attorney for a corporation, although he is also president or one of the directors, may recover for his professional service to the corporation, when it is rendered at request of the directors or of the managing officer.⁷ A lawyer may, in equity, enforce the corporation's agreement to pay him five per cent. of the corporation's net earnings, where there are net earnings, and the corporation refuses to comply with the contract.⁸ A corporation is liable for the fees and expenditures, paid by the attorney who prepared the articles of association, and organized the corporation.⁹

Amount of fees allowed by the court to receiver's counsel.—The court will allow reasonable fees of counsel employed by a receiver.¹⁰ For examples: Where the sum of twenty thousand dollars was allowed as fees of three attorneys as counsel, their clients having prevailed in the suit;¹¹ and, where salary of five thousand dollars per year was allowed to receiver's counsel;¹² and where twenty thousand dollars was allowed as receiver's and complainant's counsel fees;¹³ and, where \$31,500 was paid without objection for five years attorney's service.¹⁴ Allowance of fees for receiver's counsel, is made, not to the counsel, but to the receiver.¹⁵

³ Simonson v. N. Y. City Ins. Co., 141 N. Y. 12.

⁴ Finley, etc. Co. v. Finley, 32 Atl. 740 (N. J. Eq.).

⁵ Davis v. Memphis City Ry. Co., 22 Fed. 883.

⁶ Mobile, etc. Ry. Co. v. Owen, 121 Ala. 505, 25 So. 612.

⁷ Taussig v. St. Louis, etc. Ry. (1901), 166 Mo. 28, 89 Am. St. Rep. 674; Kenner v. Whitelock (1899), 152 Ind. 635; Arapahoe Inv. Co. v. Platt (1895), 5 Colo. App. 515, 39 Pac. 584.

⁸ Dupignac v. Bernstrom (1902), 76 N. Y. App. Div. 105.

⁹ Freeman, etc. Co. v. Osborn

(1900), 14 Colo. App. 488, 60 Pac. 730; Taussig v. St. Louis, etc. Ry. (1901), 166 Mo. 28.

¹⁰ Stuart v. Boulware (1890), 133 U. S. 78.

¹¹ Phinizy v. Augusta, etc. R. R. (1896), 98 Fed. 776.

¹² Cowdrey v. Railroad Co., 6 Fed. Cas. 660.

¹³ Walters v. Western, etc. R. R. Co. (1895), 69 Fed. 706.

¹⁴ Williams v. Morgan (1884), 111 U. S. 684.

¹⁵ First Nat. Bank, etc. v. Oregon Paper Co. (Oreg. 1903), 71 Pac. 144.

An attorney does not come within "the six months' rule," as to payment of labor and supply claims by a railroad receiver.¹⁶ A corporation may employ attorneys to defend or prosecute suits, and regardless of whether or not the suit arises from *ultra vires* transactions.¹⁷ Although the receiver is a lawyer, he may be allowed fees for employed counsel.¹⁸ The court may order the purchaser, at a receiver's sale, to pay the fees of the receiver's counsel.¹⁹

Who may employ counsel.—The president, or the general manager, may employ attorneys in the general corporation business.²⁰ The president or the directors may employ an attorney to represent the corporation. The stockholders can not employ an attorney for that purpose.²¹ The treasurer may employ an attorney to collect bills due the corporation.²² The cashier of a bank has implied authority to employ an attorney for the bank.²³

Priority in payment. Contingent fee. Adverse interest.—The receiver's compensation, and that of his counsel, has priority in payment over receiver's certificates, but the trustee and his counsel are not allowed such priority.²⁴ The company's lawyer has no priority lien over the bonds, for service rendered the company under employment before the foreclosure.²⁵ Where the receivership was a scheme to wreck the corporation, the company's attorney, who was a party to the scheme, will not be allowed any claim for professional service.²⁶ Where the attorney has con-

¹⁶ Ten Eyck v. Pontiac, etc. R. R. (1897), 114 Mich. 494, 72 N. W. 362.

¹⁷ Pixley v. Western Pac. R. R. Co., 33 Cal. 183, 91 Am. Dec. 623; National Bank v. Earl, 2 Okl. 617.

¹⁸ Olson v. State Bank (1898), 67 Minn. 267, 69 N. W. 904.

¹⁹ Louisville, etc. R. R. v. Wilson (1891), 138 U. S. 501.

²⁰ Ceeder v. Loud & Sons, etc. Co., 86 Mich. 541, 24 Am. St. Rep. 134; Streeter v. Robinson, 102 Cal. 542; Sarmiento v. Davis, etc. Co., 105 Mich. 300, 55 Am. St. Rep. 446.

²¹ Breathitt, etc. Co. v. Gregory (Ky. 1904), 78 S. W. 148, 25 Ky. Law Rep. 1507.

²² Bristol, etc. v. Keavey, 128 Mass. 298.

²³ Western Bank, etc. v. Gilstrap, 45 Mo. 419; Potter v. New

York, etc. Asylum, 44 Hun (N. Y.) 367.

²⁴ Penn Co., etc. v. Jacksonville, etc. Ry. (1899), 93 Fed. 60; Petersburg, etc. Ins. Co. v. Dellatorre, 70 Fed. 643 (1895); Central Trust Co. v. Thurman (1894), 94 Ga. 735, 20 S. E. 141; Mauran v. Crown, etc. Co. (1901), 23 R. I. 324, 50 Atl. 387; Lyle v. Staten Island, etc. Co. (N. J. 1901), 48 Atl. 783; Chesapeake, etc. Ry. v. Atlantic, etc. Co. (N. J. 1901), 48 Atl. 997.

²⁵ Finance Co., etc. v. Charleston, etc. R. R. (1892), 52 Fed. 526; People, etc. v. American, etc. Co. (1902), 70 N. Y. App. Div. 579; Grigg v. Mercantile T. Co. (1901), 109 Fed. 220.

²⁶ Baxter v. Lowe (1899), 93 Fed. 358.

tingent interest in a claim, it will not be defeated by his client's assignment of the claim.²⁷ The attorney will be paid out of the assets of the bank, for collection of its claim which he had undertaken before the receiver's appointment.²⁸ The court will not permit the receiver's employment of an attorney hostile to the interests represented by the receiver,²⁹ nor an attorney who is interested on one side of the suit.³⁰ Where the stockholders attorney's service, in the suit, is for contingent fees, and he recovers a large sum for the corporation, the court will order him paid, out of the amount recovered.³¹ The stockholder, succeeding in his suit in behalf of the corporation, is entitled to reimbursement for expenses and for attorney's fees, and to have a lien therefor on the recovered property.³² Upon successful suit of minority stockholders, to restrain and cancel a sale of all the corporate property, its value, and not that of the plaintiff shareholders, is to be considered in measuring the amount to be allowed plaintiffs for attorney's fees.³³ An implied and indefinite contract by a corporation with an attorney, to pay him for his services in the formation of the company, is complied with by employment and compensation for his services for one year.³⁴

§ 724. **Salary of the president.**—The contract to pay the president, may be oral and informal, and by conversations.³⁵ The president's salary is not payable to the vice president, while acting as president.³⁶ To entitle a president or director of a corporation to recover for services rendered his corporation, he must prove an express contract of employment, if the services for which he claims compensation are within the line and scope of his duties as president or director.³⁷ The rule which excludes compensa-

²⁷ *Central Trust Co. v. Richmond, etc. R. R.* (1900), 105 Fed. 803.

²⁸ *Sowles v. National Union Bank* (1897), 82 Fed. 139.

²⁹ *Farwell v. Great Western T. Co.* (1896), 161 Ill. 522.

³⁰ *Speiser v. Merchants' Exchange Bank* (1901), 110 Wis. 506.

³¹ *Crumlish v. Shenandoah Valley R. R.* (1895), 40 W. Va. 627, 22 S. E. 90.

³² *Grant v. Lookout Mt. Co.*, 93 Tenn. 691 (1894); *Hobbs v. McLean* (1886), 117 U. S. 567.

³³ *Forrester v. Boston, etc. Co.* (Mont. 1904), 74 Pac. 1088.

³⁴ *Sullivan v. Detroit, etc. Co.* (Mich. 1904), 64 L. R. A. 673.

³⁵ *Bagley v. Carthage* (1898), 25 N. Y. App. Div. 475.

³⁶ *Brown v. Galveston, etc. Co.* (1899), 92 Tex. 520.

³⁷ *Santa Clara Mining Assn. v. Meredith* (1878), 49 Md. 400, 33 Am. Rep. 264; *Citizens' National Bank v. Elliott*, 55 Iowa, 104, 39 Am. Rep. 167; *Kilpatrick v. Penrose, etc. Co.*, 49 Pa. St. 118, 88 Am. Dec. 497; *Merrick v. Pene*

tion to directors, applies to the president chosen by the directors from their own number, and also to a treasurer when a director.³⁸ Where a president has served, while no fixed salary has been fixed for his services or attached to the position, the directors can not afterwards vote him pay for such services.³⁹ But when the charter of a corporation provides that certain officers may be elected, and their salary fixed, by a board of directors, and a president is thus elected, but without a salary being named, the law raises an *assumpsit* on the part of the corporation to pay a reasonable compensation for his services, rendered after election.⁴⁰ And, generally, for services beyond their regular employment, the president

Coal Co., 61 Ill. 472; Sawyer v. Pawnors' Bank, 6 Allen, 207; Holland v. Lewiston Falls Bank, 52 Me. 564; Gridley v. Lafayette, etc. Ry. Co., 71 Ill. 200; Emporium Real Estate Co. v. Emrie, 54 Ill. 345; Taylor on Corporations, § 647.

³⁸ Note to Cook v. Sherman, 20 Fed. Rep. 183, citing Loan Assn. v. Steinmetz, 29 Pa. St. 118.

³⁹ An appropriation by the directors of a corporation of its funds as compensation to its president for services rendered at a time when there was no by-law or resolution authorizing payment for the services is unauthorized, and the corporation, by its receiver, may recover the funds so appropriated. Ellis v. Ward (Ill. 1889), 25 N. E. Rep. 671, 137 Ill. 509. And in this case where it appears that the president had parted with all his interests in the company before the action was taken by its directors; that he had never demanded payment for his services, and had no actual knowledge of the resolution of the directors; that he accepted checks drawn on the company's funds for an amount due him under an agreement by the directors purchasing his stock, but refused to receipt for the checks as salary,—it does not sufficiently appear that he was a party to the misappropriation, so as to render

him liable to the company for the amount of the checks.

⁴⁰ Grundy v. Pine Hill Coal Co. (Ky. 1888), 9 S. W. Rep. 414. In a New York case in point the president of a company had served for years without salary and had also advanced the company considerable sums of money which had not been repaid him, and it was held to be within the power of the directors to issue to him the shares of the company by way of payment for his services and in repayment of the advances. Reed v. Hayt (1888), 109 N. Y. 659, 4 Ry. & Corp. L. J. 135, affirming 51 N. Y. Super. Ct. 121. So a resolution of the board of directors of a private corporation reciting that the president's salary was fixed at a certain amount during the preceding year, is competent evidence of the fact; but it does not show a contract for a salary prior to that time. Smith v. Woodville Consolidated Silver Mining Co. (1885), 66 Cal. 398. In Jones v. Morrison (1883), 31 Minn. 140, it was held that the vote of directors fixing the compensation of one of their number as an officer of the corporation is *prima facie* voidable at the election of a stockholder; and further that the directors cannot pay for past services rendered at a fixed salary or under an agreement that they should be gratuitous.

and directors of a company, may recover a *quantum meruit*.⁴¹ But the value of such services must be well established upon the evidence.⁴² In a case decided in the New York courts, it was held that salary wrongfully voted and paid a president by the directors of a company, might be recovered from those of them who voted to authorize it.⁴³

D.

AUTHORITY AND POWERS.

§ 725. **Scope of authority of officers and agents.**—Officers and agents, other than directors, have only such authority to bind the corporation as is expressly conferred upon them by the char-

⁴¹ Santa Clara Manuf. Assn. v. Meredith, 49 Md. 389, 33 Am. Rep. 264; Cheeney v. Lafayette, etc. R. Co., 68 Ill. 570, 18 Am. Rep. 534, 87 Ill. 446; Rockford, etc. R. Co. v. Sage, 65 Ill. 329, 16 Am. Rep. 587; Citizens' Nat. Bank v. Elliott, 55 Iowa, 104, 39 Am. Rep. 167; New Orleans, etc. Packet Co. v. Brown, 36 La. Ann. 138, 51 Am. Rep. 5; Jackson v. New York Central R. Co., 2 Thomp. & C. 653; Shackelford v. New Orleans, etc. R. Co., 37 Miss. 202; Gardner v. Butler, 30 N. J. Eq. 702, 721; Rogers v. Hastings, etc. Ry. Co., 22 Minn. 25; Greensboro, etc. Co. v. Stratton (1889), 120 Ind. 294; Missouri River R. Co. v. Richards, 8 Kan. 101. *Contra*, Levissee v. Shreveport City R. R. Co., 27 La. Ann. 641; Pew v. Gloucester Nat. Bank, 130 Mass. 391. But in a late case in New York it was held that a director who receives a salary as vice-president, cannot, in the absence of a special agreement, recover compensation for services outside of his duties as director and vice-president. Gill v. New York Cab Co. (1888), 48 Hun, 524. *Acc.* Barril v. Calendar Insulating, etc. Co., 50 Hun, 257 (1888).

⁴² The superintendent of a mining company testified that the services rendered by the president and secretary of the company out-

side of the performance of their duty as such officers were worth a certain sum, but it appeared that he resided at the mine, was seldom at the offices of the company, and did not know what services were rendered by the president and secretary. The only evidence as to the value of his own services was the fact that he was superintendent. And it was held that this evidence was insufficient to show that these officers had rendered services worth the sum stated, and that their charging the corporation therewith, by a resolution passed by their own votes, was fair and honest. Graves v. Mono Lake Hydraulic Min. Co. (Cal. 1890), 22 Pac. Rep. 665.

⁴³ The directors of a railway company voted without authority to pay their president a salary, and at a subsequent meeting assumed to authorize him to issue and negotiate the company's notes in payment thereof. Some of these notes passed into the hands of *bona fide* purchasers, and thereupon the company brought suit against its president and directors for the value of the notes issued. Upon these facts and because of the injury done by the apparent authority to negotiate, and thus to convert its void notes into valid obligations, and by the actual negotiation of some of

ter, the statutes or the by-laws, and by the rules of law of principal and agent.⁴⁴ The stockholders or members of a corporation, though they own a majority of its stock, are not its agents, and as individuals, have no power to bind the corporation, unless expressly authorized.⁴⁵ Corporate engagements can not be implied from unauthorized acts or declarations of the individual members,⁴⁶ but only from the acts and declarations of officers, who are constituted to act for the company. And by the acts and declarations of its officers and agents, within the apparent scope of their several employments, the company is bound. Nor is notice imputed to persons dealing with them, of extrinsic facts making it improper for them to act.⁴⁷ Accordingly, a corporation is estopped to deny its liability under a contract, on the ground that its officers were not technically authorized to make it, or that its own proceedings in the premises were irregular, when the contract—(within the scope of its powers),—was entered into by proper officers and has been recognized by corporate acts.⁴⁸ Thus, the authority of the proper officers who make a contract under the seal of the corporation,—is presumed, until the contrary be proven; and this presumption is not overcome by the mere fact that no vote of the directors authorizing it, is shown.⁴⁹ An officer of a corporation may, by the acts of its directors or managers, be invested with capacity to bind the company, even beyond the scope of those powers which are inherent in his office; as where, in the general course of the company's business, the directors or managers have permitted an officer to assume the control and direction of its affairs, and have held him out to the public as its gen-

them, the company can maintain an action against the directors who voted to confer the power, without any allegation of payment of the notes or of actual loss. Modifying 45 Hun, 590. Metropolitan Ry. Co. v. Kneeland, 24 N. E. Rep. 381 (N. Y. 1890).

⁴⁴ Moshannon Land, etc. Co. v. Sloan, 109 Pa. St. 532, 7 Atl. 102; Slattery v. North End Sav. Bank, 175 Mass. 380; Green v. Hugo, 81 Tex. 452, 26 Am. St. Rep. 824.

⁴⁵ Humphreys v. McKissocok, 140 U. S. 304; Sellers v. Greer, 172 Ill. 549; Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 40 Am. St. Rep. 299; Merchants' Ad-Sign Co.

v. Sterling, 124 Cal. 429, 71 Am. St. Rep. 94.

⁴⁶ Allegheny County Workhouse v. Moore (1881), 95 Pa. St. 408.

⁴⁷ Credit Co. Limited v. Howe Machine Co. (1887), 54 Conn. 357, 1 Am. St. Rep. 123.

⁴⁸ So held as to a contract that a lessee railroad company would lend to the lessor company \$150,000, and take 1,000 shares of the lessor's stock as security. Peterborough R. Co. v. Nashua & Lowell R. Co. (1883), 59 N. H. 385.

⁴⁹ Fidelity Ins. T. & S. D. Co. v. Shenandoah Val. R. Co. (1889), 32 W. Va. 244.

eral agent. His authority to act for the company in a particular transaction may be implied from the manner in which he has been permitted by the directors or managers to transact its business.⁵⁰

§ 726. **Authority determined by the by-laws and by custom.**—The authority of officers of corporations, depends upon the by-laws or upon the custom of the corporation.⁵¹ But this rule is modified in practice, when there is want of notice of the company's rules and regulations. Thus, rules and regulations of a corporation that no contracts shall be binding upon it which are not in writing, signed by its president, can not affect contracts made by agents of the corporation with persons having no notice of the rule.⁵² Though it is held, generally, that persons dealing with one claiming to have authority to act for a corporation, do so at their peril, and having failed to inform themselves as to his authority, they are estopped from complaining of the company's refusal to assume responsibility for his unauthorized contracts.⁵³ Thus, persons selling land to a corporation through a supposed agent, must inform themselves of his authority.⁵⁴ And where the officers of a corporation have no power to give an indefinite extension of time for payment for shares, one with whom they contract for credit is chargeable with knowledge of the limitations upon their authority.⁵⁵ The authority of an agent, however, need not be shown to have been expressly conferred. It may be implied from his official position, or from custom.⁵⁶ And a custom recognized by the corporation may supply the place of express authority.⁵⁷ Thus, one who had advanced money to promote the

⁵⁰ Fifth Ward Sav. Bank v. First Nat. Bank (1887), 48 N. J. 513.

⁵¹ *E. g.* To execute a note, Foster v. Ohio-Colorado Reduction, etc. Co. (1882), 17 Fed. Rep. 130; to sell land, Bocock v. Alleghany Coal & Iron Co. (1887), 82 Va. 913, 3 Am. St. Rep. 128.

⁵² Walker v. Wilmington, C. & N. R. Co. (1887), 26 S. C. 80.

⁵³ Bocock v. Alleghany Coal & Iron Co. (1887), 82 Va. 913, 3 Am. St. Rep. 128; Credit Co. v. Howe Machine Co. (1887), 54 Conn. 357, 1 Am. St. Rep. 123; De Bost v. Albert Palmer Co. (1884), 35 Hun, 386.

⁵⁴ Bocock v. Alleghany Coal &

Iron Co. (1887), 82 Va. 913, 3 Am. St. Rep. 128.

⁵⁵ McComb v. Credit Mobilier, 13 Phila. 468.

⁵⁶ Indianapolis Rolling Mill Co. v. St. Louis, etc. R. Co., 120 U. S. 256; Page v. Fall River, etc. R. Co., 31 Fed. Rep. 257; Flynn v. Des Moines, etc. Ry. Co., 63 Iowa, 490; Fifth Ward, etc. Bank v. First Nat. Bank, 48 N. J. 513; Topeka Primary A. U. B. v. Martin (1888), 39 Kan. 570; Hannibal Bank v. North Missouri Coal Co., 86 Mo. 125.

⁵⁷ Page v. Fall River, etc. R. Co., 31 Fed. Rep. 257; Topeka Primary A. U. B. v. Martin (1888), 39 Kan. 570; Fifth Ward, etc. Bank v.

purposes of a corporation, in accordance with the directions of a general manager invested with the entire control of the affairs of the corporation, and in accordance with a custom recognized and acquiesced in by the members, although without express authority from the trustees, was held entitled to recover the amounts advanced.⁵⁸

§ 727. **Authority only such as is expressly conferred, or necessarily implied.**—From the general powers expressly conferred upon corporate officers and agents, there arise certain other implied powers, necessarily incidental thereto.⁵⁹ Thus, an agent who has power to sign and deliver insurance policies, and who is responsible to the company for collection of all premiums on policies issued by him, binds the company by an agreement to give credit on the premium for a certain time, though he is expressly authorized to give credit only for a shorter time.⁶⁰ These incidental powers, however, are not to be lightly inferred, nor is an agent's authority to be thus extended beyond its original scope.⁶¹ Thus, where an agent of a railroad company is empowered "to procure a right of way," this does not give him power to promise an owner of land that the company will locate a depot in a certain place;⁶² and where the board of directors authorized a company's officers to execute a note for a certain sum at a given rate of interest, it was held that the officers had no power to stipulate for the payment of attorney's fees in the event of suit to collect the note.⁶³ So, generally, in order to render a corporation liable for

First Nat. Bank, 48 N. J. 513; *Flynn v. Des Moines, etc. Ry. Co.*, 63 Iowa, 490.

⁵⁸ *Topeka Primary A. U. B. v. Martin* (1888), 39 Kan. 570.

⁵⁹ *New York, etc. R. Co. v. Schuyler*, 34 N. Y. 30, 65; *Whitaker v. Kilroy* (1888), 70 Mich. 635.

⁶⁰ *Farnum v. Phenix Ins. Co.*, 23 Pac. Rep. 869 (Cal. 1890).

⁶¹ *Hardin v. Iowa Ry. & Const. Co.* (1889), 78 Iowa, 726. It has been decided where nothing appears concerning the functions and powers of a corporation beyond what may be implied from its name, "The Woman's Christian Temperance Union," and nothing concerning the power of a certain

agent, the corporation will not be held liable for articles purchased by such agent without authority. *Woman's Christian Temperance Union v. Taylor* (1885), 8 Col. 75. But where a company passed a resolution to pay a certain sum to a certain class of its workmen, it was held, that the officials were not precluded by the resolution from hiring additional workmen on the same terms. *Hardy v. Tittabawassee Boom Co.* (1884), 52 Mich. 45.

⁶² *Houston & Texas Central R. Co. v. McKinney* (1881), 55 Tex. 176.

⁶³ *Hardin v. Iowa Ry. & Const. Co.* (1889), 78 Iowa, 726.

services of an attorney employed by a subordinate agent, an express delegation of authority to employ must be shown.⁶⁴

§ 728. **Authority of managing officer to issue negotiable paper, etc.**—The authority of the officers of a corporation to issue its promissory note may be inferred from the acquiescence of the corporation or by its recognition of the acts of its accredited officers in the regular course of its authorized business.⁶⁵ And in a suit for money lent to a corporation, and used by it, the defendant can not plead that the officers negotiating the loan were not properly authorized.⁶⁶ Where it is within the inherent power of a corporation to make and indorse notes, and there is evidence that in the course of its business its notes have been made by a certain officer, and that notes held by it have been indorsed in its name by that officer, an indorsement of a note by him in the name of the corporation is binding upon it, when the note is in the hands of a *bona fide* holder, and the holder is not prevented from availing himself thereof by the fact that he had never before dealt in the corporation's commercial paper, though it also appears to be the uniform custom of the corporation that all notes belonging to it should be indorsed by a certain other officer also in his individual name, before being discounted or used.⁶⁷ The possession of a note by an indorsee purporting to be indorsed by a corporation, is *prima facie* evidence that it was so indorsed, without proof that the person who made it had authority to do so.⁶⁸ An officer, whether president, general manager, or other officer, or agent of the corporation, who is entrusted with the entire management and control of its business, has implied authority to make necessary contracts, and to draw, accept or indorse notes, bills or drafts in the usual and necessary course of the corporate business. He has no such authority, if he has not entire charge of the corporate business, but is under direct control of the directors or other officers.⁶⁹

⁶⁴ Maupin v. Virginia Lead Mining Co. (1883), 78 Mo. 24.

⁶⁵ Hannibal Bank v. North Missouri Coal, etc. Co. (1885), 86 Mo. 125.

⁶⁶ Connecticut River Savings Bank v. Fiske (1884), 60 N. H. 363; nor that borrowing the money was an *ultra vires* act.

⁶⁷ Bank of Attica v. Pottier &

Stymus Manuf. Co. (1888), 49 Hun, 606.

⁶⁸ National Bank of Battle Creek v. Mallan (1887), 37 Minn. 404.

⁶⁹ Bond v. Pontiac, O. & Pt. A. R. Co. (1886), 62 Mich. 643, 4 Am. St. Rep. 885; Gane v. Loemo Printing Co., 47 Ill. App. 456; Alabama Nat. Bank v. O'Niel, 20

§ 729. **Authority of subordinate officers.**—The duties and powers of the minor officers and agents of corporations are not generally prescribed by the by-laws, but are determined by custom; and whether or not, a particular act be within the scope of such an official's authority, is to be determined largely by the circumstances of each case. Thus, while ordinarily, there is no presumption that the chief engineer of a railway company has authority to contract for the erection of a depot building, it has been held, under a particular state of facts, that a contractor might assume that a chief engineer, and others with whom he dealt, represented the company and had authority to bind it.⁷⁰ In a Florida case it was held that the roadmaster and conductor have no authority to employ surgeons for employees, in the service of a

Ala. 688; *Adriance v. Roome*, 52 Barb. (N. Y.) 399; *Schuykill Electric Ry. Co.*, 195 Pa. St. 211; *Morris v. Griffith, etc. Co.*, 69 Fed. 131; *Jewett v. West Somerville, etc. Bank*, 173 Mass. 54, 73 Am. St. Rep. 259.

⁷⁰ In an action against a corporation for services rendered and money advanced by plaintiff preparatory to making and performing a contract to construct a railroad, it appeared that one S., who assumed to be defendant's chief engineer, first called plaintiff's attention to the subject of becoming a contractor, and introduced him to L., who was said to be one of defendant's counsel, and L. submitted a proposed contract to plaintiff. Plaintiff was soon after informed that the contract was to be let to another person, D., but that plaintiff should be the latter's subcontractor in such a manner as to be subrogated to his rights. A subsequent meeting of defendant's board of directors approved the contract with D., and a proposed agreement by D. with plaintiff was also approved, and the board agreed to accept plaintiff as subrogated to D.'s rights and liabilities on the execution of the contract with D. by plaintiff. At the same meeting L. and S. were ap-

pointed counsel and chief engineer respectively of defendant, and L. sent plaintiff a copy of the resolution concerning D.'s contracts with the company and plaintiff. L. and S. had been previously designated as counsel and engineer in a printed circular, but had not been formally appointed such. Plaintiff's advances and services were given with the knowledge and consent of S. and L., and were essential in preparing to construct a railroad, and drawings paid for by plaintiff were approved by defendant's president. The construction of a railroad was defendant's only immediate object, and plaintiff had a practical knowledge of that business. Another person, who represented the stockholders, was active in the negotiations with plaintiff. And it was decided that plaintiff was entitled to assume that the persons with whom he dealt represented and acted with the authority of defendant, and that, on defendant's refusal to award him the contract, he could recover for his services and expenditures. *Wilson v. Kings County Elevated R. Co.* (1889), 114 N. Y. 487, 6 Ry. & Corp. L. J. 342.

railway company.⁷¹ And there is a similar decision in England in respect of the station master.⁷² In a case which was decided in Texas, a finding by the jury that one who had the control and direction of the entire business affairs of a railroad company, and whose duty it was to prepare the case of the company in litigations affecting it, had authority to institute a prosecution for perjury, alleged to have been committed in any such litigation, was sustained by the court.⁷³ A corporation organized and chartered for the purpose of holding the title to a college building, and property erected and maintained by a religious denomination, is bound by contracts made by the synod of the denomination for the erection of the building, the synod being a shifting, unincorporated body, which, however, controls the denomination.⁷⁴

§ 730. **Powers of directors, generally.**—The directors make all corporate contracts within the express or implied corporate powers, and without any counsel or assent of the stockholders. The stockholders can not make any corporate contracts,⁷⁵ though only they can make or authorize by-laws and elect or accept resignation of directors, and fill vacancies in the office of director. "When a charter invests a board with the power to manage the concerns of a corporation, the power is exclusive in its character. The incorporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment. The stockholders, as such, in their collective capacity, can do no corporate act. The directors are their representatives and alone authorized to act."⁷⁶ At common law the directors have powers co-extensive with those of the corporation, and have not a mere delegated authority as common agents.⁷⁷ And in the absence of restrictions in the charter or by-laws, directors have all the authority of the corporation itself in the conduct of its ordinary business.⁷⁸ They are clothed with the

⁷¹ *Peninsular R. Co. v. Gary*, 22 Fla. 356 (1886), 1 Am. St. Rep. 194.

⁷² *Cox v. Midland Counties Ry. Co.*, 3 Ex. 268, which, however, say *Brown & Theobald*, would probably not now be followed. *Brown & Theobald's Ry. Law*, 108.

⁷³ *Gulf, C. & S. F. Ry. Co. v. James* (1889), 73 Tex. 12.

⁷⁴ *McLaughlin v. Concordia College* (1885), 20 Mo. App. 42.

⁷⁵ *Sellers v. Greer* (1898), 172 Ill. 549, 40 L. R. A. 589. See 49 L. R. A. 471.

⁷⁶ *McCullough v. Moss* (1846), 5 Denio, 567.

⁷⁷ *Bliss v. Keweenaw Canal, etc. Co.*, 65 Cal. 502, 4 Pac. 507.

⁷⁸ *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Burrill v. Nahant Bank*, 43 Mass. 163, 35 Am. Dec. 395; *Park v. Grant, etc. Works*, 40 N. J. Eq. 114, 3 Atl. 162;

power of managing the corporate property, and conducting the affairs of the company.⁷⁹ Generally, whatever the directors do within the scope of the objects and powers of the corporation, the corporation does.⁸⁰ "All powers directly conferred by statute, or impliedly granted of necessity, must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts. The expression of the corporate will and the performance of corporate functions in the management of a corporation, may originate with its directors where the law or the by-laws have not expressly restricted their authority and made their action to rest for its validity upon the concurrence of the stockholders, by previous action or subsequent ratification. Within the chartered authority, they have the fullest power to regulate the concerns of the corporation, according to their best judgment; and contracts, which the corporation could legitimately make, come within the scope of the ordinary powers of corporate management."⁸¹ They have a general power to make and modify contracts, and the stockholders can not control that power when it is exercised in good faith.⁸² The law does not authorize directors to bind their companies by contracts foreign to the purposes for which they were established, but it does hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which can not clearly be shown not to fall within them; and they further hold companies to be bound by a continued course of dealing by their directors with third persons.⁸³ Where it is provided by the charter, or the enabling act under which the corporation is organized, that the directors shall "manage its affairs,"⁸⁴ the provision is construed to vest in them full authority

"Directors of Corporations," by Joseph A. Joyce, 19 Cent. L. J. 305, citing *Bank of Middlebury v. Rutland, etc. Co.*, 30 Vt. 159; *Morse on Banking*, 90. Cf. also *Dispatch Line v. Bellamy Manuf. Co.*, 12 N. H. 225; *State v. Smith*, 48 Vt. 226.

⁷⁹ *Hoyle v. Plattsburg, etc. R. Co.*, 54 N. Y. 314. They are the power which gives expression to the will of the corporation. *Salmon v. Richardson*, 30 Conn. 360; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48.

⁸⁰ "Directors of Corporations," by Joseph A. Joyce, 19 Cent. L. J. 305, citing *Leavitt v. Oxford, etc. Co.*, 3 Utah, 265.

⁸¹ *Beveridge v. N. Y. E. R. Co.*, 112 N. Y. 1.

⁸² *Flagg v. Manhattan Ry. Co.*, 20 Blatchf. C. C. 142.

⁸³ *Eastern Counties Ry. Co. v. Hawkes* (1855), 5 H. L. Cas. 331, 381; *National Exch. Co. v. Drew*, 2 Macq. 103; *Bargate v. Shortridge*, 5 H. L. Cas. 297.

⁸⁴ As in the General Railroad Act of New York (N. Y. Laws of

to act for the corporation, in all ordinary matters within the scope of its charter powers.⁸⁵ Stockholders may adopt by-laws limiting the powers of directors, if not inconsistent with the charter or general law, but not to affect third persons ignorant of such restricting by-laws.⁸⁶ And the stockholders' resolution "that it is not deemed necessary to adopt by-laws, for the reason that the articles of incorporation provide that the control and management of the corporation shall be in the hands of the board of directors," has been held to leave the entire control of the corporate business with the directory with full power to do anything the stockholders themselves or the corporation might do.⁸⁷ Under their general power to manage the corporate affairs, conferred upon them by the charter or by-laws, the directors may sign checks, borrow money, issue notes and execute mortgages to secure the same;⁸⁸ they may make the company liable for items of account against

1850, ch. 140, § 5) or that "the powers of the corporation shall be exercised by a board of directors." The English Companies Clauses Act of 1845 provides that the directors shall have the management and superintendence of the affairs of the company, and that they may lawfully exercise all the powers of the company, except as to such matters as are directed by that act or the special act of incorporation, to be transacted by a general meeting of the company; but that all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of the act and of the special act of incorporation; and shall be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by the general meeting. 8 Vic., ch. 16, § 90.

⁸⁵ *Bank of United States v. Dandridge*, 12 Wheat. 113, *per* Marshall, C. J.; *Hoyt v. Thompson*, 19 N. Y. 207, 216; *Tripp v. Swanzey Paper Co.*, 13 Pick. 291; *Sims v. Street Railroad Co.*, 37 Ohio St. 556; *Wood v. Whelen*, 93 Ill. 53; *Dana v. Bank of United*

States, 5 Watts & S. 243, 246; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. 236; *Burrill v. Nahant Bank*, 2 Met. 163, 35 Am. Dec. 395; *Wright v. Orrville Manuf. Co.*, 40 Cal. 20. *Cf.* *Beaty v. Knowler's Lessee*, 4 Pet. 152; *Bargate v. Shortridge*, 5 H. L. Cas. 297.

⁸⁶ *Fowler v. Great Southern, etc. Co.*, 104 La. 751, 29 So. 271; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187; *In re Millward-Cliff Cracker Co.*, 161 Pa. St. 167.

⁸⁷ *Reichwald v. Commercial Hotel Co.* (1883), 106 Ill. 439; *Burrill v. Nahant Bank*, 43 Mass. 163, 35 Am. Dec. 395.

⁸⁸ Under laws authorizing a mining company "to enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes for which it was created," and empowering the directors to exert its corporate powers,—it was held, that the directors might borrow money for its purposes, negotiate loans, execute notes, and sign checks. *Mahoney Mining Co. v. Anglo-Californian Bank* (1881), 104 U. S. 192; *Saltmarsh v. Spaulding* (1888), 147 Mass. 244, 4 Ry. & Corp. L. J. 151. The cir-

which the statute of limitations might otherwise have been effectually interposed as a bar to recovery;⁸⁹ they may bind their stockholders by a settlement of a pending action, although it subsequently appear that they failed to secure the best terms to which the corporation might have been entitled;⁹⁰ may make assessments, without showing that the business of the corporation requires them to be made, and this whether the statute expressly confers such power or not;⁹¹ and they may make an assignment of all the property of an insolvent company for the benefit of creditors.⁹² The latter power, however, has been questioned.⁹³ The directors have authority to amend by-laws adopted by them-

cumstances of this case, more fully, were these: The directors of a New Hampshire corporation, by vote passed in Massachusetts, authorized the execution of a certain mortgage on land in Massachusetts, the directors having by by-law the management and control of the business of the corporation, and authority to appoint all necessary agents, and the mortgage, pursuant to the vote, was executed in the name of the corporation, as was usual in Massachusetts; and it was decided that the mortgage was valid, notwithstanding Gen. Laws N. H., ch. 135, § 2, provides that corporations authorized to hold real estate may convey the same by an agent appointed for that purpose, there being no express prohibition of other modes of conveyance. Where a board of directors approve of a sale of the corporation property under mortgages executed under the seal by the president (the mortgage notes having been duly entered on the books and included in the yearly report of liabilities), this confirms the notes and mortgages as valid obligations of the corporation. *Reichwald v. Commercial Hotel Co.* (1883), 106 Ill. 439. And where a mortgage given by a corporation to secure a loan

represents upon its face that it was duly authorized by the board of directors, the mortgagee, knowing the corporation had power to borrow money, and advancing it in good faith, upon the security of the mortgage, is not bound to look beyond the mortgage for the authority for its execution. *Manhattan Hardware Co. v. Phalen* (1889), 128 Pa. St. 110; *Manhattan Hardware Co. v. Boland*, 128 Pa. St. 119 (1889). And, even acts of an Iowa corporation in acquiring property in Illinois, and in giving notes and mortgages therefor, are not "corporate acts," but such as may be done by the directors in the exercise of their powers as agents, and may be performed in Illinois. *Reichwald v. Commercial Hotel Co.* (1883), 106 Ill. 439.

⁸⁹ *Bliss v. Kaweah Canal, etc. Co.*, 65 Cal. 502; *Leavitt v. Oxford, etc. Silver Mining Co.*, 3 Utah 265, 1 Pac. 356.

⁹⁰ *Donohoe v. Mariposa, etc. Co.* (1885), 66 Cal. 317.

⁹¹ *Rutland, etc. R. Co. v. Thrall*, 35 Vt. 536; *Oglesby v. Attrill*, 105 U. S. 605; *Budd v. Multnomah Street R. Co.* (1887), 15 Oreg. 413, 3 Am. St. Rep. 169.

⁹² *Calumet Paper Co. v. Haskell, etc. Co.*, 144 Mo. 331, 66 Am. St.

⁹³ A corporation's assignment for benefit of creditors made by the board of directors without consent of the stockholders, is void

as against the stockholders, but not as against a mere creditor. *Eppright v. Nickerson* (1885), 78 Mo. 482.

selves.⁹⁴ The trustees of a secret society, vested with general power to manage its property, may lease the lodge-room to another society for one night in each week.⁹⁵ Directors are not necessarily bound to keep corporate property insured.⁹⁶

§ 731. Directors' management of the corporate business.—

The directors and president, as its agents, manage the business of the corporation, but their authority to transact the corporate business gives them no authority to manage the corporation by change of its articles of association, or to do any other act which belongs only to the corporation, unless the stockholders and the State both assent. The members are the corporation. The directors and officers are only its agents.⁹⁷ Although majority rule, as to all matters of policy and changes provided for in the charter, is one of the principal aims of incorporation, no fundamental change can be made without consent of all the members, and consent also of the State.⁹⁸ The powers of the corporation, the officers, and the stockholders, are prescribed by the charter; it is a limitation upon them severally and jointly. After the incorporation is complete, they can not change the control and management of the corporation from the method and agencies provided by the charter. It is a contract between the corporation, its members, and agents, and the State, and not to be changed without the assent of all of them.⁹⁹ The State can not change the charter, without reserved power to change or repeal it. If the State authorize a fundamental change, that may be consummated by action upon its authority. The directors alone can not accept the change, without assent of all the members; for such act of change, like the original act of incorporation, is an original contract between the corporation and the State.¹

Rep. 425; *Sargent v. Webster*, 54 Mass. 497, 46 Am. Dec. 743; *Duncomb v. New York, etc. R. Co.*, 88 N. Y. 1, 84 N. Y. 190; *Chamberlain v. Bromberg* (1888), 83 Ala. 576. And a quorum of the directors will suffice for the purpose. *Chase v. Tuttle* (1887), 55 Conn. 455, 3 Am. St. Rep. 64.

⁹⁴ *Heintzelman v. Druids Relief Assn.* (1888), 30 Minn. 138, where the articles of association provided for a board of directors and their meetings, and the management of the corporation by them,

but made no provision for corporate meetings.

⁹⁵ *Phillip v. Aurora Lodge*, 87 Ind. 505 (1883).

⁹⁶ *Charlestown Boot & Shoe Co. v. Dunsmore* (1884), 60 N. H. 85.

⁹⁷ *Bastian v. Modern Woodmen*, 166 Ill. 595.

⁹⁸ *Allerton v. Chicago, etc. Co.*, 18 Wall. 233; *Willis v. Central Ry. Co.*, 41 N. J. Eq. 5.

⁹⁹ *Mills v. Cent. R. R. Co.*, 41 N. J. Eq. 5.

¹ *Livingston v. Lynch*, 4 John. Ch. 573.

§ 732. **Limitations of directors' powers.**—The power to elect directors, does not devolve upon the directors, but that power is reserved to the shareholders. The power to sell, and transfer the charter and franchises, is not granted to them; the power to dissolve the body is not within the scope of their authority. The power is not possessed by them to effect great and radical changes in the organization of the body without the consent of the shareholders. They can not, at pleasure, and without the consent of the shareholders, increase or diminish the capital stock of the company, and thus materially affect the value of the shares and the amount of dividends.² The directors have no authority to sell its stock below par, under a charter authorizing them to sell the property of the company or notes or bonds belonging to it. And therefore the issuing by the directors of a bond convertible into stock, which is the same thing in effect as the sale of so much stock, and the sale of such a bond at a discount, is unlawful and void.³ The board of directors can not by resolution release a large number of the stock subscribers from their liability, when such act is tantamount to destroying the company;⁴ or release stockholders from liability on their subscriptions, without sufficient consideration;⁵ or dispose of all the corporate property, and wind up the corporation;⁶ or make, alter or repeal the by-laws, unless such power is delegated to them by the stockholders;⁷ or pledge the future earnings of the company;⁸ or accept an amendment, changing the character of the corporation,⁹ or enlarging its powers.¹⁰ Their authority does not extend to the reorganization or reincorporation of the company,¹¹ or to

² *Eidman v. Bowman* (1871), 58 Ill. 444, 11 Am. Rep. 90; *Railway Co. v. Allerton* (1873), 18 Wall. 233; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Chicago City Ry. Co. v. Allerton*, 18 Wall. (U. S.) 233.

³ *Sturges v. Stetson* (1858), 1 Biss. 246.

⁴ *Bedford R. Co. v. Bowser*, 48 Pa. St. 29, 37 (1864).

⁵ *Tuckerman v. Brown*, 33 N. Y. 297, 88 Am. Dec. 386.

⁶ *Chicago City Ry. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Baliet v. Brown*, 103 Pa. St. 546;

Jones v. Bank of Leadville, 10 Colo. 464, 17 Pac. 272.

⁷ *Albers v. Merchants' Exch.* of St. Louis, 39 Mo. App. 583; *Watson v. Woody Printing Co.*, 56 Mo. App. 145.

⁸ *Brown v. Bradford*, 103 Iowa, 378.

⁹ *Commonwealth v. Cullen*, 13 Pa. St. 123, 53 Am. Dec. 450; *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Venner v. Atchison, Topeka, etc. Co.*, 28 Fed. 581.

¹⁰ *Marlborough v. Smith*, 2 Conn. 579.

¹¹ *State v. Steele*, 37 Minn. 428.

its consolidation with another corporation,¹² or to a sale or lease of the entire property, except to pay debts.¹³ The executive board of a voluntary association can not convert it into a corporation unless the power is conferred on it by the constitution and by-laws, or by an express resolution of the association.¹⁴ And on the other hand the officers of a corporation of Free Masons, composed of several integral parts or lodges, can not dissolve the corporation without the full assent of the great body of the society.¹⁵ Directors have no right to pay the expenses of a suit, brought for a libel of themselves individually, out of the funds of the company.¹⁶ Nor can the directors authorize the expenses of sending out proxy-forms with stamps for their return, to be paid out of the funds of the company.¹⁷

§ 733. **How far directors may delegate their powers.**—According to a general rule of the law of agency, directors can not delegate to others any of their powers which require the exercise of judgment and discretion.¹⁸ Thus, the making of calls is a matter of discretion and, therefore, can not be delegated by them to the treasurer.¹⁹ So the directors can not make the president and treasurer a committee to order sales of shares, to obtain unpaid assessments thereon.²⁰ For the same reason the directors can not delegate the power of allotment of shares to subscribers, to two of their number and the manager,²¹ nor can they confer upon the manager of the company the power to purchase of a stockholder his shares,²² nor confer upon the bank president or cashier the power to make discounts;²³ nor confer upon an agent the power to lease the company's lands upon terms he may deem

¹² *Blatchford v. Ross*, 54 Barb. (N. Y.) 42.

¹³ *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 59 Am. St. Rep. 105; *People v. Ballard*, 134 N. Y. 269; *Easun v. Buckeye, etc. Co.*, 51 Fed. 156.

¹⁴ *Rudolph v. Southern Beneficial League* (1889), 6 Ry. & Corp. L. J. 402, 7 N. Y. Supp. 135.

¹⁵ *Smith v. Smith* (1813), 3 Desaus. 557.

¹⁶ *Studdert v. Grosvenor* (1886), 33 Ch. Div. 528.

¹⁷ *Studdert v. Grosvenor* (1886), 33 Ch. Div. 528.

¹⁸ *Silver Hook Road v. Greene*

(1878), 12 R. I. 164; *York, etc. R. Co. v. Ritchie* (1856), 40 Me. 425.

¹⁹ *Silver Hook Road v. Greene* (1878), 12 R. I. 164; *Rutland, etc. Co. v. Thrall*, 35 Vt. 536; *Pike v. Bangor, etc. Ry. Co.*, 68 Me. 45; *Banet v. Alton, etc. Ry. Co.*, 13 Ill. 504.

²⁰ *York, etc. R. Co. v. Ritchie* (1856), 40 Me. 425.

²¹ *In re Leeds Banking Co.*, 36 L. J. Eq. 42 (1867).

²² *In re County Palatine, etc. Co.* (1874), 43 L. J. Eq. 588.

²³ *Percy v. Millaudon*, 8 Mart. (N. S. La.) 68, 3 La. 568.

proper.²⁴ Nor can the directors delegate the power to declare dividends.²⁵ But the directors, having determined upon a mortgage, may commit to some other officers of the company the execution thereof.²⁶ And they may delegate the powers of the board, in ordinary business affairs, to a committee of the board, which committee may even pledge or mortgage property.²⁷ But the principle, to the extent it applies to a natural person, does not apply to officers and agents of a corporation. By necessity of attention to numerous details, and by custom, they have implied authority to appoint committees and subordinate agents, and to delegate authority to them;²⁸ although the highest judgment and discretion may be involved in the exercise of such delegated authority.²⁹ "The directors have the power, without statutory authority, to delegate to agents, or executive committees, the power to transact, not only ordinary and routine business, but business requiring the highest degree of judgment and discretion. Thus, authority to manage the business of railroad corporations, insurance companies, banking institutions and other corporations, having large and complicated business interests, is usually delegated by the directors to agents, often, but not necessarily, officers of the corporation. These agents, or managing officers, have incidental powers to employ all assistants, and to do all acts necessary to properly conduct the business over which they are given charge. Formal action of the board of directors, is not necessary in order to confer the authority. The power expressly given by statute to the board of directors to appoint such subordinate officers and agents as the business of the corporation may require, does not limit or diminish their common law powers to delegate authority. The directors represent the impersonal corporation completely, in the business it is authorized to transact, and have the power to do, or cause to be done, whatever they, as individuals, could do if the business were their own. They act as the corporation itself, as well as under a delegated authority from it."³⁰ But

²⁴ *Gillis v. Bailey*, 91 N. H. 149.

²⁵ *Gratz v. Redd*, 4 B. Mon. (Ky.) 186.

²⁶ *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888); *Burrill v. Bank*, 2 Metc. 166, 35 Am. Dec. 395; *Potts v. Wallace*, 146 U. S. 689; *Arms v. Conant*, 36 Vt. 744.

²⁷ *Hoyt v. Thompson* (1859), 19

N. Y. 205; *Burrill v. Nahant Bank* (1840), 2 Metc. 163.

²⁸ *Union Pac. Ry. Co. v. Chicago, etc. Ry. Co.*, 2 C. C. A. 174, 10 U. S. App. 98, 163 U. S. 564, 51 Fed. 309.

²⁹ *Burden v. Burden*, 9 App. Div. 160, 159 N. Y. 297.

³⁰ *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436.

such power to delegate is limited to the necessities of the corporate management. Without express authority, the directors can not delegate to others full corporate control,³¹ nor can they delegate the exercise of their own prescribed discretionary powers, to subordinate officers or agents.³² Any officer of the corporation to whom has been intrusted the general control and management of the corporate business, has implied power under his general authority, to appoint subordinate officers and agents to act under his control, although in their action they must exercise discretion and judgment; but such general manager may not so delegate any special authority conferred upon him; as, for example, to authorize a subordinate to execute negotiable paper.³³

§ 734. **Stockholders' control of directors.**—If the charter vests the full government of the corporation in the board of directors, their control and exercise of judgment is exclusive of stockholders or members.³⁴ But, unless given such control as against stockholders, their authorized acts govern, and, contrary to their protest, the directors may not act.³⁵ While it is true, that the power which ultimately controls the corporation, is its stockholders, since they may, at proper times, change the board of managing officers, and may also have recourse to courts of equity for proper redress should occasion demand,³⁶ yet powers expressly conferred upon the directors, are exclusive of any action by the members.³⁷ When a charter invests a board with the power

³¹ *Tempel v. Dodge*, 89 Tex. 68; *Flagstaff, etc. Co. v. Patrick*, 2 Utah, 304.

³² *Bliss v. Kaweah, etc. Co.*, 65 Cal. 502, 4 Pac. 507.

³³ *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436; *Emerson v. Providence Manuf. Co.*, 12 Mass. 237, 7 Am. Dec. 66.

³⁴ *McCulloch v. Moss*, 5 Denio (N. Y.), 567; *Hunt v. American Grocery Co.*, 80 Fed. 70.

³⁵ *Smith v. Wells Manuf. Co.*, 148 Ind. 333; *Cass v. Manchester Iron & Steel Co.*, 9 Fed. 640.

³⁶ "Directors of Corporations," by Joseph A. Joyce, 19 Cent. L. J. 305; *Cass v. Manchester, etc. Co.* (Pa. 1881), 13 The Reporter, 167; *Morse on Banks & Banking*, 90.

³⁷ *Moses v. Tompkins* (1887), 84

Ala. 613; *Sims v. Street R. Co.* (1882), 37 Ohio St. 556, where the court said: "If, however, the directors who are presumed to represent the will of a majority, act within the scope of their powers, their will must govern in the absence of fraud or breach of trust;" and cited *Dodge v. Woolsey*, 18 How. 342; *Ware v. Grand Junction Co.*, 2 Russ. & M. 470; *Gifford v. New Jersey R. Co.*, 10 N. J. Eq. 171; *Stevens v. Rutland, etc. R. Co.*, 29 Vt. 545; *Bissell v. Michigan S. & J. R. Co.*, 22 N. Y. 258; *Kean v. Johnson*, 1 Stock. Ch. 401. In *Conro v. Port Henry Iron Co.*, 12 Barb. 27, the directors having authority to make a lease, one made by the stockholders was held to be void. Metro-

to manage the concerns of a corporation, the power is exclusive in its character. The corporators have no right to interfere with it, and the courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment.³⁸ Within the sphere of their duties, the right of the directors to act is exclusive, but nevertheless all corporate powers do not reside in the board of directors.³⁹ Generally, so long as honesty and good faith concur, the expediency of a contract made by the directors of a corporation in its behalf, is for their determination, and their decision concludes the corporation.⁴⁰ The statute has altered the rule in England, however, so that the powers delegated to the directors, are subject to the control and regulation of any general meeting especially convened for that purpose, but not to such an extent as to render invalid any act done by the directors, prior to any resolution passed by such a general meeting.⁴¹

E.

DE FACTO DIRECTORS AND OFFICERS.

§ 735.—**Directors de facto.**—To constitute directors *de facto*, there must be a color of election, or an exercise of the functions of office under such circumstances and for such a length of time, without interference, as to justify the presumption of a legal election.⁴² To be a *de facto* officer, he must be openly in actual

politian Elevated R. Co. v. Manhattan Elevated R. Co. (1884), 11 Daly, 482, distinguishing *In re Excelsior Fire Ins. Co.* (1862), 16 Abb. Pr. 8, 14; *Elwell v. Dodge*, 33 Barb. 336, 339; *Robertson v. Bullions*, 11 N. Y. 243, 250; *In re St. Ann's Church*, 23 How. Pr. 285; *Dana v. Bank of the United States*, 5 Watts & S. 223, 246.

³⁸ *McCullough v. Moss*, 5 Denio, 567, 575. In *Railway Co. v. Alling*, 99 U. S. 463, and *Elkins v. Camden, etc. R. Co.*, 36 N. J. Eq. 241, persons obtaining majorities of stock were not enabled immediately to carry out their wishes against the board of directors.

³⁹ *Metropolitan Elevated R. Co. v. Manhattan Elevated R. Co.*, 11 Daly, 475.

⁴⁰ *Park v. Grant Locomotive*

Works (1885), 40 N. J. Eq. 114. In this case, however, the directors were managing the property of the company under an agreement with creditors, in regard to the disposition of net profits, and their discretion was limited by that agreement.

⁴¹ 8 Vic., ch. 16, § 90.

⁴² *Hudson v. Parker Machine Co.*, 173 Mass. 242; *Anglo-Cal. Bank v. Mahoney*, 5 Sawy. 255, 104 U. S. 192; *Merchants' Nat. Bank v. Citizens, etc. Co.*, 159 Mass. 505, 38 Am. St. Rep. 453; *Beach on Railways*, § 498, citing *Cary v. State*, 76 Ala. 78, and *Moses v. Tompkins* (1888), 84 Ala. 613, 4 Ry. & Corp. L. J. 268, holding that the mere exercise of the functions of office is not in itself sufficient, and saying that it

exercise of the duties of the office, claiming it under election or appointment.⁴³ In such case he is *de facto* an officer, regardless of any irregularity of election,⁴⁴ or disqualification under the by-laws,⁴⁵ and though holding over after expiration of his term.⁴⁶ The decision of a court declaring the election of the directors void, and ousting them from office, does not invalidate any of their acts while in office; as, in making assessments or calls;⁴⁷ or appointment to office;⁴⁸ such an act by *de facto* board of directors has all the force of similar acts by a *de jure* board. A board of directors, claiming an election at a meeting at which a quorum for the transaction of business was not present, can not, as against another board holding over from a previous election, about which no question is raised, be regarded as officers *de facto*. That doctrine has no application where other individuals are claiming to hold the title to the office, and the right to act therein.⁴⁹ The legality of their acts rests upon the law of estoppel.⁵⁰ *De facto* directors or other officers are estopped to deny that they were not *de jure* officers, and their acts are binding upon them as to their liability to the corporation and its creditors.⁵¹ But a *de facto* director, as such, cannot enforce any claim against the corporation, as for salary, or upon a contract executed by himself as such officer.⁵² The public to whom they have been held out by the corporation as its duly authorized agents, having no notice of the flaw in their title, may safely deal with them, until judgment of ouster has been rendered and made a matter of record. So that, where certain directors met and executed a note for the company, just after a decision removing them from office had been ren-

might well be doubted whether allegations of only two official acts would suffice to make out a *prima facie* case of *de facto* tenure.

⁴³ *Waterman v. Chicago, etc. R. Co.*, 139 Ill. 658, 32 Am. St. Rep. 228.

⁴⁴ *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453; *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265; *Ohio, etc. R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128.

⁴⁵ *Despatch, etc. v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

⁴⁶ *Trustees, etc. v. Hill*, 6 Cow.

(N. Y.) 23, 16 Am. Dec. 429; *Miliken v. Steiner*, 56 Ga. 251.

⁴⁷ *San Joaquin, etc. Co. v. Beecher*, 101 Cal. 70.

⁴⁸ *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460.

⁴⁹ *Ellsworth Woolen Manuf. Co. v. Faunce* (1887), 10 N. E. Rep. 250.

⁵⁰ *Moses v. Tompkins* (1888), 84 Ala. 613.

⁵¹ *Hall v. Westchester Co.*, 180 Pa. St. 561; *McDowall v. Sheehan*, 129 N. Y. 200; *Stetson v. Northern Inv. Co.*, 104 Iowa, 393.

⁵² *Lebanon, etc. Co. v. Adair*, 85 Ind. 344.

dered, but before the judgment had been filed and recorded, the corporation was held to be bound by their act.⁵³ But the corporation is not concluded by their acts, where the person dealing with them, had reason to know that they were acting without authority.⁵⁴ The law as to the acts of directors *de facto*, has been reduced to statutory form in England by the Companies Clauses Act of 1845.⁵⁵

The rule of estoppel, from which the acts of directors *de facto* derive validity, operates as well against third persons dealing with them as against the corporation; accordingly, they may not evade the obligation of contracts which they have made with directors *de facto*, by pleading the flaw in their title.⁵⁶ But in an action between a member and the corporation, the former is not regarded as a third party, and is not estopped from denying the right of the acting directors to represent the corporation in the matter in controversy.⁵⁷ Thus, persons acting as directors of a street-railway company, alleged not to have been legally elected, will be enjoined from selling complainants' stock for non-payment of assessments and calls thereon, and from making other calls, and the validity of their election will be examined into, as collateral to the relief sought, though an original bill to test such election would not be sustained.⁵⁸

⁵³ Mahoney Mining Co. v. Anglo-Californian Bank (1881), 104 U. S. 192.

⁵⁴ In Orr Water Ditch Co. v. Reno Water Co. (1883), 17 Nev. 166, the trustees and stockholders of a corporation sold to one subscriber the entire stock of the corporation, and delivered to him all of the property of the corporation. He remained in possession of it for three years, openly using and managing it, and then sold out to others. The trustees closed up their accounts after the sale and did no further act as trustees until three years afterwards when the majority of them met and allowed an account and drew a check; and it was held that the trustees were not then such either *de jure* or *de facto*, and that the corporation could not be held liable by reason of the check, espe-

cially as the person in whose favor it was drawn was not misled.

⁵⁵ All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding it may be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director. 8 Vic. ch. 16, § 99.

⁵⁶ Moses v. Tompkins (1888), 84 Ala. 613.

⁵⁷ Moses v. Tompkins (1888), 84 Ala. 613; Thorington v. Gold, 59 Ala. 461; People's Mutual Ins. Co. v. Westcott, 14 Gray, 440.

⁵⁸ Moses v. Tompkins (1888), 84 Ala. 613. The bill in this case also

§ 736. Officers *de facto* distinguished from officers *de jure*.—"To constitute an officer *de facto* there must be a color of election or appointment, or an exercise of the functions of the office under such circumstances and for such length of time, without interference, as to justify the presumption of a due election or appointment. The mere exercise of the functions of the office, is in itself insufficient."⁵⁹ An officer *de jure* is such when he is either in office, or is ousted from it, though entitled to it, or has not yet taken possession of it. A *de facto* officer is one who is permitted to assume the office and its powers and duties, though not legally entitled thereto; for example, an officer illegally elected or ineligible though elected, or elected under an unconstitutional law, or one not elected at all. An officer "holding over" until re-election, is *de facto* as also *de jure*. A *de jure* director, having sold all his stock, is therefore a *de facto* director while permitted to act.⁶⁰ It is the rule that the acts and contracts of a *de facto* officer, acting within the proper sphere of the powers and duties of the office, are binding upon the corporation.⁶¹ His right to act can not be questioned by those who have acquiesced therein.⁶² An officer *de facto* is one who has the reputation of being, and yet is not, an officer in point of law.⁶³ To be a *de facto* officer, one must be in possession of the office, and in the exercise of its duties, under color and claim of election or appointment,

sought to enjoin the extension of the railway, and to prevent the directors from using the effects of of the corporation for that purpose; alleging that such act was unauthorized, and contrary to the wishes of a majority of the stockholders, but not that it was *ultra vires* or a breach of trust. It was held that the injunction will be dissolved so far as it restrains the use of the corporate property in extending the road. *Stone, C. J.*, dissenting. *Cf. Atlantic, etc. R. Co. v. Johnson*, 70 N. C. 348, where in an action in trespass brought by a board of *de facto* directors against another board claiming to be directors *de jure*, the latter were not allowed to defend by impeaching the title of the former, as this, it was said,

would be doing collaterally what may be done only by direct proceedings under a writ of *quo warranto*. See also *Taylor on Corporations*, § 809.

⁵⁹ *Moses v. Tompkins* (1888), 84 Ala. 613, 4 South. 763.

⁶⁰ *Beardsley v. Johnson* (1890), 121 N. Y. 224.

⁶¹ *Mechanics', etc. Bank v. Burnett, etc. Co.* (1880), 32 N. J. Eq. 236.

⁶² *Wallace v. Walsh* (1890), 125 N. Y. 26; *Grovel, etc. Co. v. Farmers', etc. Co.* (1901), 25 Wash. 344; *Richards v. Farmers', etc. Inst.* (1893), 154 Pa. St. 449; *Savage v. Miller* (1898), 56 N. J. Eq. 432; *Silsby v. Strong* (1900), 38 Oreg. 36, 62 Pac. 633.

⁶³ *Lord Ellenborough in King v. Bedford Level*, 6 East, 368.

however irregular it may have been.⁶⁴ Though the charter, or act of incorporation, prescribe the mode in which the officers of a corporation aggregate shall be elected, and an election contrary to it would unquestionably be voidable, yet if the officer has come in under color of right and not in open contempt of all right whatever, he is an officer *de facto*,—within his sphere, an agent of the corporation,—and his acts and contracts will be binding upon it.⁶⁵ This is upon grounds of estoppel and of public policy.⁶⁶ Even in the case of a person in office without so much as the form of an election, if the corporation hold him out to the world as its officer, his acts would be binding upon it, upon the ground of estoppel.⁶⁷ But the rule respecting officers *de facto* is to be applied with caution, and not to be extended to persons clearly usurping office and holding over after the lawful election of their successors.⁶⁸ A *de facto* officer can not escape liability to the corporation, or

⁶⁴ Anglo-Californian Bank v. Mahoney, etc. Co., 5 Sawy. 255, 104 U. S. 190; State v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

⁶⁵ Wheelwright v. St. Louis, etc. Co., 56 Fed. 164; Merchants', etc. Bank v. Citizens', etc. Co., 159 Mass. 505, 38 Am. St. Rep. 453; Angell & Ames on Corporations, § 286; St. Luke's Church v. Mathews, 4 Des. 578, 586; Vernon Society v. Hills, 6 Cowen, 23; All Saints Church v. Lovett, 1 Hall. 191; Lovett v. German Reform Church, 12 Barb. 67; Riddle v. Bedford, 7 Serg. & R. 392; York County v. Small, 9 Watts & S. 320; Kingsbury v. Ledyard, 2 Watts & S. 41. In Moses v. Tompkins (1888), 84 Ala. 613, 4 Ry. & Corp. L. J. 268, 270, it was held that to constitute an officer *de facto* there must be a color of election or appointment, or an exercise of the functions of the office under such circumstances and for such a length of time, without interference, as to justify the presumption of a due election or appointment. See also McGargell v. Hazleton Coal Co., 4 Watts & S. 425; Despatch Line v. Bellamy Manuf. Co., 12 N. H. 205; Smith v. Erb, 4 Gill, 437; Burr v. McDonald, 3 Gratt. 215.

⁶⁶ Moses v. Tompkins (1888), 84 Ala. 613, 4 Ry. & Corp. L. J. 268, where the doctrine of the validity of the acts of *de facto* officers was declared to rest upon public policy and general principles of justice. Their dealings with third persons, it was there said, are sustained as rightful and valid on the ground of continuous acquiescence by the corporation in suffering them to hold themselves out as possessing authority to act for it and thereby inducing others to deal with them in the capacity of corporate officials.

⁶⁷ United States Bank v. Dandridge, 12 Wheat. 70; Union Bank v. Ridgely, 1 Harr. & G. 421; Wild v. Passamaquoddy Bank, 3 Mason, 505; Barrington v. Washington Bank, 14 Serg. & R. 405; Minor v. Mechanics' Bank, 1 Pet. 46; Cahill v. Kalamazoo Ins. Co., 2 Doug. (Mich.) 124; State v. Harris, 3 Ark. 570, 36 Am. Dec. 460.

⁶⁸ Lebanon & Royalton Gravel Road Co. v. Adair (1882), 85 Ind. 44, where under the Indiana statute governing gravel road corporations authorizing the loan of money to such a corporation by an officer thereof, and the giving of a promissory note therefor, it was

to its creditors, for his acts as officer.⁶⁹ Nor can he enforce at law any rights he may have against the corporation, based upon his position as such *de facto* officer.⁷⁰

F.

FIDUCIARY RELATIONS OF DIRECTORS.

§ 737. **Of relations toward the corporation.**—The directors, officers and agents of a corporation, are held to the general rule of law, resting “upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity.”⁷¹ The directors and officers are but agents of the company, and while acting in that capacity for it, can not deal with themselves to the detriment of the corporation. All contracts of that character are voidable at the option of the corporation.⁷² Thus, an officer of an association, who knows that it is insolvent, can not discharge his indebtedness to it with stock held by him.⁷³ As a general rule, directors and officers can not buy up claims against it at a discount, and then prove them at their face value on the winding-up of the company.⁷⁴ And the vice president of a company who is its treasurer also, and at the same time its managing and controlling officer, will not be permitted to use the corporation’s funds to purchase claims against it at a large discount and prove them for their face value on foreclosure of the corporate property, without accounting to the creditors and stockholders for all profits thus realized.⁷⁵ Even

held that such a note given to its president *de facto* only, and signed by him and by others who were only officers *de facto*, holding over after the lawful election of others, was unauthorized and invalid.

⁶⁹ Hall v. Westchester, etc. Co., 180 Pa. St. 561.

⁷⁰ Waterman v. Chicago, etc. Co., 139 Ill. 658, 32 Am. St. Rep. 228; Shellenberger v. Patterson, 168 Pa. St. 30.

⁷¹ Michoud v. Girod, 4 How. 555.

⁷² Meeker v. Winthrop Iron Co. (1882), 17 Fed. Rep. 48. *Acc. Sellers v. Phoenix Iron Co.*, 13 Fed. Rep. 20; *McAllen v. Woodcock* (1875), 60 Mo. 174; *Brewster v. Stratman* (1877), 4 Mo. App. 41; *First Nat. Bank v. Reed* (1877), 36 Mich. 263.

⁷³ *Quein v. Smith* (1885), 108 Pa. St. 325. Although it is held that after an assignment by a corporation for the benefit of its creditors, and the sale of its entire assets, one who was its treasurer and a director may purchase debts owing by the corporation, and having done so, is entitled to participate in the distribution of the fund. *Appeal of Hammond* (1879), 123 Pa. St. 503.

⁷⁴ *Taylor on Corporations*, § 633; *Lingle v. National Ins. Co.*, 45 Mo. 109; *Thomas v. Sweet*, 37 Kan. 183; *Ex parte Larkin*, 4 Ch. Div. 566.

⁷⁵ *Thomas v. Sweet* (1887), 37 Kan. 183.

the holders of a majority of the capital stock of a corporation, by their votes in a stockholders' meeting, can not lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose, and exclusively owned by them, unless the lease be made in good faith, supported by an adequate consideration; and in a suit properly prosecuted, to set aside a contract of that character, the burden of proof is upon the parties claiming thereunder. All doubts will be solved in favor of the corporation for whom the stockholders assumed to act.⁷⁶ Contracts between the president and a corporation, by which the former agrees, for a commission, to effect and become liable for a loan to the company, while looked upon with suspicion and disfavor by the court, may be enforced, if shown to have been for the benefit of the corporation.⁷⁷ And one agent may validly act in a transaction for two adversely interested corporations, if there be no improper concealment of his double agency.⁷⁸ A director may even enforce a claim against his company, which he

⁷⁶ *Meeker v. Winthrop Iron Co.* (1882), 17 Fed. Rep. 48.

⁷⁷ *Trust Co. v. Weed*, 14 Phila. 422. In *Hancock v. Holbrook* (1888), 40 La. Ann. 53, a newspaper corporation bought property, giving its bond in payment, with a surety. Being unable to pay the bond, it transferred the property to the surety who had paid it, by a vote of the majority of the stockholders at a regularly called meeting. The surety sold to the president of the late corporation, taking his notes therefor. And it was decided, in an action by a stockholder against the president, to set aside the conveyance to him, that the transaction lacked the elements of fraud and only accomplished justice. In *Baker v. Harpster* (1889), 42 Kan. 511, the officers of an incorporated company entered into a written contract with its president, by the terms of which the president was to advance, from time to time, sums of money to carry on the business of the company, and was to have as security for said advances a first lien upon all of the

property of the company. Under this agreement large sums of money were advanced by him for its use, and afterwards said company was reorganized, with the understanding that the business of the new corporation was to be a continuation of the old, the new company receiving all the assets and assuming all the liabilities of the old. The secretary of the new company indorsed upon said written contract a continuation thereof, and thereafter under such arrangement large sums of money were advanced to the company, with a full knowledge of the all the officers and directors of such company. *Held*, that the officers of said company had power to execute notes and mortgages to secure the same upon all the property of the corporation for the amount due for such advances.

⁷⁸ *Taylor on Corporations*, § 642; *Bradley v. Richardson* (1851), 23 Vt. 720; *Adams Mining Co. v. Senter* 1872), 26 Mich. 73; *Taylor on Corporations*, § 642. But see *San Diego v. San Diego, etc. R. Co.* (1872), 44 Cal. 106.

has purchased from another, provided he seek to derive no secret profit.⁷⁹

§ 737a. **Of relations toward the stockholders.**—It is by no means a well settled point, what is the precise relation which directors sustain to stockholders. They are said by many authorities to be undoubtedly trustees, but this is to be taken only in a general sense, as the term is applied to any agent or bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries, persons who have gratuitously undertaken to perform certain duties.⁸⁰ Though the relation between the directors and other officers, and the corporation, is that of principal and agent,—as agents entrusted with the management of the corporation for the benefit collectively of the stockholders, the relation is fiduciary or *quasi* trust.⁸¹ A director's relations are so far fiduciary with a stockholder to whom he is selling shares, that he is bound to reveal to the stockholder all material facts to him known affecting the value of the stock, and which are unknown to the stockholder.⁸² Where a director purchases the shares of a stockholder, concealing the fact of an impending sale of the whole plant, which nearly doubles the value of the stock, the transfer of shares may be set aside.⁸³ A director, knowing the condition of the corporate affairs, before purchasing the shares of a stockholder not actively engaged in the management, must inform him of the true conditions of the affairs of the corporation.⁸⁴ But whether a director of a corporation is to be called a trustee or not, in the strict sense of the word, there can be no doubt that his character is fiduciary, being intrusted by others with powers, which are to be exercised for the common and general interests of the corporation.⁸⁵ And it is well settled that directors and managers of corporation and other companies, are equally within the rule which guards and restrains the deal-

⁷⁹ *Smith v. Lansing*, 22 N. Y. 520; *Pacific R. v. Ketchum*, 101 U. S. 289; *Kitchen v. St. Louis, etc. Ry. Co.*, 69 Mo. 224; *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Seeley v. San Jose Mill Co.*, 59 Cal. 22; *Sullivan v. Trinifo Mining Co.*, 39 Cal. 459.

⁸⁰ *Sharswood, J.*, in *Spering's Appeal*, 78 Pa. St. 11.

⁸¹ *Pearson v. Concord R. Corp.*,

62 N. H. 537, 13 Am. St. Rep. 590; *Hoyle v. Plattsburgh, etc. Co.*, 54 N. Y. 314, 13 Am. Rep. 595.

⁸² *Oliver v. Oliver* (Ga. 1903), 45 S. E. 232.

⁸³ *Oliver v. Oliver* (Ga. 1903), 45 S. E. 232.

⁸⁴ *Stewart v. Harris* (Kan. 1904), 77 Pac. 277.

⁸⁵ *Hoyle v. Plattsburg, etc. R. Co.*, 54 N. Y. 314. *Appleton, C. J.*,

ings and transactions between trustee and beneficiary, and agent and his principal; directors or managers being in fact trustees and agents of the bodies represented by them.⁸⁶ A director whose personal interests are adverse to those of the corporation, has no right to act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign.⁸⁷ Directors of a railroad company can not acquire such an interest in the profits of a contract for the construction of the road, as would give them a standing in a court of equity to interpose an objection to the consummation of a compromise between the railroad company and its contractor.⁸⁸

§ 738. **Of relations toward creditors.**—The directors can not divert the corporate property from the general purpose of paying the creditors. A violation of this duty will entitle the creditors who suffer thereby to relief.⁸⁹ When a sale of corporate property, charged to be a diversion thereof, from the payment of corporate debts, is a sale of such property to one of the directors taking part in the transaction as buyer and seller, it devolves on the directors to establish both the good faith of the transaction, and that the sale produced the full value of the property. If not made in good faith, or if it did not produce the full value of the property, the directors taking part in the sale, will be answerable to creditors for what was thus lost.⁹⁰ In case of the insolvency of a corporation, there is no power in its directors or officers to mortgage or convey the corporate property to themselves, or to secure to themselves a preference.⁹¹ For the directors of an insolvent corporation are trustees for the creditors of the corporation, and they can not obtain priority over a creditor, by taking mortgages to themselves to secure them for advances and for their indorsement of the notes of the corporation, after the creditor

in *European, etc. R. Co. v. Poor*, 59 Me. 277, said that the president and directors of a corporation must be held as occupying a fiduciary relation to the stockholders, for and in behalf of whom they act.

⁸⁶ *Cumberland, etc. Co. v. Parish* (1875), 42 Md. 598, 605, citing *Att'y-Gen. v. Wilson*, 1 Craig & P. 1; *Benson v. Heathorn*, 1 Young & C. Ch. 326; *York, etc. R. Co. v. Hudson*, 16 Beav. 485; *Aberdeen R. Co. v. Blaikie*, 1 Macq.

461; *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 586; *Hoffman, etc. Co. v. Cumb, etc. Co.*, 16 Md. 456, 20 Md. 117.

⁸⁷ *Goodin v. Cincinnati, etc. Co.* (1868), 18 Ohio St. 183.

⁸⁸ *Paine v. Lake Erie, etc. R. Co.* (1869), 31 Ind. 283, 353.

⁸⁹ *Wilkinson v. Bauerle* (1886), 41 N. J. Eq. 635, 645.

⁹⁰ *Wilkinson v. Bauerle* (1886), 41 N. J. Eq. 635, 645.

⁹¹ *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639.

has brought suit, and when the company is insolvent.⁹² But a sale of its property by an insolvent corporation to one of its directors to satisfy a debt, though made without an order of the board of directors, is ratified by the company's receiving and canceling the notes in payment of which it was made.⁹³ The directors of a company stand in the same relation toward creditors of the corporation, that they do to its shareholders, being trustees for the benefit of corporate creditors also.⁹⁴

§ 739. **Personal interest of directors. Dealing with themselves as individuals.**—It is the rule that, as to *quasi*-public corporations, a contract entered into by the authority or direction of its directors with themselves, and for their benefit, or a transfer of its property by authority of themselves as directors to themselves as individuals, may be set aside in case it injures any public interest, or the private interest of any shareholder or creditor, even though the contract or transfer was executed in good faith by the directors;⁹⁵ and as to strictly private corporations, such contracts are not void, but are voidable as to those who are affected by the fraud.⁹⁶ The rule, that an agent may not, by his acts, profit at the expense of his principal, or a trustee to the detriment of his beneficiary, governs, in all transactions by a director, or other corporate officer, relating to the corporation.⁹⁷ Where his relations with the corporation are fiduciary, he is not allowed to act both for the corporation and for himself, in buying property from, or selling property to it, or in contracting with it, alone, or with other officers, where he is personally interested, and his vote or counsel is necessary to the transaction. Any such con-

⁹² *Olney v. Conanicut Land Co.* (R. I. 1889), 6 Ry. & Corp. Law J. 414, where it was held also that the facts that the creditor had not reduced his claim to judgment at the time the mortgage was given, and that the claim was for damages suffered by the creditor through the negligence of the company while he was a guest at the company's hotel, do not change the duty of the directors to him, as they had notice of the claim by the commencement of suit.

⁹³ *Beach v. Miller*, 123 Ill. App. 151.

⁹⁴ *Thomas v. Sweet* (1887), 37

Kan. 183; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635; *Goodin v. Cincinnati, etc. Co.* (1868), 18 Ohio St. 183; *Delano v. Case* (1887), 121 Ill. 247, 2 Am. St. Rep. 81, holding that directors of a bank are trustees for depositors as well as for stockholders.

⁹⁵ *Tamble v. Queen, etc. Co.*, 123 N. Y. 91; *Duncomb v. Railroad Co.*, 84 N. Y. 190; *Bjornsgaard v. Goodhue Co. Bank* (1893), 59 Minn. 483.

⁹⁶ *Skinner v. Smith*, 134 N. Y. 240.

⁹⁷ *People v. Township Board, etc.*, 11 Mich. 222.

tract is voidable by the stockholders, and any profits of the transaction are recoverable, without proof of actual fraud, or of injury to the corporation.⁹⁸ The rule, as announced by Judge Andrews, is: "The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction, or refuses to enforce it at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall."⁹⁹ If less than a majority of the directors are disinterested in a contract voted upon by the board, it is voidable by the corporation, and at the instance of stockholders who are entitled to complain.¹ Among numerous examples in the authorities of application of the rule, that a majority of the directors must be personally disinterested in the matter voted upon, are: voting a salary to themselves, or to one of themselves as corporate officer;² purchasing property from one or more directors at a price above its cost to them;³ renewal of notes of the corporation to themselves;⁴ making contract with a partnership, of which a director is a member;⁵ making a contract between two corporations, where one or more directors or other officer of one, is also director, officer, or stockholder in the other.⁶ Where officers of a corporation sell property to it on the

⁹⁸ *Thomas v. Brownville, etc. Ry. Co.*, 2 Fed. 877, 109 U. S. 522; *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654; *Union Pacific Ry. Co. v. Credit Mobilier, etc.*, 135 Mass. 367; *Chicago, etc. Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315; *Sims v. Petaluma, etc. Co.*, 131 Cal. 656; *O'Connor, etc. Co. v. Coosa Furnace Co.*, 95 Ala. 614, 36 Am. St. Rep. 251.

⁹⁹ *Munson v. Syracuse, etc. Ry. Co.*, 103 N. Y. 58.

¹ *Smith v. Los Angeles, etc. Assn.*, 78 Cal. 289, 12 Am. St. Rep. 53.

² *Davis v. Memphis Ry. Co.*, 22 Fed. 883; *Copeland v. Johnson Manuf. Co.*, 47 Hun (N. Y.), 237.

³ *Parker v. Nickerson*, 112 Mass. 195.

⁴ *Smith v. Los Angeles, etc. Assn.*, 78 Cal. 289, 12 Am. St. 53.

⁵ *Davis v. Rock Creek, etc. Co.*, 35 Cal. 359, 36 Am. Rep. 40; *Sims v. Petaluma, etc. Co.*, 131 Cal. 656.

⁶ *O'Connor, etc. Co. v. Coosa Furnace Co.*, 95 Ala. 614, 36 Am. St. Rep. 251; *Parker v. Nickerson*, 112 Mass. 195; *United States, etc. Co. v. Atlantic, etc. Ry. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380.

one hand, and buy for it on the other, and make a profit for themselves by the transaction, they will be liable to the company for the profit.⁷

Dealing with themselves as individuals.—As two parties are essential to any contract, one can not be both vendor and purchaser. A corporate officer can not make any valid contract in behalf of the corporation, with himself as an individual;⁸ but, as such officer, he may contract for the corporation with himself, under direct supervision of a superior officer, as, to convey his own property to the corporation.⁹ Directors are agents to buy labor and materials with which to build roads and works for their companies; in brief, to make construction contracts. Such contracts, made with themselves, or with third persons who are their partners in business, are voidable.¹⁰ They can not purchase on their own account, what they sell on account of their company;

⁷ *Pittsburg Min. Co. v. Spooner* (1889), 47 Wis. 307, in which case a complaint alleged that defendants, having obtained the right to purchase a mining option for twenty thousand dollars, proceeded to form a corporation to make the purchase, representing to the persons who subscribed for stock that the option would cost ninety thousand dollars; and that, having first induced third persons to subscribe for stock on those representations, and to pay to the corporation the sum of one hundred thousand dollars for their stock, the corporation then, through defendants, its officers, purchased the option nominally for ninety thousand dollars, paying the twenty thousand which it actually cost them with the money received by the corporation from the sale of stock, and converting the remaining seventy thousand to their own use. The action was brought in the name of the corporation, to recover the latter amount, and upon the principle stated in the text it was held that a good cause of action was stated. And it was further held that it was immaterial that the sale and purchase were made at a time

when defendants were the only members of the corporation, the stock not having been then actually allotted to the third persons, who were in reality interested in the formation of the corporation, and who had agreed to take the stock; that the fact that the ninety thousand which the corporation paid defendants for the option were the proceeds of an issue of its stock in violation of the statute could be set up to defeat the recovery from defendants of the excess over the actual purchase price; and that the defendants were in no position to attack either the issue of the stock or the legality of the corporate organization.

⁸ *Miner v. Belle Isle Ice Co.*, 93 Mich. 97; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 59 Am. Rep. 466, note; *People v. Township Board, etc.*, 11 Mich. 222.

⁹ *Louisville, etc. Ry. Co. v. Carson*, 151 Ill. 444.

¹⁰ *European, etc. R. Co. v. Poor*, 59 Me. 279; *Flint, etc. R. Co. v. Lake Erie & L. R. Co.*, 31 Ind. 283; *Port v. Russell*, 36 Ind. 60; *Port v. Russell*, 36, 36 Ind. 60; *Weed v. Little Falls & D. R. Co.* (1883), 31 Minn. 154.

if they do, the company may repudiate the sale, or may charge the profits made by the directors as trustees or agents, with an implied trust for its benefit.¹¹ Neither can directors, purchasing property for their companies, retain a commission paid them by the vendor for effecting the sale.¹² And if property is conveyed to them personally, they can hold it only as trustees for the company.¹³ Under no circumstances can they resell to the company at an advance.¹⁴ The purchase of assets of an incorporated company by one of its directors, is voidable only at the instance of a party in interest. Such director is conclusively presumed to know the financial condition of the company, and therefore the transaction is not *bona fide*.¹⁵ The mere fact, however, that one of the directors was interested in a purchase made by a corporation, will not avoid the purchase, no damage appearing to have resulted to the shareholder making the complaint.¹⁶

¹¹ Parker v. Nickerson (1873), 112 Mass. 195; Greenfield Sav. Bank v. Simons (1882), 133 Mass. 415.

¹² Morrison v. Ogdensburg & L. C. R. Co., 52 Barb. 173, 179.

¹³ York & North Midland R. Co., 19 Eng. L. & Eq. 361; Blake v. Buffalo Creek R. Co., 56 N. Y. 485; Buffalo, etc. R. Co. v. Lampson, 47 Barb. 533; Great Luxembourg R. Co. v. Magnay, 25 Beav. 586.

¹⁴ Redmond v. Dickerson, 9 N. J. Eq. 515; McAleer v. Murray, 58 Pa. St. 126.

¹⁵ Jones v. Arkansas Agricultural & Mechanical Co., 38 Ark. 17. And where the directors of a railroad company, which has suspended operations, purchase part of the construction material, execution creditors of the company can not avoid the purchase, and take the material from the directors' possession under execution against the company. Cornell v. Clark (1887), 104 N. Y. 451. A director of a corporation purchased at a foreclosure sale property of the corporation mortgaged by vote of the directors. But it was held that good faith being shown, the sale could not be avoided; and, in the absence of

good faith, the sale could be avoided only upon repayment of the purchase price, and then by the corporation or its stockholders, and not by the purchaser of the land at a sale on execution in a suit against the corporation. Saltmarsh v. Spaulding (1888), 147 Mass. 224.

¹⁶ Hill v. Nisbet, 100 Ind. 341. So it is not necessarily a fraud on the creditors of a corporation for its trustees to purchase of one of its number property for the alleged benefit of the corporation, paying therefore the entire capital of the corporation. Such a transaction may or may not be fraudulent, according to circumstances. Knowles v. Duffy, 40 Hun, 485. And the owners of a graded railroad bed can sell it to a railroad company, whose officers, directors, and stockholders are composed of the owners of the road-bed, and receive in payment therefor shares in the capital stock of the railroad company, at a time when those who sell the road-bed, and own and control the railroad company, are the absolute owners of all the stock issued by the railroad company, and where the terms of sale and the issue of

Purchase by directors of claims against the corporation.—Directors, or other officers, who have charge or management of the corporation, may purchase legitimate claims against it, or advance money for paying them, and hold the corporation for such payment, and legal interest thereon; but, they are not allowed to settle any such claim at a discount, and hold the corporation for its full amount.¹⁷ A director may purchase an obligation of the corporation, if he is under no duty at the time to act in the premises for the corporation, and the rights of other creditors are not thereby prejudiced.¹⁸

Purchase of corporate property at execution sale.—A director or other corporate officer may, on his personal account, purchase corporate property at execution sale without liability to the corporation, if at the time he does not represent it in the affair, or does not induce the sale in violation of his official duty;¹⁹ or may purchase at foreclosure sale, under a mortgage which secures a debt to himself.²⁰

Ratification of contract between the corporation and a director.—The stockholders may ratify by consent or acquiescence,²¹ any contract between the corporation and its directors, or other officers, which they had power to make.²² The board of directors, by a majority disinterested, may similarly ratify any act or contract which they could have authorized.²³ A director buying up claims against a company for a third party, must act in good faith.²⁴

stock, are matters of record on the books of the railroad company, and when the transaction occurs months before any other or additional stock is issued by the railroad company. St. Louis, F. S. & W. R. Co. v. Tiernan (1887), 37 Kan. 606.

¹⁷ Duncan v. New York, etc. Ry. Co., 84 N. Y. 190; McDonald v. Houghton, 70 N. C. 393.

¹⁸ McIntyre v. Ajax Min. Co. (Utah, 1904), 77 Pac. 613.

¹⁹ New Memphis, etc. Cases, 205 Tenn. 268, 80 Am. St. Rep. 880; McKittrick v. Arkansas, etc. Ry. Co., 152 U. S. 473; Lucas v. Friant, 11 Mich. 426.

²⁰ Saltmarsh v. Spaulding, 147 Mass. 224.

²¹ Foster v. Bear Valley, etc. Co.,

65 Fed. 836; Stetson v. Northern, etc. Co., 104 Iowa, 393.

²² Hoyle v. Plattsburgh, etc. Ry. Co., 54 N. Y. 314, 13 Am. Rep. 595; Louisville, etc. Ry. Co. v. Carson, 151 Ill. 444; O'Connor, etc. Co. v. Coosa Furnace Co., 95 Ala. 614, 36 Am. St. Rep. 251.

²³ Miner v. Mechanics' Bank, etc., 1 Pet. (U. S.) 46.

²⁴ So decided. An attorney, who was also a director, of an insolvent railroad company, was employed by third parties, who desired to reorganize the road, to buy up the claims of plaintiffs, creditors of the company, which he did, not informing them of the scheme of reorganization. His position as director and attorney for the debtor company required him,

§ 740. **Secret Profits.**—"A director can not, directly or indirectly derive any personal benefit or advantage to himself by reason of his position distinct from his co-shareholders." He must account to the corporation for all secret profits derived in any dealings in regard to it, however much the transaction may be of profit or advantage to the corporation.²⁵ Even where the president, a director in the corporation, received a bribe in money to secure the election of outside parties to be directors, and to control the corporation, he was held to account for the money.²⁶ Where his duty was to negotiate for the purchase of land for the corporation, and he acquired it for his own benefit in his own name, his purchase was held, in equity, to be in trust for the corporation.²⁷ A contract between a corporate officer and a third person, in promotion of a fraud upon the corporation, is contrary to public policy, and can not be enforced by either party.²⁸ It is no violation of the rule against retaining secret profits, for a director to sell to the corporation, property at whatever profit to himself, if he purchased it when he was not a director, and owed no duty to the corporation.²⁹ A director may sell to the company property in which he has an interest, provided the property be of a kind which the company is authorized to purchase and which as a matter of fact, it needs for the purposes of its incorporation, if the transaction be in good faith.³⁰ But any secret profits that directors may make in transactions with their corporation, may be recovered by the company, although the latter may also have profited by the transaction.³¹ For fraud is presumed as a

in his dealings with plaintiff, to exercise the utmost good faith; but, where they received all that their claims were worth, the fact that they were not informed as to the new scheme would not constitute constructive fraud on the part of the director. *Powell v. Willamette Val. R. Co.* (1887), 14 Oregon, 356.

²⁵ *Bird, etc. Co. v. Humes*, 157 Pa. St. 278, 37 Am. St. 727.

²⁶ *McClure v. Law*, 161 N. Y. 78, 76 Am. St. Rep. 262.

²⁷ *Higgins v. Lansingh*, 154 Ill. 301.

²⁸ *Guernsey v. Cook*, 120 Mass. 501; *Noel v. Drake*, 28 Kan. 265,

42 Am. Rep. 162; *West v. Camden*, 135 U. S. 507.

²⁹ *St. Louis, etc. Co. v. Chenault*, 36 Kan. 51.

³⁰ *Knowles v. Duffy* (1886), 40 Hun, 485, where the whole capital stock was paid for the property, and it was held not to be a fraud upon corporate creditors.

³¹ *European, etc. Ry. Co. v. Poor*, 59 Me. 195; *Greenfield Savings Bank v. Simons*, 133 Mass. 415; *Parker v. Nickerson*, 112 Mass. 195; *Bent v. Priest*, 10 Mo. App. 543. See *Imperial Mercantile Credit Assn. v. Coleman*, L. R. 6 H. L. 189; 2 *Lindley on Partnership*, 588, 589.

matter of law, if it be shown that the directors have in this way acquired any secret profits.³² They can not sell property to the corporation at an advance upon the price paid by them, where they have purchased it with that end in view, and nothing has been done in the meanwhile to enhance the value of the property.³³ Thus, a contract entered into by the officers and directors of a railroad company to purchase lands and locate their line, depots etc., thereon, is contrary to public policy and is unenforceable in equity.³⁴ But if afterwards, by the director's energy and skill, the property becomes more valuable, he can not be required to account to the company for the increased value.³⁵ Directors can not, in general, make gains or receive benefits from dealings of the corporation with persons connected with themselves.³⁶

³² *Duncomb v. New York, etc. R. Co.* 84 N. Y. 190; *Flint v. Dewey*, 14 Mich. 477; *Greenfield Savings Bank v. Simons*, 133 Mass. 415; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. 505; *Bent v. Priest*, 10 Mo. App. 543; *Cook v. Berlin Woolen Mills Co.*, 43 Wis. 433. *Cf. Davone v. Fanning*, 2 Johns. Ch. 252. Where the president of packet company made a contract in his own behalf with the United States government for the carriage of the mails and used the boats of the company for that purpose, it was held that he should not be allowed to make any profit out of the use of the company's boats, but must account to it for all that he received for the service performed by them. *Clubb v. Davidson* (1888), 95 Mo. 467, 4 Ry. & Corp. L. J. 161. But where a director purchased in good faith at a foreclosure sale property of the corporation which had been mortgaged by a vote of the directors, he does not necessarily hold the purchased property in trust for the corporation. *Saltmarsh v. Spaulding* (1888), 147 Mass. 224, 4 Ry. & Corp. L. J. 151. *Acc. Hancock v. Holbrook* (La. 1888), 3 So. Rep. 351. *Cf. County Court v. Baltimore, etc. R. Co.* (1888), 35 Fed. Rep. 161.

³³ *Benson v. Heathhorn*, 1 *Younge & C.* 326, and cases cited *infra*.

³⁴ *Cook v. Sherman*, 20 Fed. Rep. 167.

³⁵ *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, where the sale was to repay money lent by the director himself to the corporation. *Addison v. Lewis*, 75 Va. 701, 720; *Harts v. Brown*, 77 Ill. 226. *Cf. Seely v. San José Mill Co.*, 59 Cal. 22.

³⁶ A director of a corporation can not enforce a contract made with his co-directors, under which he is to have one-third of a profit of \$100,000 for selling a railroad property, his services being trifling. Such a contract is beyond the power of the directors to make. *Hubbard v. New York, N. E. etc. Investment Co.*, 14 Fed. Rep. 675. In *Bent v. Priest*, 86 Mo. 475, the defendant, a director in a life insurance company, in consideration of certain railroad bonds delivered to his business partner, agreed to and did advocate and vote for the assignment of the company's policies to another company and for the reinsurance of the same in the latter company; and it was held that so many of the bonds as defendant received belonged to the cor-

Participation in secret profits, realized by directors at a sale in foreclosure of the corporate property, collusively permitted or otherwise, is a common scheme of fraud by directors, operated at the expense of the corporation, its stockholders and creditors. Any purchase by the directors of the corporate property, however adequate the price may be, is voidable by the corporation.³⁷ *Vide infra*, § 1199.

G.

CONTRACTS AND DEALS, BETWEEN OFFICERS AND THE CORPORATION.

§ 741. **Contracts with the corporation.**—Directors are disqualified from acting in right and behalf of themselves, and of their companies at the same time; and transactions with themselves, or wherein they are interested, are voidable, either by the company or by its stockholders, or by its creditors,³⁸ provided

poration of which he was a director, and on his failure to produce the same, a judgment for their estimated value was rightly entered. A bill in equity, brought by three stockholders, two of whom were directors, against four other directors, constituting the executive committee, one of whom was treasurer, charged that the treasurer bought exclusively of a firm of which he was a member, at prices largely in excess of the market rates, and asking for his removal and a settlement of his accounts; and it was held to show no equity as not charging fraud on the part of the other members of the committee or alleging that redress had been sought by an appeal to the directors, or by vote of the stockholders, or by other remedies provided by the charter or by-laws. *Tuscaloosa Manuf. Co. v. Cox*, 68 Ala. 71. While an arrangement by which a managing director of a railroad corporation puts forward a third person as a contractor to do work for the corporation, the director designing to secure a special benefit to himself, may be constructively fraudulent, yet where the relation of the director to the contract is

not that of an undisclosed principal, and the stockholders have knowledge of the fact and power to prevent the consummation of the contract, if they choose, actual fraud not existing, constructive fraud will not be presumed. *Union Pacific R. R. Co. v. Credit Mobilier*, 135 Mass. 367.

³⁷ *Cumberland, etc. Co. v. Sherman* (1859), 30 Barb. 553.

³⁸ The law as to directors' contracts with themselves is that they are not void, but merely voidable. The company has an election to affirm or disaffirm them; and having made its election, it would be estopped from abandoning its choice in case it should prove to have been unwise. And where a director's contract with himself is one which is also injurious to the public, or to any person not interested pecuniarily in the company, it would seem that the public or such person might have it declared void. For example, if it be a contract discriminating in freight rates in the director's favor, persons discriminated against, or the public, might impeach and invalidate it. This is consistent with the law which makes unjust discrimination ille-

they repudiate the transaction within a reasonable time.³⁹ The same rule applies to any money made out of any transaction of the company's business or connected therewith.⁴⁰ And where a director had to vote for a contract with himself to secure its passage, the contract was held invalid.⁴¹ But on the other hand, it has been held that where a quorum of a board of directors of a corporation votes to make a contract with some of their number, the contract is not necessarily void because those members voted,

gal. 16 Am. L. Rev. 919; Davis v. Rock Creek, etc. Co., 55 Cal. 359, 36 Am. Rep. 40; Port v. Russell, 36 Ind. 60, 10 Am. Rep. 5; Coleman v. Second Ave. R. Co., 38 N. Y. 301; Butts v. Wood, 37 N. Y. 317; Munson v. Syracuse, etc. Ry. Co., 29 Hun, 76; Weed v. Little Falls & D. R. Co. (1883), 31 Minn. 154; First National Bank v. Drake, 29 Kan. 311; Guild v. Parker, 43 N. J. 430; First National Bank v. Gifford, 47 Iowa, 575; Chamberlain v. Pacific Wool Growers' Co., 54 Cal. 103; European, etc. R. Co. v. Poor, 59 Me. 277; Blair Town Lot Co. v. Walker, 50 Iowa, 376; *Ex parte* Hill, 32 L. J. Eq. 154; Murray v. Vanderbilt, 39 Barb. 140; Abbot v. American Hard Rubber Co., 33 Barb. 578; Rhodes v. Webb, 24 Minn. 292. *Cf.* Taylor on Corporations, § 619. In England under the Companies Clauses Act of 1845 if a director is interested in a contract with the company, while the contract is not void, he will be disqualified to act as a director. 8 Vic. ch. 16 §§ 85, 86; Foster v. Oxford, etc. Ry. Co., 13 C. B. 200, 22 L. J. C. B. 99, 17 Jur. 167; Browne & Theobald's Ry. Law, 102.

³⁹ Stewart v. Lehigh Valley R. Co. (1875), 38 N. J. L. 505; Twin Lick Oil Co. v. Marbury (1875), 91 U. S. 591; Ryan v. Leavenworth, etc. Ry. Co., 21 Kan. 365, where it was said: "It was not necessary to allege that the company did not discover the fraud of the defendants until within two years next before the suit was

commenced, as the allegations of the petition show satisfactorily that the company was and continues to be under the potential control of the wrong-doers, who are necessary defendants; and knowledge on the part of the guilty officers and agents of the corporation of the fraudulent acts of themselves and guilty associates, is not notice to the corporation or its stockholders, so as to give the advantage of this notice to such agents and associates. (City of Oakland v. Carpenter, 13 Cal. 540.) Upon this point the counsel of plaintiffs well say: 'The defendants are estopped from setting up their own laches in failing to sue themselves. Nor can they be heard to claim that the corporation had notice, on the ground that when they committed the wrongs it had full notice of what they were doing. They were the eyes, the ears and the hands of the corporation, through which alone it could see, hear or act.' " There has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in every case upon all the elements of it which affect that question. Twin Lick Oil Co. v. Marbury (1875), 91 U. S. 591.

⁴⁰ Gaskell v. Chambers, 26 Beav. 360; York, etc. Ry. Co. v. Hudson, 16 Beav. 485; Madrid Bank v. Pelly, L. R. 7 Eq. 442.

⁴¹ Bennett v. St. Louis Car Roofing Co., 19 Mo. App. 349. *Cf.* Reilly v. Oglesbay, 25 W. Va. 36.

no fraud or bad faith being charged.⁴² And, generally, a director of a company may deal with it in like manner as may any other individual, if he deal honorably, with full disclosure to the company that he is acting in his own behalf, and adversely to it, and without endeavoring to influence or control it.⁴³ Independently of statute, a contract between a director and the corporation is not voidable, merely because made with a director, when all interested in the corporation, officers, directors, and stockholders, not only know of, but consent to it, and the property acquired by it is kept and used by the corporation.⁴⁴ But the company must either adopt the transaction, or repudiate it, and if it elect to do the latter, it must repudiate it altogether. It can not repudiate it so far as it is onerous, and adopt it so far as it is beneficial.⁴⁵ Thus, in case of an election to set aside a transaction with a director, the purchase price paid by the latter must be refunded.⁴⁶ In no case can specific performance of an agreement by a director with the company for the benefit of himself or his firm, be enforced.⁴⁷ Directors are precluded by their fiduciary *status* from sharing any personal advantage from contracts, beyond that they may be entitled to as stockholders.⁴⁸ An unfair contract between

⁴² Leavitt v. Oxford & Geneva Silver Mining Co., 3 Utah, 265.

⁴³ "Directors' Contracts with Themselves," 16 Am. L. Rev. 917, citing Harts v. Brown, 77 Ill. 226; United States Rolling Stock Co. v. Atlantic, etc. R. Co., 34 Ohio St. 450; Mayor of Griffin v. Inman, 57 Ga. 370; Foster v. Oxford W. & W. R. Co., 13 C. B. 200.

⁴⁴ Battelle v. Northwestern Cement, etc. Co. (1887), 37 Minn. 89; Knowles v. Duffy (1886), 40 Hun, 485; Budd v. Walla Walla, etc. Co. 2 Wash. 347; Santa Cruz R. Co. v. Spreckles, 65 Cal. 193; Hill v. Nisbet, 100 Ind. 341. Thus where a transaction fairly and openly entered into between a corporation and one of its directors, sanctioned by all and inuring to the benefit of the corporation, will not be set aside at its instance seven years afterwards on the ground that it was *ultra vires*. Pneumatic Gas Co. v. Berry, 113 U. S. 322.

⁴⁵ Great Luxembourg Ry. Co. v. Magnay (1858), 25 Beav. 586. In this case the railway company furnished a director with a large sum of money, to enable him to purchase the "concession" of another line. He purchased it, as it turned out, from himself, he being the concealed owner of it. And it was held that the transaction could not stand, but that the company having sold the concession pending the suit impeaching the transaction, they could have no relief, either as to the application of the money or otherwise.

⁴⁶ Cornell v. Clark (1887), 104 N. Y. 451; Saltmarsh v. Spaulding (1887), 147 Mass. 224.

⁴⁷ Flanagan v. Great Western Ry. Co. (1868), L. R. 7 Eq. Cas. 116.

⁴⁸ Robertson v. H. E. Bucklen & Co. (1903), 107 Ill. App. 369.

a corporation and its directors, where undue advantage is attempted against the corporation, may be set aside at the instance of the corporation or its creditors or stockholders.⁴⁹ Where, by resolution, the corporation voted to sell certain of its stock to one of the directors, they could vote on the resolution without consent of all persons interested.⁵⁰

§ 742. **Entitled to security for money lent.**—When the lender of money to a corporation is a director, charged along with others with its control and management, his obligation, when he becomes a party to a contract with it, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him; but the general doctrine with regard to this class of contracts, is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it.⁵¹ Accordingly, a director of a corporation is not prohibited from lending it

⁴⁹ Wyman v. Bowint (Iowa, 1904), 127 Fed. 257, U. S. C. C. A.

⁵⁰ Hartley v. Pioneer, etc Works (1903), 84 N. Y. S. 79.

⁵¹ Addison v. Lewis, 75 Va. 701; Hallam v. Indianola Hotel Co., 56 Iowa, 178, Am. Law Reg. July, 1882, and note by Adelbert Hamilton. In order to enable a manufacturing corporation to pay its debts and thus continue its business, its directors may guaranty payment of its note made to its own order, and take as security for their liability its mortgage of all its property. Hopson v. Aetna Axle & Spring Co., 50 Conn. 597. And where a corporation, to secure certain of its notes on which the directors were accommodation indorsers, assigned certain bonds which were part of its assets at a time when suits were pending against it for the appointment of a receiver, it was held that the assignment, if made in good faith, was valid. Planters' Bank v. Whittle, 78 Va. 737. So, the appropriation of bills receivable, by the directors of a bank, as indemnity for notes issued by them

for the accommodation of the bank, if done in good faith, in ignorance of the impending insolvency of the bank, does not render them liable either for fraud or negligence. Appeal of Warner (Pa. 1887), 7 Atl. Rep. 216. A wool dealer applied to the Wool-Growers' Exchange for money to purchase wool. The exchange not being able to raise the money on its credit, the directors discounted their individual notes for the amount, and the dealer gave his note as collateral. The directors paid their notes without receiving money from the exchange for that purpose. The exchange made an assignment for the benefit of its creditors. An attorney employed, succeeded in collecting some of the money still due on the dealer's collateral. Held, that the attorney's fees should first be paid out of this money, and that the balance should be distributed among the directors, in preference to the creditors, of the exchange. Appeal of Atkinson (Pa. 1887), 11 Atl. Rep. 239.

moneys when needed, if the transaction be open, and otherwise without blame; nor is his subsequent purchase of its property, at a fair public sale by a trustee, under a trust deed executed to secure the repayment of his loan,—invalid.⁵² But directors may lend money to the corporation, only upon terms as favorable as the most favorable upon which it could borrow from others.⁵³ Thus, a director of a corporation, on a mortgage taken as security for notes given him by the corporation—on money advanced by him,—can not recover excessive interest stipulated for, nor an amount included therein beyond the sum which he advanced.⁵⁴ A director of a corporation is disqualified to vote at a meeting of the board, on a resolution authorizing the renewal of notes in his own favor.⁵⁵ Shares of its stock owned by a corporation, may be assigned to a creditor in satisfaction of the debt, and it makes no difference that the creditor was a trustee and

⁵² *Saltmarsh v. Spaulding* (1888), 147 Mass. 224, citing *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Holt v. Bennett*, 146 Mass. 439; *Harts v. Brown*, 77 Ill. 226; *McMurtry v. Montgomery, etc. Co.* (1887), 84 Ky. 462; *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193; *Hallam v. Indianola Hotel Co.*, 56 Iowa, 178; *Duncomb v. New York, etc. R. R. Co.*, 88 N. Y. 1, 84 N. Y. 190, where the security taken was the bonds of the company at ten cents on the dollar. The advances may be of services and materials instead of money. Where the director of a turnpike company renders services and furnishes materials to the company, which are necessary to the completion of its road, he is entitled to a reasonable compensation therefor. *Greensboro & N. C. J. Turnpike Co. v. Stratton* (1889), 120 Ind. 294. And a director, making a *bona fide* advance of money to a corporation, which is accepted and expended for the necessary purposes of the corporation, has a legal claim therefor against the corporation. *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193; *Borland v.*

De Haven (1889), 37 Fed. Rep. 394. In a case in Massachusetts, a corporation, having borrowed money from its directors and secretary, and being in need of funds for its business, negotiated its note, secured by a conveyance of all its property, and with the proceeds paid the loans to its directors and secretary, and with the balance bought materials and defrayed legitimate expenses. Subsequently its property was sold for its full market value, and the proceeds applied as far as they went to the payment of the note. It was held that as all the transactions were in good faith and in the due course of business, a creditor whose debt had not been paid had no claim on the directors individually for the payment of it. *Holt v. Bennett* (1886), 146 Mass. 439.

⁵³ *Sutter St. R. Co. v. Baum*, 66 Cal. 44; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Campbell's Case*, 4 Ch. Div. 470.

⁵⁴ *Sutter St. R. Co. v. Baum*, 66 Cal. 44.

⁵⁵ *Smith v. Los Angeles I. & L. Co-operative Assn.* (1889), 78 Cal. 289.

took part in the proceedings authorizing the assignment, if the proceedings were afterwards ratified by the corporation.⁵⁶

§ 743. **Dealing in company's bonds.**—A director who buys the bonds of his company from it below par, does so at the peril of their avoidance by the courts at the suit of the corporation.⁵⁷ So, where directors purchase from themselves, stock at one-third its par value, the corporation and its creditors may hold them for the full value of the stock so procured.⁵⁸ But there is no relation of trustee and beneficiary between directors and shareholders which makes their contracts with each other, for the sale of stock, voidable at the election of the stockholder.⁵⁹ A shareholder's stock is not corporate property, and the directors are not agents for the management of it, and there is no trust relation between them in regard to it.⁶⁰ In regard to representations as to the value of stock, there is a distinction between directors in their official capacity and as individuals. In the latter capacity, they are not under any obligation to say anything about the affairs or condition of the corporation, or to disclose any fact or circumstance material to the value of its shares of stock.⁶¹ But it is the right of a shareholder fully to inform himself concerning the condition of the company. It is the duty of a director to allow and facilitate his doing so, and it is a fraud which will vitiate a sale of stock to the director, if he diverts or prevents the seller from getting the information he desires, or if in giving information as director he makes false statements or suppresses the truth.⁶² Where two managers of a company conspired together to depress the price of its shares by a system of false accounts and concealment, and in particular entered upon the company's books large quantities of goods as having been sold at

⁵⁶ Reed v. Hayt, 51 N. Y. Super. Ct. 121. The action of the directors in delivering corporate stock in payment of debts, and consolidating the rest into a mortgage on the corporate property, is not illegal because the directors became guarantors for further advances made to the corporation after it had exhausted its credit, which advances were to be paid by the delivery of the stock. County Court v. Baltimore & O. R. Co., 35 Fed. Rep. 161. An assignee of a claim held by a director against his com-

pany, has no superior equities to those of the director himself. Hurling v. Sweet, 33 Kan. 244.

⁵⁷ Duncomb v. New York, etc. R. Co., 84 N. Y. 190.

⁵⁸ Freeman v. Stine, 15 Phila. 37.

⁵⁹ Carpenter v. Danforth, 52 Barb. 581.

⁶⁰ Carpenter v. Danforth, 52 Barb. 581.

⁶¹ Carpenter v. Danforth, 52 Barb. 581.

⁶² Carpenter v. Danforth, 52 Barb. 581.

prices much less than those actually received, and invested the difference in government stock in the name of one of them, thus succeeding in bearing down the company's stock, some of which they bought at much less than its real value, this was decided to be a fraud which vitiated the sale.⁶³ In New York, directors are prohibited from bearing the market by speculative sales of their companies' shares, trusting to acquire them for delivery at a price below that at which they have agreed to sell.⁶⁴

§ 744. **Contracts between corporations having directors in common.**—There is no legal presumption of illegality or unfairness, in transactions between two corporations, from the mere fact that a portion of the board of directors in the one constituted a part of that of the other at the same time, and participated in the dealings between the two. It is only when their dealings are shown to be prejudicial to one of the corporations represented by them, that their conduct will be subject to a strict scrutiny by the courts.⁶⁵ Thus, where a sale of corporate property to pay debts, though made by persons who are directors, both of the selling and purchasing corporations, realizes more than the value of the property, stockholders in the former have no ground of complaint.⁶⁶ Where a majority of the board are not adversely interested, and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness.⁶⁷ Nor is a contract necessarily void because all the directors, of one of the corporations, are members of

⁶³ *Walsham v. Stainton*, 1 De G., J. & S. 678.

⁶⁴ No officer or director of any railroad corporation shall sell or agree to sell, or be directly or indirectly interested in the sale or agreement to sell any shares of the stock of the corporation of which he is an officer or director, unless at the time of sale or agreement to sell, he is the actual owner of such shares. N. Y. Laws of 1884, ch. 223, § 1. Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not less than six months or by a fine not exceeding \$5,000 or by both

such fine and imprisonment. N. Y. Laws of 1884, ch. 223, § 2.

⁶⁵ *Booth v. Robinson*, 55 Md. 419; *Mayor, etc. of Griffin v. Inman*, 57 Ga. 370; *United States Rolling Stock Co. v. Atlantic, etc. R. Co.*, 34 Ohio St. 450. See, also, *Foster v. Oxford, etc. Ry. Co.*, 13 Com. B. 200, 203. See 33 L. R. A. 788.

⁶⁶ *Manufacturers' Sav. Bank v. O'Reilly* (1889), 97 Mo. 38.

⁶⁷ *United States Rolling Stock Co. v. Atlantic, etc. R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380; *Met. El. Ry. Co. v. Man. Ry. Co.*, 14 Abb. N. C. 103; *O'Connor, etc. Co. v. Coosa Furnace Co.*, 95 Ala. 614, 36 Am. St. Rep. 251; *Parker v. Nicholson*, 112 Mass. 195.

the board of directors of the other corporation.⁶⁸ The rule, however, has many exceptions in practice, and it would seem that its application extended much beyond ordinary dealings between the corporations having directors in common.⁶⁹ It has also been held that directors of one telegraph company, who are also directors of another company which owns two-fifths of the stock of the former, can not properly vote to lease the property of the former company to the latter. Such a lease is voidable.⁷⁰

§ 745. **Injunction upon fraudulent contracts.**—A court of equity may restrain the consummation of contracts, between directors and the company, fraudulent upon their face; and the fact that a majority of the shareholders may have given their consent to the transaction, will not deprive the creditors or minority stockholders of the right to restrain the fraud by injunction.⁷¹ But where it does not appear that a corporation was insolvent at the

⁶⁸ *Alexander v. Williams*, 14 Mo. App. 13.

⁶⁹ *Bill v. Western Union Tel. Co.*, 16 Fed. Rep. 14; *San Diego v. San Diego, etc. R. Co.*, 44 Cal. 106. Where the board of directors of an insolvent corporation conveyed all its property to secure a debt due from it to another corporation, at a meeting in which one or more of the directors, participating and voting, for the conveyance, were also directors of the other company, it was held to be *prima facie* fraudulent and void as to the grantor, its stockholders and creditors; and it was said that clear and convincing proof would be required to show that the conveyance was fair, reasonable and free from fraud. *Sweeney v. Grape Sugar Co.* (1888), 30 W. Va. 443. It seems a matter of course, that arrangements by directors of a railroad company, to secure an undue advantage at its expense, by the formation of a new company as auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given it, in the profits of which they, as

stockholders of the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration. *Wardell v. Railroad Co.*, 103 U. S. 651, 658.

⁷⁰ *Bill v. Western Union Tel. Co.*, 16 Fed. Rep. 14. When two corporations enter into a contract with each other, parties holding the position of directors in either corporation consenting thereto, but the shareholders not being advised with, the contract is voidable, even though at the election of the directors the stockholders were cognizant of the fact that some of them belonged to the board of the other corporation, and even though the contract was confirmed by a majority of directors without taking into account those who were members of either board. *Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co.*, 11 Daly, 373, 14 Abb. N. C. 103.

⁷¹ *Gamble v. Queens County Water Co.* (1889), 52 Hun, 166. In this case a corporation organized under the general manufacturing

time its board of directors executed judgment bonds to secure debts due certain of the directors, or that there was any collusion or actual fraud, the mere entry of judgment on the bonds after its supposed insolvency, is not such a fraud in law as to warrant the continuance of an injunction restraining the sale of corporate property on execution issued on the judgment.⁷²

act adopted a resolution to issue \$50,000 of stock and \$60,000 of bonds to raise money for the purchase from one of its trustees of property worth \$65,000. The corporate stock was at that time above par. This was regarded as sufficient evidence of fraud to au-

thorize an injunction restraining the company from carrying out the resolution. And the court said that it was immaterial that a majority of the stockholders consented to the arrangement.

⁷² Appeal of Neal (1889), 129 Pa. St. 64, 18 Atl. Rep. 564.

CHAPTER XXIX.

LIABILITIES OF DIRECTORS.

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| <p>§ 746. Liability of officers for negligence and mismanagement.</p> <p>747. Degree of care and skill required of officers.</p> <p>748. On contracts on behalf of the corporation.</p> <p>749. Personal liability for mistakes of law.</p> <p>750. Their joint and several liability.</p> <p>751. To whom officers are liable.</p> <p>752. Liability to the corporation.</p> <p>753. Liability to creditors.</p> <p>754. For the debts of the corporation.</p> <p>755. For what debts liable.</p> <p>756. Liability for failure to make required reports.</p> <p>757. For making false reports to the state.</p> <p>758. For acts of agents and other appointees.</p> | <p>§ 759. How the liability is fixed.</p> <p>760. Procedure to enforce liability.</p> <p>761. Contribution among directors and among stockholders.</p> <p>762. Liability on contracts on behalf of the corporation.</p> <p>763. Provisions of New York penal code as to directors.</p> <p>764. Liability of officers upon irregularly executed contracts.</p> <p>765. Liability of officers other than directors.</p> <p>766. Liability for negligence and non-feasance is only to the corporation.</p> <p>767. Liability to third persons for fraud, misrepresentations and torts.</p> |
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References:

Liability of the corporation for acts of its officers and agents.

Sections 768-791.

Ultra vires acts and contracts. Sections 887-921.

Directors, officers and agents. Sections 705-745.

Suits by stockholders against directors. Sections 565-574.

§ 746. **Liability of officers for negligence and mismanagement.**—Since the directors of corporations generally serve without compensation, their liability for neglect of duty is similar to that of mandataries,¹ “persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more.”² As was said

¹ *Percy v. Millaudon*, 8 Mart. (N. S.) 68, 6 Mart. (N. S.) 616, 17 Am. Dec. 196; *Seymour D. Thompson* in 6 So. L. Rev. 389.

² *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684; 10 Minn. 421; 35 Mo. 492; 58 N. H. 17.

by a New Jersey court: "These directors serve without pay. They were selected by their fellow stockholders to manage gratuitously the affairs of the association in which they and the other stockholders were jointly interested. To apply to them the strict rules which are applicable to trustees who assume the discharge of the duties of private trusts, would be unjust. In the absence of fraud, and where they have neither derived, nor expected to derive any profit, benefit or advantage from their management which was not common to the other stockholders; when they have acted fairly, and have not been guilty of gross neglect or gross inattention,—they should not be held liable. The rule, applicable to mandataries, is sufficiently stringent for such cases, and is a reasonable one."³ Being elected from the body of stockholders, directors are not to be judged by the same strict standard as agents or trustees of private estates.⁴ It is said, on the one hand, that in matters of discretion, they are not responsible for mistakes of judgment, nor in ministerial duties, for anything less than gross negligence or fraud.⁵ Mere imprudence, unless it amounts to gross negligence, in the exercise of a rightful power, will not render the directors personally liable.⁶ On the other hand, it is denied that a director is only responsible for gross misjudgment until it approaches bad faith. And, as a mandatar, to whom he has been likened, it is argued, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he can not set up that he did not possess them. When damage is caused by his want of judgment, he can not excuse

³ *Citizens' etc. Assn. v. Coriell*, 34 N. J. Eq. 383.

⁴ *Thomp. Liab. O. & A. Corp.* 233. And where a union store association, instead of confiding the management of its affairs to its directors, imposes the same upon a managing agent, and the members knowing how the business is conducted, and that the by-laws are not strictly observed and obeyed, acquiesce in what is being done, the directors are not to be held to as strict an accountability as directors of an ordinary moneyed corporation. *Henry v. Jackson*, 37 Vt. 431.

⁵ *Citizens' Building Assn. v. Coriell*, 34 N. J. Eq. 383; *Neall v. Hill*, 16 Cal. 149; *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684; *Charitable Corporation v. Sutton*, 2 Atk. 400; *Overend & Gurney Co. v. Gibb*, L. R. 5 H. L. 480, L. R. 4 Ch. 701.

⁶ *Overend v. Gibb*, L. R. 5 H. L. 480; *Hedges v. Paquett*, 3 Oreg. 77; *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Henry v. Jackson*, 37 Vt. 431; *Vance v. Phoenix Ins. Co.*, 4 Lea (Tenn.), 385; *Godbold v. Branch Bank of Mobile*, 11 Ala. 191, 46 Am. Dec. 211.

himself by alleging his gross ignorance. One who voluntarily takes the position of director and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses, at least, ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable to public officers, to professional men, and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously.⁷ They must exercise such reasonable diligence or ordinary care, as a prudent man takes in the management of his own concerns.⁸ They are personally liable if they suffer the corporate funds or property to be wasted or lost, by gross negligence and inattention to the duties of their trust.⁹ Directors and officers are personally liable for loss or injury to the corporation, by reason of their *ultra vires* acts.¹⁰ As examples:—They have been held personally liable for false statements inducing deposit in bank, and loss by its failure;¹¹ for false representations dissuading a stockholder from accepting an offer for his stock;¹² for deceit in inducing purchase of bank stock;¹³ for loan by president of a

⁷ Briggs v. Spaulding, 141 U. S. 132; Redemption v. Hill, 56 Me. 385, 96 Am. Dec. 470; North Hudson, etc. Assn. v. Childs, 82 Wis. 460, 33 Am. St. Rep. 57; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Earl, J., in Hun v. Cary, 82 N. Y. 65 (1880), 37 Am. Rep. 546, citing Story on Bailments, § 182.

⁸ Smith v. Prattville Manuf. Co., 29 Ala. 503; Percy v. Millaudon, 8 Mart. (N. S.) 68; Bank of Mutual Redemption v. Hill, 56 Me. 385; Scott v. De Peyster, 1 Edw. Ch. 547.

⁹ Horn Silver Min. Co. v. Ryan (Minn. 1890), 44 N. W. Rep. 50. In this case it is further held that an action at law may be maintained against them jointly and severally for the amount of such losses. Also that a complaint states a cause of action which alleges that defendant wholly neglected his official duty with regard to detailed transactions of certain

defaulting officers, that the means of knowledge of such transactions was within his reach, and that he wholly failed to prevent or expose them, but abstained from attending the meetings of the directors. And it is not necessary that the complaint should negative knowledge of, or acquiescence on the part of the stockholders in, the negligence or misconduct of the directors. Nor is there misjoinder of causes of action in the complaint which sets forth a series of acts or omissions on the part of directors, alleged to have constituted actionable negligence on their part.

¹⁰ North Hudson, etc. Assn. v. Childs (1892), 82 Wis. 460.

¹¹ Brady v. Evans, 78 Fed. 588 (1897).

¹² Rothmiller v. Stein, 143 N. Y. 581 (1894).

¹³ Trimble v. Exchange Bank, 62 S. W. 1027 (Ky. 1901).

bank, of its funds without security, and which were used in payment of a debt to himself;¹⁴ for infringement by the company of a patent,¹⁵ and for the making of an *ultra vires* contract on behalf of the corporation.¹⁶ They have been held liable to the corporation for authorizing the issue of watered stock, and for bank funds used in *ultra vires* operation of a mill.¹⁷ They have been held liable to the receiver for acceptance of notes in payment of subscriptions to the stock of a bank.¹⁸ Directors are personally liable to a corporate creditor for incurring debts in excess of the amount of indebtedness allowed by the charter.¹⁹ Liability of a director, under New Jersey statutes, for dividend paid out of capital stock, can not be enforced in New York upon a director of the corporation doing business there, though the dividend was declared and paid there. The liability, though not a penal statute, is a liability imposed by another State, and does not rest on contract, or on the common law. But the New Jersey corporation may sue its directors in New York to recover such a dividend paid there under the New York statutes; or make directors jointly and severally liable for the payment of an unlawful dividend, and authorize a foreign corporation doing business in New York to enforce against its directors a liability for making unauthorized dividends, to the same extent as directors of a domestic corporation would be liable.²⁰ A creditor of a corporation can not complain of mismanagement by officers or agents at a time prior to the time when the credit was extended.²¹

§ 747. **Degree of care and skill required of officers.**—Directors must have reasonable capacity, and exercise their best judgment if they would escape liability for mismanagement.²² For supine and gross negligence on their part and malicious exercise of their discretion, which amount to a breach of trust, they are liable in damages.²³ Good faith in the management of the af-

¹⁴ Wickersham v. Crittenden, 93 Cal. 17 (1892).

¹⁵ National, etc. Co. v. Leland (1899), 94 Fed. 502.

¹⁶ Solomon v. Penoyar (1891), 89 Mich. 11.

¹⁷ Cockrill v. Abeles (1898), 86 Fed. 505.

¹⁸ Coddington v. Canaday, 61 N. E. 567 (1901), 157 Ind. 243.

¹⁹ Guenther v. Baskett, etc. Co. (Ky.), 52 S. W. 931.

²⁰ Hutchinson v. Stadler (1903), 83 N. Y. S. 509, 85 App. Div. 424.

²¹ Commercial Bank, etc. v. Warthen (1904), 119 Ga. 990.

²² Hun v. Cary, 82 N. Y. 74; Vance v. Phoenix Ins. Co., 4 Lea, 385.

²³ Charitable Corporation v. Sutton, 2 Atk. 400, and the cases cited above.

fairs committed to their charge, is a primary requisite from the fiduciary position occupied by directors whether they are regarded as strict trustees or not.²⁴ They are not liable for errors in the exercise of a discretion confided to them, unless so great as to amount to gross negligence, or to evince want of ordinary capacity or to warrant the imputation of fraud.²⁵ "Where the ground of liability is for non-feasance, negligence or misjudgment in respect to matters within the scope of the proper powers of the officer, he will be held responsible only for a failure to bring to the discharge of his duties such degree of inattention, care, skill and judgment as are ordinarily used and practiced in the discharge of such duties or employments; the degree of care, skill and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case, and the usage of business."²⁶ Whether a particular act of the directors is under the circumstances performed with ordinary prudence, skill and care, or whether it be rash, and imprudent, is for the jury to determine.²⁷ But the rule that relieves the corporate officer from liability for mistakes of judgment or discretion, does not apply in case of loss or damage resulting from his neglect to exercise due diligence and proper care and skill. "Directors are not merely bound to be honest; they must also be diligent and careful in performing the duties they have undertaken. They can not excuse imprudence, on the ground of their ignorance or inexperience, or the honesty of their intentions; and, if they commit an error of judgment through mere recklessness or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences."²⁸ The fact that they acted in good faith, is no defense to an action against directors for dam-

²⁴ *Bank of St. Marys v. St. John*, 25 Ala. 611; *Smith v. Prattville Manuf. Co.*, 29 Ind. 503; *Ryan v. Leavenworth, etc. R. Co.*, 21 Kan. 36; *Shea v. Mabry*, 1 Lea, 319; *Vance v. Phoenix Ins. Co.*, 4 Lea, 385.

²⁵ *Briggs v. Spaulding*, 141 U. S. 132; *Hibernia Assn. v. McGrath*, 154 Pa. St. 296, 35 Am. St. Rep. 828; *Warren v. Robison*, 19 Utah, 289, 75 Am. St. Rep. 734; *Ritchie v. McMullen*, 25 C. C. A. 50, 168 U. S. 710, 79 Fed. 522; *Godbold v. Branch Bank*, 11 Ala. 191; *Van Dyck v. McQuade*, 86 N. Y. 38.

²⁶ *North Hudson, etc. Assn. v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57.

²⁷ *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546. *Cf. Van Dyck v. McQuade*, 86 N. Y. 38. See, also, *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684; *Scott v. De Peyster*, 1 Edw. Ch. 513; *Litchfield v. White*, 2 Sand. 545; *Liquidators, etc. v. Douglas*, 11 Ses. Cas. 3d series, 112.

²⁸ *Marshall v. Farmers', etc. Bank*, 85 Va. 676, 17 Am. St. Rep. 84.

ages resulting from *ultra vires* acts.²⁹ One who has acted as trustee may be liable, although he was not legally elected, and was not a stockholder.³⁰ As a general rule, there is no wrong or fraud which directors of a company can commit which can not be redressed by appropriate and adequate remedies.³¹ But a complaint by stockholders against the directors of a ditch and canal company, which alleges that the company "is incorporated under, and by virtue of, the laws of the State of California" for the purpose of constructing a water-ditch for irrigating purposes, and that defendants have fraudulently distributed the water gratuitously, without alleging that the corporation was organized for profit or for the purpose of selling water, does not state a cause of action, since it shows no misconduct on the part of defendants.³²

§ 748. Personal liability on contracts on behalf of the corporation.—The liability of directors upon contracts entered into on behalf of the company, is governed by the same principles of agency as that of other officers. The officer is not personally liable unless expressly made so by statute.³³ He is not personally liable if the contract is within his authority to make, and is made in the name of the corporation;³⁴ or, if he had no authority, but the contract is ratified by the corporation, or if his want of authority was known to the other party.³⁵ If, having authority to contract for the corporation, he did not disclose the fact, but made the contract in his own name, the other party may, at his election, hold him personally liable, or may hold the corporation.³⁶ He is personally liable upon a contract, made in the

²⁹ *Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. 211; *Van Dyck v. McQuade*, 45 N. Y. Super. Ct. 620; *Ex parte Wilson*, L. R. 8 Ch. 45; *Hodgkinson v. National, etc. Ins. Co.*, 26 Beav. 473; *Williams v. Page*, 24 Beav. 654; 2 *Lindley on Partnership*, 592, 794, except where there is doubt as to the limits of their authority; *Hodges v. New England Screw Co.*, 1 R. I. 312, 3 R. I. 9; 53 Am. Dec. 624; *Spring's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684. As where the charter of a company is a complicated one made up by comparing sixteen acts of incorporation or supplements. *Spring's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684.

³⁰ *Halstead v. Dodge* (1884), 51 N. Y. Supr. Ct. 169.

³¹ *Cross v. Sackett*, 16 How. Pr. 62; *Robinson v. Smith*, 3 Paige Ch. 222, 24 Am. Dec. 216.

³² *Applegarth v. McQuiddy*, 77 Cal. 408 (1888).

³³ *Frost Manuf. Co. v. Foster*, 76 Iowa, 535; *Knower v. Haines*, 31 Fed. 513; *Sampson v. Fox*, 109 Ala. 662, 55 Am. St. Rep. 950.

³⁴ *Seeberger v. McCormick*, 173 Ill. 404; *Ogden v. Raymond*, 22 Conn. 379, 53 Am. Dec. 429.

³⁵ *Frost Manuf. Co. v. Foster*, 76 Iowa, 535.

³⁶ *Neely v. State*, 60 Ark. 66, 46 Am. St. Rep. 148.

name of the corporation in excess of his authority, and not ratified by the corporation, where such want of authority is unknown to the other party.³⁷ He is liable, if the assumed corporation has not acquired even a *de facto* corporate existence;³⁸ or if the contract is beyond the power of the corporation to make, and the other party has no knowledge, and is not chargeable with knowledge of such lack of corporate power;³⁹ or if it is a foreign corporation, which has not acquired right to do business in the State.⁴⁰ The common law on this subject, as to directors, is declared in the English Companies Clauses Act of 1845, which enacts that no director, by being party to or executing in his capacity of director any contract or other instrument on behalf of the company, or otherwise lawfully executing any of the powers given to the directors, shall be subject to be sued or prosecuted, either individually or collectively, by any person whomsoever, and the bodies or goods or lands of the directors shall not be liable to execution of any legal process by reason of any contract or other instrument so entered into, signed, or executed by them, or by reason of any other lawful act done by them in the execution of any of their powers as directors.⁴¹ Being agents and trustees, the directors are entitled to be indemnified by the company from all losses and expenses, in good faith sustained and incurred by them in the exercise of the trust imposed on them.⁴² There is considerable conflict on the question as to whether directors and agents are entitled to any indemnity from the corporation in respect of unauthorized expenditures.⁴³

³⁷ *Small v. Elliott*, 12 S. D. 570, 76 Am. St. Rep. 630; *Frankland v. Johnson*, 147 Ill. 520, 37 Am. St. Rep. 234.

³⁸ *Lasher v. Stenson*, 145 Pa. St. 30, 48 Am. St. Rep. 914; *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436; *Bartholomew v. Bentley*, 15 Ohio, 659, 45 Am. Dec. 596.

³⁹ *Abeles v. Cochran*, 22 Kan. 405, 31 Am. Rep. 194.

⁴⁰ *Ferguson v. Soden*, 111 Mo. 208, 33 Am. St. Rep. 512.

⁴¹ 8 Vic., ch. 16, § 100.

⁴² 2 Lindley on Partnership, 760; *In re Court Grange Manuf. Co.*, 2 Jur. N. S. 494. This rule is enacted by the Companies Clauses Act of 1845, which provides that

the directors, their heirs, executors and administrators, shall be indemnified out of the capital of the company for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs and damages which they may incur in the execution of the powers granted to them; and the directors for the time being of the company may apply the existing funds and capital of the company for the purposes of such indemnity, and may, if necessary for that purpose, make calls of the capital remaining unpaid, if any. 8 vic., ch. 16, § 100.

⁴³ One line of cases holds that

§ 749. **Personal liability for mistakes of law.**—Mistakes of law will not render the directors liable for a loss resulting therefrom, if they act with reasonable care and diligence, and in good faith, even though they might have avoided such mistakes by taking legal advice.⁴⁴ Thus, in a Tennessee case, the directors of an insurance company re-elected their secretary, but took no new bond, supposing that the bond first given was a continuing security. They took no legal advice, but in other respects were good business men and stockholders in the company. It was held that, as they acted in good faith, they could not be made personally liable for the secretary's defalcation.⁴⁵ In another case, the managers of a building and loan association were held not to be personally liable for losses resulting from an honest mistake in estimating the value of stockholders' lands on which they lent money, nor for a defect in the acknowledgment of a mortgage, which rendered it worthless. But they were held liable for losses from loans made on personal security of the stockholders, in violation of a by-law limiting the amount of such loans.⁴⁶

§ 750. **Directors' joint and several liability.**—Each director is answerable only for his own acts and not for those of his associates.⁴⁷ Nor is he responsible for those of his predecessors, unless he continue the same default begun by them.⁴⁸ Therefore, in order to charge directors with joint liability, it must be shown that they acted together as a board.⁴⁹ A director is, of

they are not: *In re* National Building Soc., L. R. 5 Ch. 309; *In re* Worcester Corn Exchange Co., 3 De Gex, M. & G. 180; *Ex parte* Cropper, 1 De Gex, M. & G. 147. *Cf.* 2 Lindley on Partnership, 765. And on the contrary it has been held that they were: *Ex parte* Chippendale, 4 De Gex, M. & G. 19, followed by Hoare's Case, 30 Beav. 225; Troup's Case, 29 Beav. 353; Baker's Case, 1 Drew. & S. 54; *Ex parte* Bignold, 22 Beav. 143.

⁴⁴ *Vance v. Phoenix Ins. Co.*, 4 Lea, 385.

⁴⁵ *Vance v. Phoenix Ins. Co.*, 4 Lea, 385 (1881).

⁴⁶ *Citizens' Building, etc. Assn. v. Coriell* (1881), 34 N. J. Eq. 383.

⁴⁷ *Cargill v. Bower*, 10 Ch. Div. 302; *Hargraves v. Chambers*, 30 Ga. 580, 590; *McMaster v. Kohnner*, 12 Jones & S. 253; *Irvine v. McKeon*, 23 Cal. 472; *Weir v. Bell*, 3 Ex. Div. 238; *Weir v. Barnett*, 3 Ex. Div. 32. But the contrary has been held under a particular statute in Georgia. *Banks v. Darden*, 18 Ga. 318, 334. Thus, directors failing to account for profits improperly received by them, are only severally liable each for his own receipts. *Parker v. McKenna*, L. R. 10 Ch. 96; *General Exchange Bank v. Horner*, L. R. 9 Eq. 180.

⁴⁸ *Moses v. Ocoee Bank*, 1 Lea, 398.

⁴⁹ *Franklin Ins. Co. v. Jenkins*, 3 Wend. 130.

course, not liable for a breach of trust or improvident act committed by his co-directors, when he was not present when it was decided upon, took no part in it and had no knowledge of it, unless it appears that he might have prevented it by ordinary attention to his duties.⁵⁰ For directors are not partners nor guarantors of each other's conduct; but where all concur in a wrongful act forbidden by a statute, or are guilty of neglecting some duty enjoined by it, all may be proceeded against in one action, just as several joint-feasors may.⁵¹ So, those who know of and sanction a breach of trust, although not actively taking part therein, are equally liable.⁵² Directors present at a meeting when certain loans not unusual in amount or character, were reported by the executive committee, when in fact no loans had been made, but the money was drawn to buy in shares of the corporation for the purpose of raising the price of its stock, are not to be held liable therefor, merely on account of neglect to inquire whether the security for the pretended loans was good.⁵³ Conversely, directors who are actually implicated in a breach of trust in misapplying the corporate funds, are jointly and severally liable therefor, although they only sign checks prepared by others.⁵⁴ Only those directors are liable who were in office at the time the fraudulent acts were committed.⁵⁵ But those have been held liable, who knew of the breach of trust and took no steps to prevent it, beyond writing a letter of disapproval.⁵⁶

§ 751. **To whom directors and officers are liable.**—Directors are responsible to those only to whom they owe the duty of diligence.⁵⁷ Thus from the fiduciary relation which directors hold to the corporation, to its stockholders and creditors, they are liable either to the corporation, or in a proper case to the share-

⁵⁰ *Spring's Appeal*, 71 Pa. St. 11; *Ashburst v. Mason*, L. R. 20 Eq. 225; *In re Montrotier Asphalt Co.*, 34 L. T. (N. S.) 716; *Maisch v. Saving Fund*, 5 Phila. 30; *Cargill v. Bower*, 10 Ch. Div. 302; *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381. *Cf.* *Lindley on Partnership*, 596.

⁵¹ 6 So. L. Rev. 411. Article by Seymour D. Thompson.

⁵² *Land Credit Co. v. Fermoy*, L. R. 5 Ch. 763; 2 *Lindley on Partnership*, 595.

⁵³ *Land Credit Co. v. Fermoy*, L. R. 5 Ch. 763.

⁵⁴ 2 *Lindley on Partnership*, 595; *Land Credit Co. v. Fermoy*, L. R. 5 Ch. 763.

⁵⁵ *Schley v. Dixon*, 24 Ga. 273, 279; *Bank of Mutual Redemption v. Hill*, 56 Me. 385.

⁵⁶ 2 *Lindley on Partnership*, 595, citing *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381.

⁵⁷ 6 So. L. Rev. 389.

holders or creditors, for a fraudulent breach of trust or misapplication of corporate funds, whereby a loss or injury results to the corporate assets.⁵⁸ They are responsible to the corporation itself, either at law or in equity; for they are its agents and trustees.⁵⁹ For wasting the assets of the corporation and rendering the shares worthless, a shareholder can not sue the directors at law, for the duty of the director is to the corporation, and not to the shareholder.⁶⁰ In the case of the shareholder, it is a matter of trust not cognizable at law.⁶¹ Directors are not liable to creditors at law or in equity, without the aid of a statute.⁶² The directors of a bank have been held to be trustees for depositors and bound to the observance or ordinary care and diligence, and liable to a general depositor for their non-observance.⁶³ In an action to enforce an equitable lien against a cor-

⁵⁸ Angell & Ames on Corp., § 314; Charitable Corp. v. Sutton, 2 Atk. 400; Kohler v. Black River, etc. Co., 2 Black, 721; Gindrat v. Dane, 4 Cliff. 260; Robinson v. Smith, 3 Paige Ch. 222, 24 Am. Dec. 212; Bank of St. Marys v. St. John, 25 Ala. 611; Smith v. Poor, 40 Me. 415; Peabody v. Flint, 6 Allen, 56; Citizens' Loan Assn. v. Lyon, 29 N. J. Eq. 110; Att'y-Gen. v. Utica Ins. Co., 2 Johns. Ch. 389; Cunningham v. Pell, 5 Paige, 607; Greaves v. Gonge, 69 N. Y. 154; Spering's Appeal, 71 Pa. St. 11; Hazard v. Durant, 11 R. I. 195; Shea v. Mabry, 1 Lea, 319.

⁵⁹ Godbold v. Branch Bank of Mobile, 11 Ala. 191; Simons v. Vulcan Oil & Min. Co., 61 Pa. St. 20; Spering's Appeal, 71 Pa. St. 11.

⁶⁰ Smith v. Hurd, 12 Metc. 371.

⁶¹ Smith v. Poor, 40 Me. 415; Allen v. Curtis, 26 Conn. 456; Faurie v. Millaudon, 3 Mart. N. S. 476. But Kimmel v. Stoner, 18 Pa. St. 155, holds otherwise.

⁶² Snyder v. Wiley, 59 Tex. 448; Frost Manuf. Co. v. Foster, 76 Iowa, 535; 6 So. L. J. 390. Under a provision in the charter of a trust company, that the "directors shall be liable to the creditors and stockholders" for loss occa-

sioned by remissness in the discharge of their official duties, a creditor cannot maintain a suit at law, but must bring a bill in equity. Crown v. Brainerd, 57 Vt. 625 (1884).

⁶³ Marshall v. Farmers', etc. Bank, 85 Va. 676, 17 Am. St. Rep. 84; Delano v. Case (1887), 121 Ill. 247, 2 Am. St. Rep. 81. The court in this case cited and relied on Percy v. Millaudon, 8 Mart. N. S. 68; United Society of Shakers v. Underwood, 9 Bush, 609; Morse on Banks and Banking (2d ed.), 133; Thompson on Liability of Officers and Agents, 395; Shea v. Mabry, 1 Lea, 319; Hodges v. New England Screw Co., 1 R. I. 312; Wharton on Negligence, § 510. Two judges dissented. In the principal case it was held that depositors may recover from directors for negligence in allowing a bank to be held out as solvent. Delano v. Case (1887), 121 Ill. 247, 2 Am. St. Rep. 81. It may be said as Judge Thompson, in 6 So. L. Rev., p. 390, says, there are American cases in which directors of a savings bank have been held liable to depositors in equity for negligence (Maisch v. Saving Fund, 5 Phila. 30; Leffman v. Flanigan, 5 Phila. 155); but as the plan on which

poration, no fraud being charged against the directors nor relief sought from them, it was held that they could not be joined with the corporation as defendants.⁶⁴ And in cases in which the directors or other officers and agents of a corporation are made co-defendants, a decree for an injunction and accounting will not issue against them individually, where the corporation is solvent, and where they have not, as individuals, violated, and are not threatening to violate, any rights of the complainant.⁶⁵

§ 752. **Liability of the directors to the corporation.**—It can hardly be said that there is an exception to the doctrine that for any breach of official duty, through which a private corporation suffers, it may recover in an action for such default against its directors or officers. Even where there is no remedy in favor of individual members or creditors of the corporation, against defaulting officers or unfaithful trustees, one will be found to exist in favor of the company itself.⁶⁶ And where there is no remedy provided by statute in the first instance, in favor of individual members or creditors of the corporation against officers or directors for breaches of official duty, an action for any infringement of the rights of the corporation lies primarily in favor of the corporate body.⁶⁷ And, generally, the failure or refusal of the corporation itself to demand redress, is a condition precedent to the right of the shareholders to sue, or to appear as plaintiffs.⁶⁸

the corporation was organized is not set out in the reports, we are left at liberty to conclude that it may have been similar to that of a mutual insurance company, the depositors being members. There is also a case where directors were held liable for negligence in suffering the ministerial officials of a corporation to convert to the use of a corporation certain special deposits (*United Society of Shakers v. Underwood*, 9 Bush, 609, 13 Am. L. Reg. (N. S.) 211); but the case, so far as we know, stands alone, and cannot be supported upon principle.

⁶⁴ *Norwood v. Memphis and Charleston R. Co.* (1883), 72 Ala. 563.

⁶⁵ *Howard v. St. Paul Plow-Works* (1888), 35 Fed. Rep. 743.

⁶⁶ *W. P. Wade* in 6 So. L. Rev.

164, citing *Smith v. Poor*, 40 Me. 415; *Smith v. Hurd*, 12 Metc. 371; *Hersey v. Veazie*, 24 Me. 9.

⁶⁷ 6 So. L. Rev. 164; *Wilson v. Rogers*, 1 Wyom. 51; *Abbott v. Merriam*, 8 Cush. 588; *Ryan v. Leavenworth, etc. R. Co.*, 21 Kan. 365; *Denny v. Manhattan Co.*, 2 Den. 115; *United Soc. v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731; *Stevens v. Davidson*, 18 Grat. 819, 98 Am. Dec. 692; *Amisiana v. Goldthwaite*, 34 Tex. 125; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Citizens' Building Assn. v. Coriell*, 34 N. J. Eq. 383; *Williams v. Riley*, 34 N. J. Eq. 398; *Oakland Bank v. Wilcox*, 30 Cal. 126.

⁶⁸ *Kennebec, etc. R. Co. v. Portland, etc. R. Co.*, 54 Me. 73, 181; *Hersey v. Veazey*, 24 Me. 9; *Greaves v. Gonge*, 69 N. Y. 154; *Memphis City v. Dean*, 8 Wall. 64,

A stockholder can not sue an officer for injury to corporation property, caused by his misfeasance in office, unless the corporation refuses to sue, and in that case the corporation must be made a party defendant.⁶⁹ Suit may be brought by stockholders, however, when demand upon the corporation to sue would be useless.⁷⁰ But on the other hand, it has been decided without qualification, that suit may be brought by a stockholder on behalf of his corporation, against the directors and others, for frauds, wrongs, and breaches of trust, and for the recovery from them of money of which the corporation has been defrauded, and the corporation be joined as a defendant.⁷¹ Such suit may be brought by one or

73; *Dodge v. Woolsey*, 18 How. 331, 345; *Brewer v. Boston Theater*, 104 Mass. 378.

⁶⁹ Code Civil Proc. N. Y., § 452, providing that the court may determine the controversy, as between the parties, where it can do so without prejudice to the rights of others, or by saving their rights, does not apply. Nor does section 1782, allowing a creditor, trustee, director, manager or other officer of a corporation, having general superintendence of its concerns, to bring an action against the officers to set aside an alienation of corporation property made by them contrary to law, or foreign to the business of the corporation, apply to a stockholder. *Stromeyer v. Combes* (1888), 18 N. Y. St. Rep. 154.

⁷⁰ As where the complaint alleges that the corporation is under the control of the defaulting directors. *Moyle v. Landers* (1889), 21 Pac. Rep. 1133 (not officially reported). So where plaintiff wrote to one W., as president of a corporation in which he was stockholder, requesting that action should be taken against two of the directors for misconduct and neglect of duty. W. wrote that he had resigned the presidency two years before. There was no evidence that he ever had resigned, and there had been no meeting of the corporation since his election. The

two directors were most active in the management of the company. These facts were sufficient to entitle plaintiff to sue as a stockholder in his own name. *Averill v. Barber* (1889), 53 Hun. 636. But in an action on a note, defendant pleaded that stock in a corporation of which plaintiff was an officer was delivered to secure the note; that by plaintiff's negligence and misconduct as such officer the stock depreciated in value, to defendant's damage. But this defense was held not available, as it would in effect be an action against a corporate officer by a stockholder, to hold him responsible for his official misconduct, without request and refusal of the corporation to bring the action. *Palmer v. Hawes* (1889), 73 Wis. 46.

⁷¹ *Beach v. Cooper* (1887), 72 Cal. 99. And where plaintiff alleged that, as owner and lessee of certain valuable coal lands, he contracted with defendants to develop the same; that a corporation was formed, of which defendants and plaintiff were directors, and the lands deeded to the same, plaintiff receiving in exchange certain stock of the company; that defendants, as directors, undertook the development of the mines, expended about \$15,000, and, after a period of four months, discharged the force employed, stopped the

any number of stockholders.⁷² And the directors, who are charged with having connived at such defaults, are proper parties defendant in such action.⁷³ An averment that the plaintiffs have been holders of the stock since a date several years prior to bringing the suit, sufficiently alleges ownership of the stock.⁷⁴ Defendants can not deny upon information and belief, and when matters alleged in the complaint are all within the knowledge of the defendants, a denial upon information and belief, is insufficient.⁷⁵ Independently of statute, a court of equity in New York has no jurisdiction at the suit of the people to compel the officers of a private business corporation to refund property of the corporation illegally disposed of. And the fact that the action was brought on the relation of a trustee, is insufficient, where neither the complaint nor the title of the action shows that it was so brought.⁷⁶ In an action by stockholders against the directors of a corporation, for a loss incurred by their unauthorized acts, where the State court refuses to permit the receiver either to sue or to be made a party defendant, the jurisdiction of the federal court fails.⁷⁷

§ 753. **Liability of directors to creditors.**—The directors of a corporation, by some courts are held to be the custodians of a fund which they characterize as a trust fund for the security of creditors.⁷⁸ The directors are not trustees for the creditors in the

work, and sold the machinery to one of their number, whereby plaintiff had been damaged a certain amount by the depreciation of his stock, and also a certain amount by failure of the lands to increase in value as they would have done. The petition showed no fraud or oppression on the part of defendant, nor did it state that the work of development could have been accomplished by a reasonable expenditure, or that there was any probability that profits would have resulted from the development of the mines. It was not clearly stated what the value of plaintiff's stock was, or would have been, if the adventure had been carried out. It was simply held that no such abuse of defendants' powers as directors was shown as would authorize a suit

against them by an individual stockholder. *Cates v. Sparkman* (1889), 73 Tex. 619.

⁷² *Moyle v. Landers* (1889), 21 Pac. Rep. 1133 (not officially reported).

⁷³ *Moyle v. Landers* (1889), 21 Pac. Rep. 1133 (not officially reported).

⁷⁴ *Moyle v. Landers* (1889), 21 Pac. Rep. 1133 (not officially reported).

⁷⁵ *Loveland v. Garner* (1888), 94 Cal. 298.

⁷⁶ *People v. Ballard* (1889), 3 N. Y. Supp. 845.

⁷⁷ *Porter v. Sabin* (1888), 36 Fed. Rep. 475.

⁷⁸ *Wood v. Dummer*, 3 Mason, 308; *Vose v. Grant*, 15 Mass. 506; *Spear v. Grant*, 16 Mass. 9, 15; *Baker v. Atlas Bank*, 9 Metc. 192; *Mumma v. Potomac Co.*, 8 Pet.

sense, however, in which an agent is trustee for his principal,⁷⁹ and hence are not liable to them for mere nonfeasance, but only misfeasance.⁸⁰ But they are liable, in equity, to the creditors of the corporation, where their wrongful acts have resulted in diminishing its assets to which the latter have a right to look for the payment of their claims.⁸¹ Thus, directors, in a court of equity, are held liable to creditors, as for breach of trust, in case of wilful

286; *Curran v. Arkansas*, 15 How. 304; *Tarbell v. Page*, 24 Ill. 46; *Ogilvie v. Knox Ins. Co.*, 22 How. 387; *Payson v. Stoerer*, 2 Dill. 431; *Sawyer v. Hoag*, 17 Wall. 610; *Burke v. Smith*, 16 Wall. 390; *New Albany v. Burke*, 11 Wall. 96; *Hightower v. Thornton*, 8 Ga. 486; *Robison v. Carey*, 8 Ga. 530; *Reid v. Eatonton Co.*, 40 Ga. 102; *Slee v. Bloom*, 19 Johns. 456; *Briggs v. Penniman*, 8 Cow. 395; *Mann v. Pentz*, 3 N. Y. 422; *Hurd v. Tallman*, 60 Barb. 272; *Bank of St. Marys v. St. John*, 25 Ala. 612; *Curry v. Woodworth*, 53 Ala. 375; *Smith v. Huckabee*, 53 Ala. 195; *Paschall v. Whitsett*, 11 Ala. 472; *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Bassett v. St. Albans' Hotel Co.*, 47 Vt. 313; *Adler v. Milwaukee Patent Brick Co.*, 13 Wis. 57; *Miers v. Zanesville, etc. Turnpike Co.*, 11 Ohio, 274, 13 Ohio, 197; *Henry v. Vermillion, etc. R. Co.*, 17 Ohio, 187; *Marsh v. Burroughs*, 1 Woods, 467; *Payne v. Bullard*, 23 Miss. 90. In *Tinkham v. Borst*, 31 Barb. 407, the court proceeded on the idea that the creditors have an equitable lien upon the assets of a dissolved corporation in the hands of one of its members.

⁷⁹ *Pool's Case*, 9 Ch. Div. 322, 328.

⁸⁰ *Fusz v. Spaunhorst*, 67 Mo. 256, 264. See in support of the same view, *Smith v. Hurd*, 12 Metc. 371; *Smith v. Poor*, 40 Me. 415; *Zinn v. Mendel*, 9 W. Va. 580.

⁸¹ *Penobscot, etc. R. Co. v. Dunn*, 39 Me. 587; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29. And

where *Laws Minn.* 1873, ch. 11, § 23 (*Gen. St.*, ch. 34, § 142) declares that "if any corporation organized and established under the authority of this act shall violate any of its provisions, and shall thereby become insolvent, the directors ordering or assenting to such violation shall be jointly and severally liable in an action founded on this statute for all debts contracted after such violation as aforesaid." It was held, that where a series of acts, or a continuous course of conduct, on part of the directors in violation of the statute, finally producing the insolvency of the corporation, is begun before the debt of a creditor is contracted, the debt is one contracted "after such violation," although the series of acts or course of conduct is not completed, or the insolvency of the corporation consummated, until afterwards. *Patterson v. Minnesota Manuf. Co.* (1889), 41 Minn. 84, 6 Ry. & Corp. L. J. 351. And this case further decided that the *ultra vires* acts of the directors in executing accommodation paper in the name of the corporation, or in lending its funds to others, constitute a violation of the act "by the corporation" within the meaning of the statute. The directors of a company, holding property of an insolvent company in trust, who misapply such assets, are individually liable to the creditors of the insolvent company to the extent of the assets so misapplied. *National Bank v. Texas Investment Co.* (1889), 74 Tex. 421.

misappropriation, or misapplication of the corporate assets, by gross negligence, whereby they are lost or wasted, resulting in insolvency of the corporation, and its inability to pay its debts.⁸² But such misapplication or loss must have resulted from the officer's own fraudulent or wilful act, or culpable negligence of duty, and not by reason of his mere mistake or error of judgment.⁸³ An unsecured judgment creditor may sue directors for illegal preferences.⁸⁴

§ 754. **Liability of the directors for debts of the corporation.**—Directors of a corporation are not liable individually for the debts of the corporation, they not having made themselves so, or unless made liable by statutes.⁸⁵ So, the facts that the

⁸² Briggs v. Spaulding, 141 U. S. 132; Millsaps v. Chapman, 76 Miss. 942, 71 Am. St. Rep. 547; Penn Bank v. Hopkins, 111 Pa. St. 328, 56 Am. Rep. 266; Landis v. Sea Isle, etc. Co., 53 N. J. Eq. 654.

⁸³ Warren v. Robison, 19 Utah, 289, 75 Am. St. Rep. 734; Briggs v. Spaulding, 141 U. S. 132.

⁸⁴ As where the directors of a corporation known to be insolvent granted a preference to the estate of a deceased director and president. The board, at the time, consisted of but three persons, two of whom were brothers of deceased, and one was agent of deceased's estate, and voted his stock. One brother was also a creditor of the estate. The preference was held illegal, and that an unsecured judgment creditor of the corporation could recover of the two brothers who had voted for the preference, such percentage of his debt as he would have received if the sum wrongfully paid had been divided *pro rata* among all the unsecured creditors, but could not charge the other director, who was not present at any of the directors' meetings, and did not vote for the preference. Adams v. Kehlor Milling Co., 36 Fed. Rep. 212 (1888). But a creditor at large cannot, under §§ 1781, 1782, of N. Y. Code, maintain an action against directors of a corporation for their misconduct. A

judgment creditor, only, is entitled to sue. Paulsen v. Van Steenberg, 65 How. Pr. 342. And under the Missouri statute, a creditor of a dissolved corporation, the assets of which have been appropriated by the directors, can only maintain an action against them after an ascertainment in equity of the amount due him, unless his claim is the only one that the corporation owed at the time of its dissolution, or unless the assets appropriated by the directors exceed such claim in amount. Horner v. Carter, 3 McCrary C. Ct. 595. Though where, at the time of the loss of a policyholder in a mutual assessment fire insurance association, there was a fund in the hands of the company, arising from dues and advance assessments, which was appropriated by the company to the payment of its privilege taxes and attorneys' fees, stripping it of its assets and rendering it insolvent, the directors and corporators of the company are personally liable to the assured for the loss, the sum misappropriated being in excess of the sum needed to satisfy his demand. Stewart v. Lee Mutual Fire Ins. Assn. (1887), 64 Miss. 499.

⁸⁵ Leggand Co. v. Dewing, 25 R. I. 568; Snyder v. Wiley, 59 Tex. 448.

directors of a corporation have mismanaged its business, and contracted an indebtedness in excess of the limit prescribed by its charter, and the published notice of incorporation, do not render them liable to creditors of the corporation, unless made so by the provisions of the charter, or some general statute; and it is immaterial that the creditors allege that credit was extended in reliance on the business character and responsibility of the directors.⁸⁶ But the directors of a corporation may be held individually liable for debts contracted by them for the company in excess of the limit of indebtedness fixed by a statute; and the remedy against them is in equity, not having been prescribed by the statute.⁸⁷ The law prohibiting the directors of a corporation from creating debts "beyond their subscribed capital stock," under penalty of being individually liable therefor, applies to all the subscribed capital stock, whether paid in or not, and regardless of the disposition made of it; and the debts do not include capital stock paid for corporate property.⁸⁸ But railroad directors, authorized by law to contract debts for construction and equipment, are not liable, under the general statute, for debts so contracted, though exceeding half the capital stock and assets.⁸⁹ Under a law providing that persons, who, by articles of association in writing, associate themselves together, "and who comply with the provisions of this chapter, shall, with their successors and assigns, constitute a body politic and corporate," the defendants organized and drew up and signed articles of agreement with the understanding and agreement that they were not to take effect till certain things were done, which never were done. It was decided that they did not constitute a corporation, and that the president and directors could not be held liable for debts,

⁸⁶ *Frost Manuf. Co. v. Foster*, 76 Iowa, 555 (1889).

⁸⁷ *Stone v. Chisolm* (1884), 113 U. S. 302; *Horner v. Henning*, 93 U. S. 228. By the statute of New York every officer, agent or stockholder of a company who knowingly assents to, or has any agency in contracting or incurring any debt, in excess of the limit of indebtedness prescribed by the statute, is held personally and individually liable to pay such debt; and also liable to arrest and imprisonment in any ac-

tion for the same and on any execution issued on any judgment obtained thereon in the same manner as defendants in actions of trespass are liable, and is also deemed guilty of a misdemeanor. N. Y. Laws of 1845, ch. 230, § 1. Cf. N. Y. Laws of 1890, ch. 564, § 24.

⁸⁸ *Moore v. Lent* (Cal. 1890), 22 Pac. Rep. 875; *Shea v. Lent* (Cal. 1890), 22 Pac. Rep. 876.

⁸⁹ *Niagara Bridge Works v. Jose*, 59 N. H. 81.

under the law, making such officers personally liable for debts contracted by corporations failing to comply with certain statutory requirements.⁹⁰

Statutory provisions.—Many States, for the protection of creditors, have, by statute, made the directors and other officers liable for corporate debts, as a penalty upon such officers for neglect to perform certain prescribed duties, or for committing acts prohibited, which statutes are construed strictly.⁹¹ As, for failure to publish or file the articles of incorporation, or other proceedings had in forming the corporation.⁹²

§ 755. For what debts directors are liable.—A tax duly assessed against the corporation, and presently payable, is a debt, within the meaning of the statute;⁹³ so also is a judgment for costs against the company;⁹⁴ and a contract obligation to one employed for a specified time by the corporation at a fixed salary, is a debt from the time the contract goes into effect.⁹⁵ But a claim in tort is not a debt, within the act, even though it has been reduced to judgment;⁹⁶ nor are unliquidated claims for breaches of contracts, and causes of action incidentally arising thereon;⁹⁷ nor are bonds of the corporation, which have been, with the holder's knowledge, diverted from their intended and authorized purpose.⁹⁸ A renewal of an old debt does not create the liability, though the indebtedness exceeds the limit.¹ The liability of a

⁹⁰ *Corey v. Morrill* (1889), 61 Vt. 598. But in this case one of such directors having visited plaintiff at his place of business, and represented that the corporation had been legally organized, and that he was a director in it, and plaintiff having on the strength of this representation sold goods to the corporation, and accepted notes, such director is estopped from setting up the defense that the corporation was never legally organized, and that, therefore, he could not be personally held liable for its debts.

⁹¹ *Park Bank v. Remsen*, 158 U. S. 337; *Bonnell v. Griswold*, 180 N. Y. 128; *Chase v. Curtis*, 113 U. S. 452.

⁹² *Edwards v. Armour Packing Co.*, 90 Ill. App. 333, 190 Ill. 467; *Kent v. Clark*, 181 Ill. 237.

⁹³ *Felker v. Standard Yarn Co.*, 148 Mass. 226.

⁹⁴ *Allen v. Clark* (1888), 108 N. Y. 269.

⁹⁵ *Brandt v. Godwin* (1889), 24 N. Y. St. Rep. 305.

⁹⁶ *Chase v. Curtis*, 113 U. S. 452.

⁹⁷ *Victory Web Printing, etc. Co. v. Beecher*, 26 Hun, 48.

⁹⁸ *Kirkland v. Kille*, 99 N. Y. 390.

¹ *Novelty Manuf. Co. v. Connell*, 80 N. Y. 254; *Jones v. Barlow*, 62 N. Y. 202; *Rutland Bank v. Page*, 53 Vt. 452. So in an action by a bank receiver against certain trustees of a mill company, it appeared that the mill was indebted in excess of its capital stock to the bank; that a contract was made by which the bank agreed to treat the debt as dead or suspended, and thereafter to cash the

corporation for infringement of letters-patent, is not, before judgment, "a debt" for which the officers are liable.² The statutory liability does not embrace debts due to the directors personally.³ The liability under these statutes, before suit brought to fix it, is not a debt, nor any fixed obligation to pay, but only that from which, by the prescribed course, an obligation to pay may be raised.⁴ To charge a trustee of a manufacturing corporation for its debt, no report having been filed, the debt must have been so contracted, as to give a present right of action against the corporation.⁵ For default in failing to file and publish such required report, or for making false report, the debts for which the officers are liable, include, among others: an obligation for which the corporation has become liable, though it is not yet due;⁶ an unliquidated claim for breach of contract of employment, if the claim is due;⁷ unliquidated damages;⁸ mortgage bonds;⁹ debts contracted and due in other States;¹⁰ debts, for which a right of action exists.¹¹ The liability does not include, wholly executory

of the defendants and the bank mill paper when indorsed by one president individually, and that subsequent mill deposits were to be credited on the new account. They were credited on the old account, and the indorsers of the paper under the new account had no notice of its dishonor. And it was considered that defendants were not liable under the law making trustees individually liable for indebtedness to which they have assented in excess of the capital stock of the company, as the new paper made by the mill under the contract was paid, so far as defendants were concerned. *Patterson v. Robinson* (1889), 116 N. Y. 193, 6 Ry. & Corp. L. J. 483.

² *Child v. Boston & Fairhaven Iron Works*, 137 Mass. 516, 50 Am. Rep. 328.

³ *McClave v. Thompson*, 36 Hun, 365.

⁴ *Knower v. Haines*, 31 Fed. Rep. 513.

⁵ *Vernon v. Palmer*, 62 How. Pr. 425. And where a lessee agrees to pay the taxes assessed on the

leased property, or to pay the amount to the lessor on a certain day afterwards, no debt is due to the lessor until the day named. In three years from that day the bar of the statute of limitations attaches. After the bar has attached, it follows that there is no debt on the basis of which the trustee of the lessee (a manufacturing corporation organized under the New York act of 1848) can be charged for a default in filing an annual report of the condition of the corporation. *Trinity Church v. Vanderbilt*, 98 N. Y. 170.

⁶ *Providence, etc. Co. v. Connell*, 86 Hun (N. Y.), 319; *Vernon v. Palmer*, 16 Jones & S. (N. Y.) 231.

⁷ *Caty v. Sanford*, 53 Vt. 632; *Green v. Easton*, 74 Hun (N. Y.), 329.

⁸ *MacVeagh v. Wild*, 95 Fed. 84.

⁹ *Morgan v. Hedstrom*, 164 N. Y. 224.

¹⁰ *Sears v. Waters*, 44 Hun (N. Y.), 101.

¹¹ *Jones v. Barlow*, 62 N. Y. 202.

or contingent obligations,¹² or a judgment against the corporation for tort.¹³ It includes only debts arising under contract. The debt must be existing, or contracted at such time as to come within the statute.¹⁴

§ 756. **Liability for failure to make reports required by the State.**—There are statutes in some of the American States which subject the directors to personal liability for the debts of the corporation by way of penalty for failure to make annual reports.¹⁵ If the directors comply with the statute by filing and publishing the report, they are not liable, because the report is false.¹⁶ This annual statement must be made without regard to whether there was, or was not, a stockholders' meeting.¹⁷ The fact that it is not actually filed within the twenty days, although made within that time, is immaterial, if it is filed within a reasonable time.¹⁸ To be liable, the directors must be such at the time

¹² *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Gold v. Clyne*, 134 N. Y. 262.

¹³ *Cable v. Gaty*, 34 Mo. 573, 86 Am. Dec. 126.

¹⁴ *Cameron v. Seaman*, 7 Hun, 601, 69 N. Y. 396, 25 Am. Rep. 212; *Providence, etc. Co. v. Hubbard*, 101 U. S. 188; *Gold v. Clyne*, 134 N. Y. 262, 58 Hun, 419.

¹⁵ N. Y. Laws of 1890, ch. 564, § 30; N. Y. Laws 1848, ch. 40; 1875, ch. 611; *Chase v. Curtis*, 113 U. S. 452. New York Laws, 1875, ch. 510, repeals 1848, ch. 40, § 12, and relieves the trustee of a manufacturing corporation from liability for its debts for failing to file the report, and it was so held as to failure to file the report due January, 1875. *Victory Web Printing, etc. Co. v. Beecher* (1881), 26 Hun, 48. Laws N. Y. 1848, ch. 40, § 12, provided that every corporation organized under that act should annually, within 20 days from the 1st day of January, make, publish, and file a verified financial report, and for a failure so to do imposed a joint and several liability upon all the trustees for all existing debts. This act was so amended by Laws 1875, ch. 510, in regard to preced-

ing cases, as to require only that the report should be made within 20 days from the 1st of January of the year following the January of the year in which the company was incorporated; the word "annually" being omitted. The company of which defendant was trustee in January, 1867, was incorporated in 1865. It was held that by omitting the word "annually" from the act of 1848, no liability was left upon defendant, in a suit commenced after the passage of the act of 1875, for an omission to make, publish, and file a report in January, 1867; it not being shown that such report was not duly made in 1866. *Carr v. Risher* (1888), 50 Hun, 147; *Clough v. Rocky Mt. Oil Co.*, 25 Colo. 520; *Halsey v. McLean*, 12 Allen, 94 Mass. 439, 90 Am. Dec. 157; *Manhattan Co. v. Caldenberg*, 165 N. Y. 1; *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212.

¹⁶ *Pier v. Hanmore*, 86 N. Y. 95; *Bonnell v. Griswold*, 68 N. Y. 294, 80 N. Y. 128.

¹⁷ *Cooke v. Pearce*, 23 S. C. 239.

¹⁸ *Butler v. Smalley*, 101 N. Y. 71.

of default in filing and publishing the report, and the debt must be then in existence.¹⁹ An annual report of a corporation, signed by two only, of seven trustees, is insufficient to satisfy the requirement of the law that a majority must sign the report.²⁰ Only those in office at the time fixed for the statement, were liable for failure to make it.²¹

Penal nature of the statutes.—These statutes, being a penalty upon the officers for their neglect to make reports, are, as to them, penal in their nature, but are not penal statutes in the strict sense, like statutes imposing punishment for offenses against the State, but they are remedial, as respects the creditors.²² A judgment, recovered against a corporate officer for failing to file report as required by such a statute, may be enforced in other States, as held by the Supreme Court of the United States,²³ and that the statute is not penal in the sense of the rule of international law,²⁴ under which penal laws are not enforced in other States.²⁵

Requirements of the statutes.—The report must be filed or published, or both,²⁶ within the prescribed time,²⁷ in the proper office,²⁸

¹⁹ Gold v. Clyne, 134 N. Y. 262.

²⁰ Westerfield v. Radde, 67 How. Pr. 204, 12 Daly, 450.

²¹ State v. Cox (1883), 88 Ind. 254; Austin v. Berlin (1889), 22 Pac. Rep. 433, where the decision was that the directors of a corporation, whose terms of office began after an indebtedness had been created against the corporation, and after default had been made by the previous board in failing to file, as required by law, a report showing the amount of the corporate indebtedness, are not liable under Gen. St. Colo., § 252, which provides "that all the directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should . . . have been made and filed, and until such report shall be made." Austin v. Berlin (Colo. 1889), 22 Pac. Rep. 433. And the directors were made defendants because of their failure to comply with the statute requiring the publication of the

articles of association, and it was held that they were liable only for breaches within the time covered by their neglect to comply with the statute, and not for damages occasioned by the non-fulfilment of the contract. Cady v. Sanford, 53 Vt. 632; Bank, etc. v. Hill, 56 Me. 385, 96 Am. Dec. 470; Schofield v. Henderson, 67 Ind. 258.

²² Huntington v. Attrill, 146 U. S. 657; Davis v. Mills, 99 Fed. 39,

²³ Huntington v. Attrill, 146 U. S. 657, 14 Am. St. Rep. 344.

²⁴ Huntington v. Attrill, 146 U. S. 657; Davis v. Mills, 99 Fed. 39; Park Bank v. Remsen, 158 U. S. 337.

²⁵ Chief Justice Marshall in The Antelope, 10 Wheat. (U. S.) 66.

²⁶ Cameron v. Seaman, 7 Hun (N. Y.), 601, 69 N. Y. 369, 25 Am. Rep. 212; Whitney v. Cammann, 28 Jones & S. 391, 137 N. Y. 342.

²⁷ Cincinnati, etc. Co. v. O'Keefe, 44 Hun (N. Y.) 64, 120 N. Y. 603.

²⁸ Uptegrove v. Schwartzwaelder, 46 App. Div. (N. Y.) 20.

setting out the material facts required to be stated,²⁹ and must be signed and verified by the designated officers.³⁰

What will not excuse the default.—Failure will not be excused, on the ground of insolvency, and transfer of all the corporate property to one of the creditors;³¹ or by cessation of all business and winding up the corporate affairs;³² or neglect of the secretary or other officer to file the report in due time.³³

Presumption that the neglect was wilful.—Neglect to comply with the requirements of the statute will be presumed to be wilful.³⁴ The term "officers," in such a statute, includes directors.³⁵ Only those who are directors or officers at or during the time of default, are liable.³⁶ An officers who has resigned, is not liable, although his resignation is not formally accepted.³⁷ Such retiring officer is not responsible for such default, and is not liable for debts subsequently contracted.³⁸ An officer's liability for such corporate debts is not affected, by reason of illegality in his election, or that he was ineligible to the office.³⁹ An officer, holding over after expiration of his term of office, is liable for default in making required report.⁴⁰ When the statute is held to be penal in its nature, the liability will not survive the death of the officer, as a claim against his estate.⁴¹ Discharge of the corporation under the National Bankruptcy Act of 1898, does not discharge directors for any such statutory liability for corporate debts.⁴² A statute of limitation of action upon statutory penalties, will apply to such liability to creditors for corporate debts; and the statute commences to run from the time of accrual of the cause of action.⁴³

²⁹ *Bonnell v. Griswold*, 80 N. Y. 128; *Whitaker v. Masterton*, 106 N. Y. 277.

³⁰ *International Bank, etc. v. Faber*, 79 Fed. 919, 30 C. C. A. 178, 86 Fed. 443; *Hardman v. Sage*, 124 N. Y. 25, 47 Hun, 230.

³¹ *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18.

³² *Witherow v. Slayback*, 158 N. Y. 649; *First Nat. Bank, etc. v. Lamon*, 130 N. Y. 366.

³³ *Whitney v. Cammann*, 137 N. Y. 342; *Van Etten v. Eton*, 19 Mich. 187.

³⁴ *Wilcox, etc. Co. v. Mosher*, 114 Mich. 64.

³⁵ *Gaff v. Theis*, 33 Ind. 307.

³⁶ *Schofield v. Henderson*, 67

Ind. 258; *Bank, etc. v. Hill*, 56 Me. 385, 96 Am. Dec. 470.

³⁷ *Wade v. Baker*, 81 N. Y. 622.

³⁸ *Vincent v. Sands*, 42 How. Pr. (N. Y.) 231.

³⁹ *Easterly v. Barber*, 65 N. Y. 252.

⁴⁰ *Jenet v. Nims*, 4 Colo. App. 88, 43 Pac. 147.

⁴¹ *Brackett v. Griswold*, 103 N. Y. 425; *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146; *Githers v. Clarke*, 158 Pa. St. 616.

⁴² *In re Marshall Paper Co.*, 95 Fed. 419.

⁴³ *Blake v. Clausen*, 10 App. Div. 223, 158 N. Y. 727; *Clough v. Rocky Mt. Oil Co.*, 25 Colo. 520.

§ 757. **Liability for making false reports to the State.**—Other statutes make directors and trustees liable for false reports made by them.⁴⁴ The report must have been knowingly false.⁴⁵ These statutes cannot be enforced in another State, even though judgment has first been obtained in the State enacting them. A judgment obtained under these laws merges all right of action of such creditor against the officer as a stockholder of the corporation.⁴⁶ In a suit to enforce the penalty under the Massachusetts act, which makes the directors of a corporation

⁴⁴ N. Y. Laws of 1890, ch. 564, § 31; N. Y. Laws 1848, ch. 40; 1875, ch. 611. A report containing the names of two persons as stockholders, and stating the amount of their stock as actually paid in, where in fact such persons are not stockholders at all, is "false in a material representation." *Brandt v. Godwin* (1889), 24 N. Y. St. Rep. 305. But such officers are liable, though they had no actual knowledge that the representations were false, and signed in good faith. *Torbett v. Eaton* (1888), 49 Hun, 209, Brady, J., dissenting. And it is no defense to the statutory liability that defendant signed such report in good faith, under the advice of counsel, and believing its statements to be true. *Brandt v. Godwin* (1889), 24 N. Y. St. Rep. 305.

⁴⁵ *Pier v. Hanmore*, 86 N. Y. 95; *Pier v. George*, 86 N. Y. 613, where it was decided that to charge a trustee of a manufacturing corporation within New York Laws 1848, ch. 40, for signing a false report, knowing it to be false, some fact or circumstances must be shown indicating that it was made in bad faith, or for some fraudulent purpose, and not ignorantly or inadvertently; and this is a question of fact that must be passed upon before the liability can be adjudged. If the report filed be untrue, and constitutes a false representation, it renders liable only the trustee who signed it, and who signed

knowing it to be false. Where the falsity charged consists in a statement that the capital stock had been paid up in full, without stating that a portion was paid for in property, it was held that bad faith or a fraudulent purpose must be shown, as the penalty follows an actual, not a constructive, falsehood. *Bonnell v. Griswold*, 89 N. Y. 122. See *Bolz v. Ridder*, 12 Daly, 329. A complaint in a proceeding to charge a trustee with a debt due from a corporation, on the ground that he signed an annual report which he knew to be false in a material representation, is sufficient in alleging knowledge of the falsity of the report, without stating facts which are implied in such allegation. *Taylor v. Thompson*, 66 How. Pr. 102. And conversely it has been decided that Pub. St. Mass. ch. 106, § 60, providing that the officers of a corporation, who knowingly make a false certificate to be filed in the office of the secretary of the commonwealth, "shall be jointly and severally liable for its debts," applies as well to debts existing when the certificate is made as to future debts. *Felker v. Standard Yarn Co.* (1889), 148 Mass. 226.

⁴⁶ *Attrill v. Huntington* (1889), 70 Md. 191. Reversed on writ of error to the Supreme Court of the United States, October term, 1892, *Huntington v. Attrill*, 146 U. S. 657.

personally liable for the corporate indebtedness, where the certificate, as to the condition of the corporation is false, it must appear that the statements in the certificate were wilfully made, with a purpose to deceive.⁴⁷ Intention to defraud by the false report is not necessary to show.⁴⁸ A director will be personally liable when he had no intention to deceive, as, where he recklessly signed a false report, without any knowledge either of its truth or of its falsity. It was held to be his duty to ascertain, and to know that the report he signed was true.⁴⁹ The falsity of the report must be material, and if not so provided in the statute, it will be implied.⁵⁰ In the absence of any such statute, directors and other officers, signing and publishing any false report, are liable on the ground of fraud and deceit, to any person acting thereupon to their injury.

§ 758. Liability of directors for acts of agents and other appointees.—It is a rule in the law of agency that an agent is not liable for the wrongs committed by a subordinate agent, appointed and controlled by him, unless he authorized the wrong or participated in it.⁵¹ So, ordinarily, directors are not liable for the misfeasance of officers and agents, appointed and selected by them with due care, except such wrong doing is in some way due to an omission of duty on the part of the directors.⁵² They are

⁴⁷ *Felker v. Standard Yarn Co.* (1890), 148 Mass. 226, construing Mass. Pub. Stat. ch. 106, § 60. In an action to recover from the trustees of a corporation the amount of a debt due the plaintiff on the ground that the defendant had been guilty of actual falsehood, in that he had signed a report required by the New York Manufacturer's Act of 1848, which stated that the capital of the corporation had been fully paid in, while in fact the defendant knew that the whole stock had been issued to one of the incorporators in payment of lands bought by him from another corporation, and by him conveyed to the defendant's company at a grossly exaggerated price, the books of the two companies are admissible in evidence, not only to prove the corporate acts of the companies, but also

for the purpose of proving the defendant's knowledge of the circumstances under which the stock was issued. *Blake v. Griswold* (1877), 103 N. Y. 429.

⁴⁸ *Chittenden v. Thannhauser*, 47 Fed. 410.

⁴⁹ *Githers v. Clarke*, 158 Pa. St. 616; *Huntington v. Attrill*, 118 N. Y. 365.

⁵⁰ *Butler v. Smalley*, 101 N. Y. 71.

⁵¹ *Thompson on Liability of Officers and Agents*, 355. And see 41 L. R. A. 650.

⁵² *Batchelor v. Planters' National Bank*, 78 Ky. 435, 446; *Batcheller v. Pinkham*, 68 Me. 253; *Bath v. Caton*, 37 Mich. 199; *Hewitt v. Swift*, 3 Allen, 420; *Nicholson v. Mounsey*, 15 East. 384; *Stone v. Cartwright*, 6 Term. Rep. 411. *Cf. Weir v. Bell*, 3 Ex. Div. 238.

not sureties to the corporation or its stockholders for the fidelity of a secretary or other subordinate officer appointed by them, so as to be liable for his embezzlement or defalcations, if they have acted prudently, and in good faith, and had no knowledge that he was untrustworthy.⁵³

Directors of a bank, by the same rule, are not liable for the dishonesty or negligence of the bank cashier, or other bank officers, when they themselves are guilty of no negligence or dishonesty.⁵⁴ The directors of a bank who receive no compensation for their services, are not personally liable for the defalcations of their fellow director, whom they have chosen as cashier, teller and bookkeeper of the bank, with no reason to suspect his fidelity to its interests, and whose past life, as a business man, so far as known, was a guaranty of his honesty and capacity, and whose experience in banking, personal and financial character for integrity commended him to all business men, as well qualified for the position.⁵⁵ But where directors sanction a breach of trust by a subordinate officer, or by negligence or inattention enable him to divert corporate funds, they will, no doubt, be liable.⁵⁶ Circumstances may exist which will charge the directors, although they did not know of the fraud at the time it was committed, as, where the directors, personally, and knowingly derived a benefit from the fraud, in which case the subordinate agents, who committed the fraud, become, in a sense, the agents of the directors.⁵⁷ So, where they remove safeguards which the by-laws

⁵³ *Scott v. De Peyster*, 1 Edw. Ch. 513.

⁵⁴ *Shering's Appeal*, 71 Pa. St. 11; *Godbold v. Bank of Mobile*, 11 Ala. 191. *Cf. United Soc. v. Underwood*, 9 Bush, 609.

⁵⁵ *Savings Bank v. Caperton* (1888), 87 Ky. 306. In this case it was said the directors ordinarily need do no more than to see that his daily, weekly or monthly statements correspond with the general balance upon the books of the bank.

⁵⁶ *Angell & Ames on Corp.*, § 334; *Att'y-Gen. v. Leicester*, 7 Beav. 176; *Cargill v. Bower*, 10 Ch. Div. 502; *Weir v. Barnett*, 3 Ex. Div. 32; *Weir v. Bell*, 3 Ex. Div. 238.

⁵⁷ As in a case where directors authorized brokers to issue a prospectus for the purpose of borrowing debentures and the brokers issued a prospectus containing fraudulent statements, a director who was abroad at the time the prospectus was issued, and knew nothing of its contents, was held not liable. And one who received no personal benefit from the transaction was also held not liable. *Weir v. Bell*, 3 Ex. Div. 238; *Browne & Theobald's Ry. Law*, 110. The law on this point, say Browne and Theobald, is, perhaps, open to reconsideration, and it may be doubted whether the better opinion is not that a director who delegates his duty to another person

throw around such subordinate officer, and permit him and his assistants to act as brokers for persons borrowing money of the corporation, and to become borrowers themselves, without adequate security, and by these, and other acts, the funds of the corporation are wasted.⁵⁸ Bank directors' liability to depositors, in case of insolvency of the bank, caused by frauds of the cashier, so concealed that the bank's affairs could not have been discovered by examination, is no defense where the directors failed to make any such examination.⁵⁹

§ 759. **How directors' liability is fixed.**—To constitute "assent" to the debt which the statute makes the ground of liability, there must be something more than mere negligence on part of a director in not knowing what, in the exercise of proper care, he ought to have known. There must be some wilful or intentional violation of duty, assenting to it, knowing that the act is being, or about to be done. But if, with such knowledge, he neither objects to, nor opposes it when his duty requires, and when he has the opportunity of doing so, this is "assent."⁶⁰ There must be "something amounting to wilful, or at least intentional violation of legal duty, either ordering the act done, participating in doing it, or assenting to its being done, with knowledge that it was being, or about to be, done."⁶¹ But an assent on the part of a trustee to contracting a debt in excess of the capital stock of a corporation, is not implied by his neglect to enter his protest against it, upon being informed thereof, after it has been incurred.⁶² Neither can an assent be implied on the part of those trustees who are never present at the meetings, are never conferred with, and never take a more active part in the administration of the trust than to affix their signatures to the yearly reports.⁶³ In an action to charge a trustee of a manufac-

is bound to see that no fraud is committed in carrying out the duty; so that, for instance, a director who authorizes brokers to issue a prospectus would be liable for a fraudulent statement contained therein. *Browne & Theobald's Ry. Law*, 110, citing *Weir v. Bell*, 3 Ex. Div. 328, Judgment of Cotton, L. J., and *Peck v. Gurney* (*Barclay's Case*), L. R. 6 H. L. 377, p. 392.

⁵⁸ *Charitable Corp. v. Sutton*, 2 Atk. 400.

⁵⁹ *Forbes v. Mohr* (Kan. 1904), 76 Pac. 827.

⁶⁰ *Patterson v. Minnesota Manufacturing Co.* (1889), 41 Minn. 84; 42 N. W. 926, 16 Am. St. Rep. 671.

⁶¹ *Patterson v. Stewart*, 41 Minn. 84, 16 Am. St. Rep. 671.

⁶² *Patterson v. Robinson*, 36 Hun, 622, 116 N. Y. 193.

⁶³ *Patterson v. Robinson*, 36 Hun, 622. It was decided that the following was evidence showing that the defendants assented to incurring the debt for the ma-

turing corporation, organized under the New York statute, with its debts, because of the failure to file a report, the trustee is not bound by a judgment obtained against the corporation.⁶⁴ Nor can such a debt be proved by the judgment roll, in the action against the corporation.⁶⁵ Whether the corporation belongs to the class requiring such statement, is to be determined from its charter.⁶⁶ A party, holding himself out as trustee, may be liable, even though it appear that he was never duly chosen, and that he owned no stock in the corporation.⁶⁷ Where such a law has been repealed, and when the corporation was organized prior to the repeal, the directors are not liable for a debt contracted after such repeal.⁶⁸ These acts should be limited to debts to creditors to whom such excess is owing.⁶⁹ The statute being mandatory as to the time when the account is to be made and posted, the penalty attaches on the failure to post on the first Monday in the month; and a complaining stockholder may recover for the failure, though the account is made and posted before the beginning of the action.⁷⁰ Where there is evidence that the matter of filing reports had been

chinery mentioned: While defendants were directors, and both present at a meeting, an order was made authorizing one of the directors to buy machinery in the company's name, provided that two of the directors named were to "hold the company harmless." Defendants claimed that the action of the board was in fact that said two directors should purchase the machinery on their credit, and, if it proved satisfactory, they were to receive a royalty from the company for its use. One of the defendants made an admission contradicting this theory. There was also proof that, though defendants at first objected, on the agreement of said two directors to pay for the machinery, they assented. The machinery was shipped in the company's name, used and sold by it, with the knowledge of defendants. *Allison v. Coal Creek & N. R. Co.* (1888), 87 Tenn. 60.

⁶⁴ *Kraft v. Coykendall*, 34 Hun, 285.

⁶⁵ *Chase v. Curtis*, 113 U. S. 452; *Brandt v. Godwin* (1889), 24

N. Y. St. Rep. 305. But it has been held that a record of a judgment obtained in another state against the corporation for the same cause of action was admissible in evidence. *Cady v. Sanford*, 53 Vt. 632.

⁶⁶ *Cooke v. Pearce*, 23 S. C. 239.

⁶⁷ *Halstead v. Dodge*, 51 N. Y. Super. Ct. 169.

⁶⁸ *Slaymaker's Adm'r v. Jaffray & Co.* (1888), 82 Va. 346.

⁶⁹ *Patterson v. Robinson*, 37 Hun, 341. And it was held that Code Tenn. (Mill. & V.), § 1858, providing that if the indebtedness of a mining company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable for such excess, applies only to unpaid creditors, to the making of whose debts the creditors assented, and not to other creditors whose debts were incurred to pay off former illegal indebtedness to which the directors had assented. *Allison v. Coal Creek & N. R. Coal Co.* (1888), 87 Tenn. 60.

⁷⁰ *Schenck v. Bandmann* (Cal. 1890), 22 Pac. Rep. 654. Though

discussed by the directors and stockholders, and all agreed that it was not necessary; that the company stopped business shortly afterwards, and never resumed; and nothing on the subject is shown to have occurred afterwards between the parties,—it is error to direct a verdict for plaintiff, on the ground of defendants' subsequent failure to file the statutory reports, as, if this failure was caused by an understanding with plaintiff, he is estopped, and whether there was such an understanding, is a question for the jury.⁷¹ In an action against the trustees of a corporation to enforce their liability on notes of the corporation, by reason of their failure to file and publish the annual report required by law, parol evidence is admissible to show that the notes were given pursuant to an oral agreement between the parties to the suit, who together owned the entire stock of the corporation, that each should advance money for the benefit of the corporation, to the amount of his stock, and wait for payment out of the profits of the business, as, such agreement having been executed, the enforcement of plaintiff's notes against defendants under the statute would be inequitable.⁷²

§ 760. Procedure to enforce liability of directors and officers.—The personal liability of directors of a national bank for violation of the law by declaring dividends in excess of net profits, and for lending to separate persons, firms or corporations, amounts exceeding one-tenth of the capital stock, can not be enforced in an action at law.⁷³ If the statute is held not to be penal in its nature, the liability survives the death of the director,⁷⁴ but if it is, as generally held, to be penal, the director's liability does not survive his death, to be enforced against his estate;⁷⁵ and any such suit pending against him will abate in case of his death before judgment recovered against him.⁷⁶ A stockholder, or officer *de jure* or *de facto*,⁷⁷ who is not responsible for default

it is admitted that they did not have the necessary information to make it, and the burden is on the directors to show exculpatory circumstances.

⁷¹ Carraher v. Mulligan (1890), 8 N. Y. Supp. 42.

⁷² Carraher v. Mulligan (1890), 8 N. Y. Supp. 42; N. Y. 3 Rev. Stat. (8th ed.), p. 1907, § 12.

⁷³ Welles v. Graves, 41 Fed. Rep. 459.

⁷⁴ Farr v. Briggs's Estate, 72 Vt. 225, 82 Am. St. Rep. 930; McComb v. Kellogg, 48 Hun (N. Y.), 621.

⁷⁵ Mitchell v. Hotchkiss, 48 Conn. 9, 40 Am. Rep. 146; Githers v. Clark, 158 Pa. St. 616.

⁷⁶ Brackett v. Griswold, 103 N. Y. 425.

⁷⁷ Easterly v. Barber, 65 N. Y. 252.

to comply with such statute, and who is, at the same time, a creditor of the corporation, may enforce the liability of the directors or other officers.⁷⁸ An assignee of a claim against a manufacturing corporation may maintain such an action against a trustee thereof.⁷⁹ An action, arising under such acts, survives the directors and may be brought against their administrators.⁸⁰ And the fact that the affairs of the corporation have been placed in the hands of a receiver, neither takes away nor suspends this right of action.⁸¹ A creditor of the corporation may sue one or more of the directors to enforce the liability without joining all the creditors to whom they are liable, or all the directors subject to the liability.⁸² And it is not necessary that the creditor, before suing the directors, shall have obtained judgment against the corporation. He may, if necessary, join it as co-defendant with the directors, and establish his claim against the corporation in the same action.⁸³ The provisions of law, which make the directors and officers of a corporation, whose indebtedness exceeds the amount of its capital stock personally liable for such excess, if they assent thereto, are not penal, within the meaning of an act which makes the lapse of two years a bar to an action for a statutory penalty.⁸⁴ Such offenses, therefore, come under the law which provides that all civil actions, not otherwise provided for, shall be begun within five years next after the cause of action accrued.⁸⁵ But the California statute, regulating the conduct of mining business, requiring the directors of corporations, organized for that purpose, under a joint and several penalty of a thousand dollars, recoverable by any stockholder, to post in a conspicuous place in the office of the company, on the first Monday of each month, a duly verified and itemized account or balance-sheet for the preceding month, is penal in its character; and, as it does not specifically declare that the penalty may be recovered for *each* failure to comply with its requirements, there can be but one recovery for all failures prior to the commencement

⁷⁸ *Anderson v. Blattaui*, 43 Mo. 42; *Sanborn v. Lefferts*, 58 N. Y. 179.

⁷⁹ *Pier v. George*, 86 N. Y. 613, reversing 20 Hun, 210.

⁸⁰ *McComb v. Kellogg* (1888), 47 Hun, 634, construing N. Y. Laws of 1848, ch. 40, § 23.

⁸¹ *Patterson v. Minnesota Manuf. Co.* (1889), 41 Minn. 84.

⁸² *Patterson v. Minnesota Manuf. Co.* (1889), 41 Minn. 84.

⁸³ *Patterson v. Minnesota Manuf. Co.* (1889), 41 Minn. 84.

⁸⁴ *Wolverton v. Taylor* (1890), 132 Ill. 197, 23 N. E. Rep. 1007.

⁸⁵ *Wolverton v. Taylor* (1890), 132 Ill. 197, 23 N. E. Rep. 1007.

of suit.⁸⁶ In an action by the creditors of a corporation against the directors thereof to hold them personally liable, because the debts of the corporation created by defendants exceed the amount of its capital stock, it is enough to state the amount of such capital, and the claims which are outstanding, and it is not necessary that the debts should be due. If an apparent claim is not real, the fact should be set up by answer.⁸⁷ To subject the directors of a corporation to liability, joint and several, for the corporate debts for the preceding year, upon a neglect on their part to file the report of debts and capital, as prescribed by statute, it is held that the complaint must allege that the company was transacting business in the county where it is claimed that the report should have been filed, and must state the contract of indebtedness, which is sued upon, as well as set forth the default of the company, and the fact that the parties sued are directors so as to be liable, since the corporation is, by the terms of the statute, charged with no such duty unless these facts exist.⁸⁸ The directors, when sued to enforce their personal liability, can not question the original consideration of a corporate note indorsed before maturity to a *bona fide* indorsee for value.⁸⁹ In attempting to set up the statute of limitations, defendants failed to allege that they were trustees at the time of defaults stated by them to have occurred in previous years, and failed to allege a default on the part of the corporation in performing the corporate duty of making a report; and it was held, that the answer stated no defense.⁹⁰ For acts of gross negligence and mismanagement, but which are not illegal, the remedy is in equity instead of at law, and where two or more of the officers or agents have participated in the acts, they must all be made parties.⁹¹

§ 761. **Contribution among directors.**—Where the liability is penal in its nature, an officer from whom has been recovered payment of such a debt, can not have contribution from any of the other officers;⁹² nor from the stockholders, when they are made liable for such debts, after remedies against the officer have

⁸⁶ Loveland v. Garner (1887), 94 Cal. 298.

⁸⁷ Robinson v. Attrill, 66 How. Pr. 121.

⁸⁸ Anfenger v. Anzeiger Publishing Co. (1887), 9 Colo. 377.

⁸⁹ Cooke v. Pearce, 23 S. C. 239.

⁹⁰ Cornell v. Roach, 101 N. Y. 373.

⁹¹ North Hudson, etc. Assn. v. Childs (1892), 82 Wis. 460, 33 Am. St. Rep. 57.

⁹² Gregory v. German Bank of Denver, 3 Colo. 332, 25 Am. Rep. 760.

been exhausted. "The obligation of contribution is founded on the equitable principle that those who have united in taking upon themselves a common duty, or burden, ought to bear equally. But in order to create this obligation, it is essential that the duty or burden should be a common one; that is, that it should rest upon all alike. It is not sufficient that two or more persons are liable to pay the same debt. The liability must be the same kind and degree; not separate and successive, but joint and co-ordinate, so that all stand in equal right, in regard to the performance of the obligation, or payment of the debt for which they are respectively liable."⁹³ As to whether the doctrine, that there can be no contribution among joint tort-feasors, applies to directors under statutes imposing liability upon them, it has been held in Massachusetts that there may be contribution, as the statute was to be regarded as remedial rather than penal, and in case of a recovery against one for failing to file the annual certificates, required by the statute, he might maintain a bill in equity, against those jointly liable with him, for contribution.⁹⁴ But the contrary was held in New York with respect to liability so arising out of tort. The right of contribution then depends upon the innocence of those of them who have been held liable therefor. There is no right of contribution between those who are equally guilty, although one of them may have been compelled to make good the whole loss; for each is liable for the whole.⁹⁵ Where the liability is penal in its nature, there is no right to contribution from the other officers, to one who has been compelled to pay a debt for default in compliance with the statute.⁹⁶ It is obvious that the solution of the question will depend upon the character of the act enjoined or prohibited by the particular statute. If the wrong committed is a mere negligence, an inadvertent omission, there may be contribution and there ought to be; if it involves the element of evil intent, there can be no contribution, and there ought not to be.⁹⁷ So, where several directors have been held liable for the wrongful acts of another, of which they are innocent, they are entitled to contribution from him; and so, if one director be

⁹³ *Stone v. Fenno*, 6 Allen (Mass.) 579.

⁹⁴ *Nickerson v. Wheeler*, 118 Mass. 295.

⁹⁵ *Andrews v. Murray* 33 Barb. (N. Y.) 354.

⁹⁶ *Andrews v. Murray*, 33 Barb. 354.

⁹⁷ *Seymour D. Thompson* in 6 So. L. Rev. 413.

made to pay the whole loss arising from a wrongful act of which he was innocent, he is entitled to contribution from the others.⁹⁸ In the case of contracts, the matter is plain. When the directors of a corporation become liable upon a contract, entered into by the corporation, and some of them are required to assume more than their proper proportion of the liability, they are entitled to contribution from the others.⁹⁹ Where the statute makes the officers primarily liable for debts contracted before payment of all the capital stock, officers, who have been compelled to pay the corporation debts, have no right to contribution from the stockholders.¹

§ 762. **Liability on contracts made on behalf of the corporation.**—The liability of the agent or officer upon written contracts, is determined exclusively by the legal construction to be put upon the language used in the contract in each case. In other cases the question of the personal liability of the officer making the contract, is determined by the principles of the law of agency. Officers are not liable, generally, upon any contract lawfully entered into, on behalf of the corporation by them in their official capacity.² without circumstances indicated that they intended to assume personal liability.³ But, where the president of a corporation procured credit for the corporation upon false representations as to its solvency, he may be held liable personally, and, the case warranting, an order of arrest against him may issue.⁴

⁹⁸ *Power v. O'Connor*, 19 Week. Rep. 923; *Power v. Hoey*, 19 Week. Rep. 916; *Lewin on Trusts* (6th ed.), 744.

⁹⁹ *Slaymaker v. Gundacker*, 10 Serg. & R. 75.

¹ *Stone v. Fenno*, 6 Allen (Mass.), 579.

² *Roberts v. Button*, 14 Vt. 195; *Rochester v. Barnes*, 26 Barb. 657; *Beattie v. Ebury*, L. R. 7 H. L. 102; *Lindus v. Melrose*, 3 Hurl. & N. 177. *Cf. Knomer v. Haines*, 31 Fed. Rep. 513.

³ *Serrell v. Derbyshire, etc. Ry. Co.*, 19 L. J. C. P. (N. S.) 371, 9 C. B. 811; *Healy v. Story*, 3 Ex. 3; *Burrell v. Jones*, 3 Barn. & Ald. 47; *Tyrrell v. Woolley*, 1 Man. & G. 809. *Cf. Holt v. Winfield Bank*, 25 Fed. Rep. 812.

⁴ *Phillips v. Wortendyke* (1883), 31 Hun, 192. Where a corpora-

tion purchases goods, and the vendor receives the personal acceptance of the president of the company in payment, and, upon the falling due of the acceptance, takes the company's sixty-day draft in payment; and it appears that the president represented that the company could not pay the amount at once, but would be able to in sixty days; and that the vendor made inquiries of other parties, and examined the company's business, and came to the same conclusion; and there being no evidence but that the president had good reason for stating what he did, or that the company was not solvent at the time, or that the draft was ever presented to the company for payment, it was held that there was no evidence of such representa-

Where goods are purchased by a corporation, and the president thereof gives his personal acceptance for the purchase price, which is received by the vendor in payment, he is relieved from personal liability, if, when such acceptance falls due, the vendor accepts the corporation's draft for the amount, without the president's indorsement, and surrenders the president's acceptance.⁵ Where a trading corporation, which has been in the habit of assisting persons with whom it does business, allows its general manager to transact all its business, and he indorses in the corporate name, the note of one with whom the corporation is dealing, causes the note to be discounted, and pays the proceeds to the maker, he is not liable to the corporation, though it be obliged to pay the note.⁶ Agents of a corporation who, as such, receive money from persons with whom they contract, may be compelled to an accounting at the instance of shareholders, where the corporation has refused to sue.⁷ An agent of a company, who un-

tions by the president of the solvency of the company, or that it would pay the draft when due, as to bind him personally for the debt, upon the failure of the company to pay the draft at maturity. *Riverside Iron-Works v. Hall* (1887), 64 Mich. 165. G. agreed with B., a bondholder, and also the largest stockholder in a street-railway company, to take his holdings if B. would put G. into control. B. thereupon got the company to give him its notes for \$15,000, which was about the amount of its pressing debts, in consideration for which he undertook to pay off the outstanding claims. These were made up in the main of mortgage coupons, and the understanding was that B. was to hold these coupons, when taken up as collateral security, and that, as fast as the notes were paid, coupons to a proportionate amount were to be surrendered. G. was then installed as manager, and the notes turned over to him. He raised the money on them, and paid it to B., who then gave him the cou-

pons. Of these coupons—313 in number—but 192 belonged to B.'s bonds. The remainder had been paid when presented at the company's office, but they had passed into B.'s hands without the knowledge or consent of the former holders. G. took up the notes for \$15,000 as they fell due, and the company then paid him the difference between their value and that of the coupons in consideration of their surrender, it being agreed that the coupons should thereafter belong to G. absolutely. It was held that as against the other bondholders secured by the mortgage, the coupons had been paid, and that G., who had sold them with a warranty that they were a lien under that mortgage, was liable in damages to the purchasers for a breach thereof. *South Covington & C. S. Ry. Co. v. Gest* (1888), 34 Fed. Rep. 628.

⁵ *Riverside Iron-Works v. Hall* (1887), 64 Mich. 165.

⁶ *Holmes v. Willard* (1889), 5 N. Y. Supp. 610.

⁷ *Sheridan v. Sheridan Electric Light Co.*, 38 Hun (N. Y.), 396.

dertakes to bind his principal by simple contract, but without authority, binds himself.⁸

§ 763. Provisions of New York penal code as to directors.—

"A director of a stock corporation, who concurs in any vote, or act, of the directors of that corporation, or any of them, by which it is intended (1) to make a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; (2) to divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation; or to reduce the capital stock without the consent of the legislature; (3) to discount or receive any note, or other evidence of debt, in payment of an instalment of capital stock actually called in, and required to be paid, or with intent to provide the means of making the payment; (4) to receive or discount any note, or other evidence of debt, with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; (5) to apply any portion of

⁸ *Roberts v. Button* (1842), 14 Vt. 195; *Owen v. Van Uster*, 10 Com. B. 318. But in *Holt v. Winfield Bank* (1885), 25 Fed. Rep. 814, *Brewer, J.* said, "I had occasion when I was on the supreme bench, in the case of *Abeles v. Cochran*, 22 Kan. 405, to examine with great care the circumstances under which an agent is responsible when the principal is not bound. There was in this case no misrepresentations of fact or of law made by the president. He simply told the parties he would subscribe (towards starting a creamery) if a majority of the directors assented. He saw a majority of the directors, and they assented; he then came back and subscribed in the bank's name. There were no false representations of facts, no representations of law. Every person who deals with corporations is chargeable with notice of the general scope of their powers. If he deals with an insurance company he knows that it is insurance business that that company is authorized to transact. So if he deals with a

bank he knows that it is banking business that that bank is authorized to transact and none other. He has the same general knowledge that the officers of the bank have. Of course, where there is a concealment of a fact within the special knowledge of the party making the representation or making the signature, he may be bound. If, for instance, the bank had power to make such a contract as this, provided the directors assented, and the defendant represented to the plaintiffs that the directors had assented when in fact they had not, then unquestionably a failure to hold the bank liable would cast a liability upon him; but when a man deals with an officer of a corporation, and no representations are made by that officer, and that officer simply proposes to bind the corporation, and as a matter of fact the corporation is not bound, and is not bound simply because the contract is *ultra vires* of that corporation, the individual making the subscription is also not bound."

the funds of the corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock; (6) to receive any such shares in payment or satisfaction of a debt due to the corporation; (7) to receive in exchange for the shares, notes, bonds, or other evidences of debt of the corporation, shares of the capital stock or notes, bonds or other evidences of debt, issued by any other stock corporation,—is guilty of a misdemeanor.⁹ A director, officer or agent of any corporation or joint-stock association, who knowingly receives or possesses himself of any property of that corporation or association, otherwise than in payment of a just demand, and with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof, in the books or accounts of the corporation or association; and a director, officer, agent or member of any corporation or joint-stock corporation, who, with intent to defraud, destroys, alters, mutilates or falsifies any of the books, papers, writings or securities belonging to the corporation or association, or makes or concurs in making, any false entry, or omits or concurs in omitting to make any material entry in any book of accounts, or other record or document kept by the corporation, or association, is punishable by imprisonment in a State prison, not exceeding ten years, and not less than three years, or by imprisonment in a county jail, not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.¹⁰ A director, officer, or agent of any corporation or joint-stock association, who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, other than such as are elsewhere, by this code, specially made punishable, is guilty of a misdemeanor.¹¹ A director of a corporation or joint-stock association, must be deemed to have such a knowledge of the affairs of the corporation or association, as to enable him to determine whether any act, proceeding or omission of its directors, is a violation of this chapter.¹² A director of a corporation, or joint-stock association, although not present at a meeting of the directors, at which any act, proceeding or omission of the directors, in violation of this chapter, occurs, must be deemed to have concurred therein, if the facts constituting such violation, appear on the record or minutes of the proceedings of the board of direc-

⁹ N. Y. Penal Code, § 594.

¹⁰ N. Y. Penal Code, § 602.

¹¹ N. Y. Penal Code, § 603.

¹² N. Y. Penal Code, § 609.

tors, and he remains a director of the company for six months thereafter, without causing, or in writing requiring, his dissent from such illegality to be entered in the minutes of the directory.¹³ The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter, or are known in law."¹⁴

§ 764. **Liability of officers upon irregularly executed contracts.**—Where the officer or agent uses his own name in the execution of a corporate contract, instead of that of the corporation, he is not personally liable, if there is sufficient in the paper, to show the name of the corporation, and his agency.¹⁵ As, where the directors signed a corporate note in their names, and indorsed it "Board of Directors,"¹⁶ and, where a note is signed with the company's name "per" officers, they are not personally bound, although the note reads, "we promise to pay."¹⁷ But, where the officer uses his name as the maker, though followed by the name of his office, he alone will be held liable; as, a note signed, with the word "president" added;¹⁸ and a note by the trustees of a society, who sign it as "trustees."¹⁹ Where the president and the secretary sign a note severally, adding "president" and "secretary," they are personally liable, in the absence of anything else to show that it is the note of the corporation.²⁰ As to informalities in execution of contracts by officers, the rule laid down by the United States Supreme Court is, that: "one who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation, issued by order of the board of directors, signed by the president and secretary, in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its

¹³ N. Y. Penal Code, § 611.

¹⁴ N. Y. Penal Code, § 614.

¹⁵ *Bush v. Gillmore* (1899), 45 N. Y. App. Div. 89; *Neptune v. Paxton*, (1896), 15 Ind. App. 284; *Morrison v. Baechtold* (1901), 93 Md. 319; *Gleason v. Sanitary, etc. Co.* (1900), 93 Me. 544, 74 Am. St. Rep. 370; *Preston v. Hixon* (1889), 22 Ind. App. 139. See 28 L. R. A. 421.

¹⁶ *Kline v. Bank of Tescott* (1892), 50 Kan. 91.

¹⁷ *Williams v. Harris* (1902), 198 Ill. 501.

¹⁸ *Lawrence County Bank v. Arndt* (1901), 69 Ark. 406.

¹⁹ *McKenney v. Bowie* (1900), 94 Me. 397.

²⁰ *San Bernardino, etc. Bank v. Anderson* (Cal. 1893), 32 Pac. 168.

officers or stockholders, or of both, have authorized the execution and issue of the obligation."²¹

§ 765. **Liability of officers other than directors.**—The cases illustrating the liability of cashiers, treasurers and other like officers of corporations, rest on no different principles from those which govern the liability of persons doing business for themselves, or as the agents of natural persons.²² But salaried officers and agents may be held to a higher degree of diligence in the performance of their duties, than are directors, for they are supposed to devote a greater portion of their time to the service of the corporation.²³ Where the president of an omnibus company directed its drivers to exclude all colored persons, it was held that he was individually liable for the ejection and personal injury of any such person, although an action might have been maintained against the company.²⁴ So, the general manager of a corporation is properly prosecuted, if the corporation violates an ordinance, by doing business without having paid its license tax.²⁵ Where the treasurer of a savings bank, who was also one of its managers, assigned to it a bond and mortgage, owned by him on lands not worth double the mortgage, as required by the bank's charter, and without submitting the investment to the finance committee for approval, as required by its by-laws, it was held that he was liable for a loss sustained on such bond and mortgage.²⁶ If the sec-

²¹ *Louisville, etc. Ry. v. Louisville Trust Co.* (1899), 174 U. S. 552.

²² *Thompson on the Liability of Officers and Agents*, 487.

²³ *Pangborn v. Citizens' Building Assn.*, 35 N. J. Eq. 341; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *Austin v. Daniels*, 4 Denio, 299; *East New York, etc. R. Co. v. Elmore*, 5 Hun, 214; *First National Bank v. Reed*, 36 Mich. 263; *Concord R. Co. v. Clough*, 49 N. H. 257; *Taylor on Corporations*, § 618. *Cf. Taylor v. Taylor*, 74 Me. 582.

²⁴ *Peck v. Cooper* (1885), 112 Ill. 192, 54 Am. Rep. 231. An affidavit reciting that judgment had been entered and served on defendant, the president of a corporation, requiring him, on receipt of certain certificates of corporate

stock and powers of attorneys, to issue new certificates, and enter the transfer on the corporation books, and that he had refused to obey the same, is sufficient to support an order punishing for contempt. *King v. Barnes* (1888), 109 N. Y. 267.

²⁵ *Wyandotte v. Corrigan* (1885), 35 Kan. 21.

²⁶ And that the fact that the managers did not object to or repudiate the transaction for six years, was so defense, whether his breach of duty was known or not known by the other managers. *Williams v. Riley* (1881), 34 N. J. Eq. 398. And where the treasurer of a corporation improperly loaned its funds to another corporation, of which he was also treasurer, and the former sued the latter for the amount, and in good faith ef-

retary of a corporation, whose duty it is to receive moneys due the corporation, and to pay them over to the treasurer, fails to pay over promptly, and the moneys are stolen from him, he, and the sureties, on a bond given by him for the faithful performance of his duties, are liable.²⁷ When a local agent of an insurance company, receives instructions to cancel a policy and fails to do it, he is responsible for the loss.²⁸ But an officer of a private corporation is not responsible for corporate funds and papers intrusted to his care, and lost without negligence on his part.²⁹

§ 766. **Liability for negligence and nonfeasance is only to the corporation.**—An agent is personally liable to third persons for his own misfeasances and positive wrongs, but he is not, in general, liable to them for mere non-feasance or omissions of duty, in the course of his employment. His liability, in these cases, is solely to his principal, there being no privity between him and outsiders. The party injured, must, in the latter event, look to the principal. Such is the general doctrine of *respondeat superior*.³⁰ These familiar principles, applicable in the case of positive torts committed by servants and ordinary agents, must

affected a settlement for a percentage, after notifying the treasurer and his sureties of their intention so to do, and offering to assign the claim to them provided they would pay the amount due from the treasurer on account of such improper loan, which was refused, and a receipt was given by plaintiff, reserving its rights against the treasurer and his sureties, it was held, that the bringing of such suit did not amount to a ratification of the treasurer's act in making the loan, and that he was still liable for the balance after deducting such percentage. *Goodyear Dental Vulcanite Co. v. Caduc* (1887), 144 Mass. 85.

²⁷ *Odd Fellows' Mut. Aid Assn. v. James* (1883), 63 Cal. 598, 49 Am. Rep. 107.

²⁸ *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409 (1887). But where an insurance company, through a misconception by its agent of his duty, while acting in good faith, was drawn into the insurance of

a building at a rate fixed for insurance if occupied for a hotel, for which purpose it had not in fact been occupied, but was expected to be soon, and the actual risk was not greater than it was represented to be, and the premium received was greater than would have been charged for an unoccupied hotel building, and it was burned before occupancy, and the company paid the loss, and sued the agent to recover the amount so paid, it being shown that the risk assumed was within the company's business, and that it was only a question of rates, the company could not recover, without showing that it was damaged in rates, more than nominal damages. *State Ins. Co. v. Richmond* (1887), 71 Iowa, 519.

²⁹ *Mowbray v. Antrim* (1890), 23 N. E. Rep. 858, 123 Ind. 24.

³⁰ *Kent's Com.* (10th ed.) 878; *Parson's Contracts* (5th ed.) 66; 1 *Blackstone's Com.* 413. *Vide infra*, § 768.

be applied to the misfeasances of directors also.³¹ It has never been held that "the actual active perpetration of a wrong to the rights of property of another, can find protection under the charter of a corporation, any more than in the command or authority of a natural superior."³²

§ 767. **Liability to third persons for fraud, misrepresentations, and torts.**—But whatever be the liability of the corporation, its agent, regardless of the agency, and whether or not acting under direction of his principal, is, for any tort committed by him, personally liable to the injured person, and at his election, may be held liable separately or jointly with the corporation.³³ Directors of a corporation, in the management of its affairs, are the power which gives expression to its will, but it is no part of their duty to perpetrate crimes or frauds in its name, or for its benefit; and whatever the liability of the corporation may be, the individuals who, under cover of their office, commit these frauds, ought to

³¹ *Salmon v. Richardson* (1862), 30 Conn. 360, 79 Am. Dec. 255, 258. Directors are individually responsible for intentionally issuing spurious stock and securing loans thereon, nor is it necessary to bring an action first against the corporation, and the existence of the corporation does not come into issue. *Exchange Bank v. Sibley*, 71 Ga. 726. In a late case the trustees issued stock in payment for property, which was worth much more than the par value of the stock, to one who sold it for several times its par value; the trustees not being in any way interested in the transaction, except to authorize the issue. They also, in good faith, conveyed all of the property of the corporation to another corporation, which transfer was authorized and ratified by a large majority of the stockholders. No case was shown for the interference of the court. *People v. Ballard* (1889), 3 N. Y. Supp. 845.

³² *Salmon v. Richardson* (1862), 30 Conn. 360, 79 Am. Dec. 255, 258. Damages may be recovered against the directors of a corporation,

who have placed in the hands of an agent for sale bonds indorsed falsely and intentionally "first mortgage bonds," by *bona fide* purchasers who have been injured by relying on the indorsement. *Clark v. Edgar*, 84 Mo. 106, 54 Am. Rep. 84. That the action is in tort against an officer who acted on his own responsibility in alienating corporation property, and signed the instrument individually, and not as trustee, does not alter his liability, as whatever damage plaintiff sustained was caused by defendant acting officially, and if he was not acting officially his act was nugatory. *Stronmeyer v. Combes* (1888), 18 N. Y. St. Rep. 154. The president of a company, which is a common carrier of persons, is personally liable for the ejectment and injury of persons, whom he has ordered to be excluded, as a class, from carriage, even though an action might lie against the company also. *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231.

³³ *Morgan v. Skiddy*, 62 N. Y. 319; *Cowley v. Smith*, 46 N. J. Law, 380, 50 Am. Rep. 432.

be, and are, upon the clearest principles of law and justice, accountable for their conduct in a civil action, at the suit of the injured party.³⁴ Thus, misrepresentations by directors as to some material matter unknown to the injured party, relied upon by him, and such as to induce him to refrain from an examination of the records, when accessible, are a fraud which will render them liable to the person injured.³⁵ Directors, who enter into contracts which they have power to make in a certain way, impliedly represent that the necessary steps have been taken, and may be made personally liable, if they have not perfected their powers.³⁶ Thus, directors borrowing money, after the company's powers are exhausted, impliedly represent that they have power to borrow,

³⁴ *Salmon v. Richardson* (1862), 30 Conn. 360, 79 Am. Dec. 255, 257, *per* Sanford, J.; *Clark v. Edgar*, 84 Mo. 106, 54 Am. Rep. 84; *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231; *Robinson v. Smith*, 3 Paige Ch. 222, 24 Am. Dec. 212; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624; *Bolz v. Ridder*, 12 Daly, 329; *Exchange Bank v. Sibley*, 71 Ga. 726; *Wyandotte v. Corrigan*, 35 Kan. 21; *Peck v. Gurney*, L. R. 6 H. L. 377.

³⁵ *Clark v. Edgar* (1884), 84 Mo. 106, 54 Am. Rep. 84, 86, where Black, J., said further that "the fact that this information was at hand and could have been ascertained by an inspection of the records, is entitled to its weight in determining whether the representations were such as would impose on one of ordinary prudence, but it does not constitute a full answer to the charges made in the petition." Where the capital stock of a corporation is not paid, but directors represent that it is fully paid up, and plaintiff, relying on such representation, purchases the note of such corporation, the liability of the directors must be determined in an action of deceit, and they cannot be joined as defendants in an action to recover of the makers and

indorsers of the note and others liable for its payment. *National Bank v. Texas Investment Co.*, 74 Tex. 421 (1889). Where directors, who had no power to bind the company, stated to a bank that the manager had authority to draw checks on account of the company, they were held personally liable to repay the bank. *Browne & Theobald's Railway Law*, 110, citing *Cherry v. Colonial Bank*, L. R. 3 P. C. 24, where the account of the company was overdrawn to the knowledge of the directors. But instructions given by directors to the bankers of the company to honor its checks drawn in a certain manner, at a time when there was a balance at the bank in its favor, have been held not to impose any liability upon the directors to repay checks subsequently drawn upon the bank when the account of the company was overdrawn. *Beattie v. Lord Ebury*, L. R. 7 H. L. 102.

³⁶ *Browne & Theobald's Railway Law*, 110; *Lakeman v. Mountstephen*, L. R. 7 H. L. 17; *Beattie v. Lord Ebury*, 7 Ch. 777, L. R. 7 H. L. 102; *Cherry v. Colonial Bank*, L. R. 3 P. C. 24; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Collen v. Wright*, 8 El. & B. 647.

and may be made personally liable.³⁷ They are liable for false and fraudulent published statements as to the solvency of a bank, or insurance company, whereby depositors or persons insured, or purchasers of stock, suffered loss;³⁸ and directors, though having no fraudulent intent, have been held liable, on the ground of allowing the publication of a prospectus, falsely representing the financial conditions of the corporation, whereby a person, to his loss, was induced to purchase stock of the corporation.³⁹

³⁷ Browne & Theobald's Railway Law, 110; Girbank's Executors v. Humphreys, 18 Q. B. Div. 54; Chapleo v. Brunswick Soc., 5 C. P. Div. 331, 6 Q. B. Div. 696; Weeks v. Propert, L. R. 8 C. P. 427.

³⁸ Tate v. Bates, 118 N. C. 287, 54 Am. St. Rep. 719; Clark v. Ed-

gar, 84 Mo. 106, 54 Am. Rep. 84; Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Dorsey, etc. Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290.

³⁹ Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699.

CHAPTER XXX.

LIABILITY OF THE CORPORATION.

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| § 768. Representation of the corporation by officers | and agents. Liability for torts. |
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References:

Fraudulent agreements by directors. Sections 252-254.

Directors, officers and agents. Sections 705-745.

Liability of directors and other officers. Sections 746-767a.

Ultra vires acts and contracts. Sections 887-921.

Contracts of promoters. Sections 809-818.

§ 768. Representation of the corporation by officers and agents. *Respondeat Superior*. *Liability for Torts*.—Though an agent is responsible to third persons for his own misfeasances and positive wrongs, he is not liable to them for mere non-feasances or omission of duty in the course of his employment. His liability in these cases, is only to his principal, there being no privity between the agent and third persons. The injured person in such case, must look to the principal. This is the doctrine of *respondeat superior*. This principle applies as well to the misfeasances or directors, as to positive torts committed by ordinary agents and servants, within the scope of their employments. A corporation is equally liable with natural persons, for wrongs to the persons or property of another, suffered at the hands of agents and servants of the corporation.¹ Judgment by confession against a corporation, in favor of the executor of an estate, is not *prima facie* void, because based upon appearance and affidavit of a managing officer of the corporation, who is personally interested in the estate.² A transfer of all the corporate property by the trustees, to a foreign corporation organized by them, for the purpose of receiving the property and purchasing or exchanging the stock of the shareholders of the vendor corporation, for stock in the foreign corporation, is absolutely void.³ The directors of a corporation can, not bind it, by contract with another, of which they are also directors and representatives in making the contract.⁴ The president of a bank can not bind the bank, by agreeing to extend time to a debtor, or to refrain from selling pledged stock, in the absence of express authority of the directors.⁵ A surety company was held not liable upon its surety bond, furnished to a corporation for its assistant treasurer, who defaulted the bond, and its renewals having been furnished upon the required statements of the gen-

¹ *Vide supra*, § 766, notes 30, 31 and 32.

² *Manley v. Mayer* (Kan. 1904), 75 Pac. 550.

³ *Forrester v. Boston, etc. Co.* (Mont. 1904), 74 Pac. 108.

⁴ *McLeod v. Lincoln, etc. University* (Neb. 1904), 98 N. W. 672.

⁵ *Arbogast v. American, etc. Bank* (Ill. 1903), 125 Fed. 518.

eral manager of the corporation, and of its auditor, that the assistant treasurer's accounts had been examined each month and found correct, which statements were untrue.⁶ A note will be treated as the obligation of the corporation, though signed by a director only in the corporate name, where the other two directors, who were the managing directors, were present, and participated in issuing the note, and they three were all the officers and stockholders of the company.⁷ A contract made between all the stockholders and the corporation, can not be set aside by the corporation or its receiver. It can be attacked only by creditors, upon proof that they have been defrauded thereby.⁸ The corporation is estopped to deny the authority of its officers to employ brokers in the purchase of a building, where the officers were authorized to purchase it, and did so by brokers, who, in lieu of commissions, were promised that they should have the renting of the building, and agreed commissions for finding tenants.⁹ A corporation was held to have ratified a deed of trust executed by its president, by subsequently obtaining release of parcels of the land included in the deed of trust, the corporation having received, and used the money which the deed of trust was given to secure.¹⁰ An agent of the general agent of the corporation, having accepted in settlement part payment of a debt due the corporation, was held to have had authority to so settle, where he was authorized by the general agent to use his own judgment, as to settlement.¹¹ One dealing with a corporate officer, in a matter within the corporate powers, is not bound to know the limits of the officer's corporate authority.¹² "To the general rule, that the acts and contracts of a general agent, within the scope of his powers are presumed to be lawfully done and made, there is an exception, as universal and inflexible as the rule. It is, that an act done; or a contract made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general powers; and no one who has notice of its character may safely rely, or recover upon it, without proof that

⁶ *Issaquah Coal Co. v. United States, etc. Co.* (Wash. 1903), 126 Fed. 89.

⁷ *Buck v. Troy, etc. Co.* (Vt. 1903), 56 Atl. 285.

⁸ *Great Western, etc. Co. v. Harris* (Vt. 1903), 128 Fed. 321 (C. C. A., U. S.).

⁹ *Pescia v. Societa, etc.* (1904), 86 N. Y. S. 952.

¹⁰ *Clark v. Elmendorf* (Tex. Civ. App.), 78 S. W. 538.

¹¹ *Russell v. Stevenson* (Wash. 1904), 75 Pac. 627.

¹² *Groeltz v. Armstrong* (Iowa, 1904), 99 N. W. 128.

the agent was expressly and specially authorized by his principal to do the act, or to make the contract. . . . This exception is a striking illustration of the policy of the law to prevent the possibility of conflict between the duty and the personal interest of an officer or agent."¹³

Ultra vires acts. Torts. Contracts.—A corporation is liable for a tort committed by its agents, within the scope of their authority, in the performance of an unauthorized corporate contract, though it is illegal or immoral. Such a contract is not voidable, on the ground that it was not within the authorized powers of the corporation. Mere want of authority does not render the contract illegal. Subscription under authority of the directors, for the building of a church, though unauthorized by the corporate charter, would not be illegal. The contract of subscription is void, but not so on the ground of illegality. The illegality of an act depends upon its quality, and not upon the person, natural or artificial, who performs the act. An agreement, declared by statute to be void, can not be enforced, because such is the legislative will, but when without such declaration, the agreement is simply illegal, it is capable of enforcement where justice plainly requires it. For example, where a banking corporation, authorized to purchase land for a banking house, purchases it with intent only to speculate, the corporation can not repudiate payment for the land, on the ground that the purchase was *ultra vires*.¹⁴

A.

KNOWLEDGE ; NOTICE TO DIRECTORS AND OFFICERS, OR AGENTS.

§ 769. When knowledge or notice is imputable to the corporation.—Notice to, or knowledge by, an officer or agent, in the course of his employment, as to matters within the scope of his authority, whether or not he communicates such knowledge, is notice to the principal, though such principal be a corporation.¹⁵

¹³ Park Hotel Co. v. National Bank, 86 Fed. 742.

¹⁴ Bissell v. Michigan, etc. R. R. Co. (1893), 22 N. Y. 258. *Vide supra*, § 961, TORTS OF AGENTS.

¹⁵ Lawrence v. Tucker, 5 Me. 195; Pittsburgh Bank v. Whitehead, 10 Watts, 397; Boggs v. Lancaster Bank, 7 Watts & S. 336; Danville Bridge v. Pomroy, 15 Pa.

St. 151; McEwen v. Montgomery Co. Ins. Co., 5 Hill, 101; Conro v. Port Henry Iron Co., 12 Barb. 27; Cumberland Coal Co. v. Sherman, 30 Barb. 560; Trenton Banking Co. v. Woodruff, 1 Green Ch. 117; Wing v. Harvey, 5 De G., M. & G. 265; Ransom v. Brinkerhoff, 56 N. J. Eq. 149; Patterson v. Pittsburgh, etc. Co., 76 Pa. St. 389, 18

"The principal is chargeable with this knowledge, for the reason that the agent is substituted in his place, and represents him in the particular transaction, and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions." Knowledge of facts, incidentally acquired by individual directors, when not acting officially, and when such knowledge is not communicated to the other directors or officers, is not notice to the corporation. The directors, individually, do not represent the corporation, and can bind it only collectively as a board.¹⁶ But when so present and acting as a meeting, a director's knowledge, as to a matter before the board, whether or not he communicates such knowledge, it is notice to the corporation.¹⁷ Although it may have been acquired before he became such director, "the existence of knowledge in an agent, when acting for his principal, is notice to the principal, however the knowledge may have been acquired,"¹⁸ if at the time of so acting, such knowledge is presumably present in the officer or agent's mind.¹⁹ Notice before incorporation, is not notice to one who afterwards becomes an officer of the company.²⁰ "If false and fraudulent representations are made to persons who afterwards become officers or agents of a corporation, and it acts on the faith of such representations, and is thereby defrauded, an action will lie in favor of the corporation for the damages thus sustained."²¹ Notice to an agent, not in the course of his employment, is not notice to the corporation.²² Notice to a traveling salesman, of a change in a partnership firm, is not notice to the

Am. Rep. 412; Quincy Coal Co. v. Hood, 77 Ill. 68; *In re Carew's Estate*, 31 Beav. 39; Zeiss v. Potter (C. C. A.), 105 Fed. 671; Atlantic Cotton Mills v. Indian, etc. Mills, 147 Mass. 168, 9 Am. St. Rep. 698; Willard v. Denise, 50 N. J. Eq. 482, 35 Am. St. Rep. 788; Bank of United States v. Davis, 2 Hill (N. Y.) 451.

¹⁶ Goodloe v. Godley, 13 S. & M. 233, 51 Am. Dec. 159; Westfield Bank v. Cornen, 37 N. Y. 320, 93 Am. Dec. 573.

¹⁷ National Sec. Bank v. Cushman, 121 Mass. 490; City Bank of Columbus v. Phillips, 22 Mo. 85, 64 Am. Dec. 254; Smith v. South,

etc. Bank, 32 Vt. 341, 76 Am. Dec. 179.

¹⁸ Fairfield, etc. Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319; Snider v. Partridge, 178 Ill. 173, 32 Am. St. Rep. 130.

¹⁹ Dorr v. Life Ins., etc. Co., 71 Minn. 38, 70 Am. St. Rep. 309.

²⁰ Taylor v. Calloway (1894), 7 Tex. Civ. App. 461; Brennan v. Emery, etc. Co. (1900), 99 Fed. 971.

²¹ Iowa, etc. Co. v. American, etc. Co. (1887), 32 Fed. Rep. 735.

²² Willard v. Denise (1892), 50 N. J. Eq. 482; Casco Nat. Bank v. Clark (1893), 139 N. Y. 307, 36 Am. St. Rep. 705.

corporation employing him.²³ "Facts coming to the knowledge of an agent or an attorney, while engaged about the business of his agency, are in law presumed to be known to the principal or client."²⁴ Knowledge of a managing cashier of a bank, learned in the course of the business of the bank, that a deed of conveyance unrecorded, has been made, is notice to the bank sufficient to defeat its deed, afterward placed on record before the former deed.²⁵ Knowledge acquired by a bank president, while acting solely for himself in his own interest, is not notice to the bank.²⁶ Notice to an officer, personally interested, is not notice to the corporation.²⁷ Where a corporation purchases land through its incorporators, and they, and the president, all knew that the title was imperfect, the corporation was charged with notice of the imperfection.²⁸ Where trustees for the benefit of corporate creditors, are at the same time officers in the corporation, notice to them as officers, is not notice to them as trustees.²⁹ Where a corporation, in exchange for its stock and bonds, purchases a railroad at foreclosure sale, it is held to have paid no value, and to hold the property subject to the same equitable liens to which it was subject in the hands of its grantors.³⁰ Property, which is turned into a corporation for its stock, is impressed with a trust, and may be followed.³¹

Minutes of Meetings, as notice to stockholders.—In a suit by a stockholder of a telegraph company, for damages by delay in transmission of message, the court held, as to notice, that:—"A shareholder in a corporation is not chargeable with constructive notice of resolutions, adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers."³² The minutes are inadmissible as notice to a shareholder, in a suit against him by the corporation.³³

²³ Neal v. M. E. Smith, etc. Co. (1902), 116 Fed. 20.

²⁴ Consolidated, etc. Co. v. Kansas, etc. Co. (1891), 45 Fed. 7.

²⁵ Johnston v. Shortridge, 93 Mo. 227 (1887).

²⁶ Seaverns v. Presbyterian, etc. (1898), 173 Ill. 414, 64 Am. St. Rep. 125; First, etc. Bank v. Skinner (Kan. 1900), 62 Pac. 705.

²⁷ Victor, etc. Co. v. National Bank (1897), 15 Utah, 391, 49 Pac. 826.

²⁸ Simmons, etc. Co. v. Doran (1892), 142 U. S. 417; Rogers v. New York, etc. Co. (1892), 134 N. Y. 197.

²⁹ New York, etc. Co. v. Lombard Inv. Co. (1895), 65 Fed. 271.

³⁰ Vilas v. Page (1887), 106 N. Y. 465.

³¹ Farmers' etc. Bank v. Kimball, etc. Co. (1890), 1 S. E. 388.

³² Pearsall v. Western U. T. Co. (1890), 124 N. Y. 256.

³³ Blake v. Griswold (1889), 103 N. Y. 429.

§ 770. **Knowledge by an officer or agent, adversely interested.**—The presumption is that the agent performs his duty to his principal. On this is based the doctrine that the principal is chargeable with notice of facts within the agent's knowledge, but the doctrine does not apply where the agent's interest is adverse to that of his principal, as where the agent is dealing in his own interest with the principal. In such case, the agent's knowledge in the subject matter of the deal is not to be imputed to the corporation.³⁴ Thus, if a railroad corporation occupies land after its agent has been notified by the owner that rent will be charged, it is liable in assumpsit for use and occupation.³⁵ So, where a corporation is made party defendant to an action by service on its president, as authorized by statute, and is represented by its attorney, it will be presumed to know what transpires in the action.³⁶

§ 771. **When the corporation is chargeable with notice of frauds by its officers.**—In case of fraud by the agent of a corporation, for his own benefit, upon any third person, or upon another corporation of which he is also officer, the former corporation is charged with notice of the facts of the fraud.³⁷ As, where the treasurer of a corporation pays his deficit to it by drawing checks upon another corporation of which he is also treasurer, no other officer of either corporation, having knowledge of the true nature of the transaction when it occurred, the knowledge of the treasurer must be imputed to the corporation receiving the checks, and their receipt must be treated as wrongful, and as imposing a liability to repay their amount to the corporation against which they were drawn.³⁸ For a principal must be regarded as acting with knowledge of a fraudulent act, when he is represented solely by an agent who has the knowledge.³⁹ Mere private and casual knowledge, however, of a transaction, possessed by one of the directors and by the actuary, is insufficient to imply that the company knew

³⁴ *Lamson v. Beard*, 36 C. C. A. 56, 94 Fed. 30; *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125; *Corcoran v. Snow Cattle Co.*, 151 Mass. 74; *Gunster v. Scranton, etc. Co.*, 181 Pa. St. 327, 59 Am. St. Rep. 650.

³⁵ *Illinois Central R. Co. v. Thompson* (1885), 116 Ill. 159.

³⁶ *Campbell v. Pope* (1889), 96 Mo. 468.

³⁷ *Atlantic Cotton Mills v. Indian, etc. Mills*, 147 Mass. 268, 9 Am. St. Rep. 698.

³⁸ *Atlantic Mills v. Indian Orchard Mills* (1888), 147 Mass. 268, 9 Am. St. Rep. 698.

³⁹ *Atlantic Mills v. Indian Orchard Mills* (1888), 147 Mass. 268, 9 Am. St. Rep. 698.

of the transaction.⁴⁰ Nor is it enough that notice should be given to one who is an officer, and in his official character. He must also be the proper officer to receive notice of the particular transaction.⁴¹ And where a director of a land company, who was also probate judge, drew a deed, in the presence of the president and executive board of said company, conveying to a third person certain lots, and took the acknowledgement, but before the deed was recorded, the company purchased the same lots from the same grantor, it was held that the company had no such knowledge of the identity of the lots purchased with those formerly conveyed, as would charge it with notice of the former conveyance.⁴²

§ 772. Notice to promoters or stockholders.—Notice to promoters, corporators, or stockholders, where they are not also officers of the corporation, where there are other stockholders, is not notice to the corporation.⁴³ Of facts, known to all the stockholders, or to the one sole owner of all the stock, the corporation is chargeable with notice.⁴⁴

B.

RATIFICATION BY THE CORPORATION OF ACTS OF ITS OFFICERS.

§ 773. Knowledge which amounts to ratification.—A corporation, like a natural person, may ratify any act of its agents which it could itself lawfully perform.⁴⁵ And a transaction, although originally unauthorized, once ratified, becomes as binding upon

⁴⁰ *Ex parte* Burbridge, 1 Deac. 131. See the same case under the name of *Ex parte* Watkins, 2 Mont. & Ayr. 690; 13 Sol. J. & Rep. (1869), 870.

⁴¹ 13 Sol. J. & Rep. (1869) 870; citing *Styles v. Cardiff Steam Boat Co.*, 12 W. R. 1080, 4 N. R. 483.

⁴² *Armstrong v. Abbott*, 11 Colo. 220 (1888).

⁴³ *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347; *Franklin Mining Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118.

⁴⁴ *Simmons, etc. Co. v. Doran*, 142 U. S. 417.

⁴⁵ *Kessler v. Ensley* (1903), 123 Fed. 546; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.* (1885), 28

Fed. Rep. 505, where it was held that the entry into possession of a leased road in pursuance of a lease executed by its officers without due authority, and operating the same and paying the rent therefor, as reserved in said lease, is ample evidence of the ratification. *Planters' Bank v. Sharp*, 4 Sm. & M. 75, 43 Am. Dec. 470; *Fleckner v. Bank of United States*, 8 Wheat. 338, 363; *Greenleaf v. Norfolk Southern R. Co.*, 91 N. C. 33; *First Nat. Bank v. Ficke*, 75 Mo. 178, 42 Am. Rep. 397; *Kelsey v. National Bank*, 69 Pa. St. 426; *Indianapolis, etc. Co. v. St. Louis, etc. Co.*, 26 Fed. 140, 120 U. S. 526; *Dallas v. Columbia, etc. Co.*, 158 Pa. St. 444.

a corporation as in case of a ratification by an individual.⁴⁶ Thus, under a statute making the written assent of stockholders, owning two-thirds of the stock of a manufacturing corporation, indispensable to a valid mortgage, such assent, if given afterwards, will validate the mortgage, if no intervening equities have arisen, even though it be not filed in the office of the clerk of the county where the mortgaged property is situated.⁴⁷ A ratification by the stockholders, made with full knowledge of all the material facts, although in ignorance of their legal effect, is conclusive against the company.⁴⁸ The stockholders only can ratify the unauthorized acts of directors, and of such corporate officers as are elected directly by the shareholders.⁴⁹ The question of ratification of the acts of directors, can seldom arise in an American court, for the reason that, in general, the whole power of the corporation itself is vested in the board of directors; therefore, what may be lawfully done by the corporation can generally be done by the board of directors. In other words, an act beyond the powers of the directors is *ultra vires* the corporation, and void. In England, on the contrary, the question may, and frequently does, arise because the directors are regarded simply as special agents of the corporation.⁵⁰ In such cases the obviously just rule is adopted, that if the act of the directors to be ratified, is one which the company itself has no power to perform, no amount of acquiescence on the part of the shareholders can effect a ratification; "not if every shareholder of the company had said, 'that is the contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company.'"⁵¹ In other cases, whether the company, *i. e.*, the shareholders. as a body, have ratified an act of the directors in

⁴⁶ 20 Cent. L. J. 412; *Fleckner v. United States Bank*, 8 Wheat. 338.

⁴⁷ *Rochester Savings Bank v. Averell* (1883), 96 N. Y. 467, construing N. Y. Laws 1864, ch. 517, and 1871, ch. 481.

⁴⁸ *Kelley v. Newburyport & Amesbury Horse R. Co.* (1885), 141 Mass. 496; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187; *Johnson Co. v. Miller*, 174 Pa. St. 605, 52 Am. St. Rep. 833; *Moller v. Keystone Fiber Co.*, 187 Pa. St. 553; *Pneu-*

matic Gas Co. v. Berry, 113 U. S. 322.

⁴⁹ *Payson v. Stower*, 2 Dill. 427; *In re New Zealand Banking Co.*, L. R. 3 Ch. 131; *Lane's Case*, 1 De G., J. & S. 504; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203.

⁵⁰ *Lindley on Part.* (4th ed.) 249. But see *Green v. Nixon*, 23 Beav. 530.

⁵¹ *Ashbury, etc. R. Co. v. Riche*, 2 App. Cas. 653, 673, L. R. 9 Exch. 224, 262, per Blackburn, J.

excess of their authority depends upon whether the act has been brought to the notice of the shareholders directly, and by them ratified, or, whether it has been adopted by other agents of the company having authority to act in the premises.⁵² While the unauthorized acts of officers, not elected by the stockholders, may be sufficiently ratified by the superior officers appointing them, the shareholders also may impart validity to such acts by their ratification thereof.⁵³ So, also, a corporation, after having once confirmed acts, done by one who has passed himself off as an agent, is estopped from denying his authority, on the ground that he was not duly chosen by the directors.⁵⁴ Where a contract, under seal, has been executed by the officers of a corporation in their individual names, it is competent to aver and prove by parol, that the corporation, as the real party in interest, adopted, ratified, and undertook to carry out the terms of the contract in such a manner as to become bound thereby.⁵⁵ The knowledge of the managing president, acquired within a week after the transaction, that the secretary, who had no such authority, had executed a note on account of the corporation, is the knowledge of the corporation. The president's tacit acquiescence amounts to ratification by the corporation.⁵⁶

§ 774. "Ratification" and "adoption" distinguished.—It is very common to find "ratification" used in decisions, where "adoption" is the word intended. Clearly, if there be no principal, there can be no agent. Thus, an organized corporation can not ratify any act previously performed in its behalf. If it afterward adopt the act, it can do so and bind itself only for a valuable or adequate new consideration. This is the formation of an entirely new contract.⁵⁷ Such adoption is not upon any principle of agency;

⁵² Lindley on Part. (4th ed.) 259. See Burgess and Stock's Case, 2 Johns. & H. 441; Irvine v. Union Bank, 2 App. Cas. 366; Athenæum L. Assur. Co. v. Porley, 3 De G. & J. 294; Spackman v. Evans, L. R. 3 H. L. 171; Evans v. Smallcombe, L. R. 3 H. L. 249; Lane's Case, L. R. 7 C. P. 43; Sewell's Case, L. R. 3 Ch. 131; Kent v. Jackson, 14 Beav. 367; Hodgkinson v. National Live Stock Ins. Co., 26 Beav. 473; 20 Cent. L. J. 414.

⁵³ Mount Washington Hotel Co. v. Marsh (1885), 63 N. H. 230.

⁵⁴ Flynn v. Des Moines, etc. Ry. Co., 63 Iowa, 490.

⁵⁵ Williams v. Uncompahgre Canal Co. (Colo. 1890), 22 Pac. Rep. 806.

⁵⁶ Joseph Wolf Co. v. Bank of Commerce (1903), 107 Ill. App. 58.

⁵⁷ Western Screw, etc. Co. v. Cousley, 72 Ill. 531; Whitney v. Wyman, 101 U. S. 392; Bommer v. American, etc. Co., 81 N. Y. 468; Abbott v. Hapgood, 150 Mass. 248,

whereas, "ratification" applies only to acts performed on behalf of an existing principal, and is based upon that law of agency that a person, in whose behalf, under simple assumed authority, an act was done, may afterward adopt it by mere acquiescence and failure to repudiate it, and thereby make the act as binding upon himself as if he had authorized it before its performance.⁵⁸

§ 775. Ratification of acts done before incorporation.—*Examples.*—*In England*, and by some American courts, a contract is held to be a nullity when made by the promoters of a corporation in its behalf before incorporation, and that the corporation can not afterward ratify or adopt it.⁵⁹

In the United States.—But, generally, in this country, it is held that the contract itself, so made, may be ratified or adopted by the corporation when organized, and become binding upon the corporation at law and in equity.⁶⁰ And when the contract is within the purposes for which the corporation was organized,⁶¹ it may be ratified; and when it was for appointment of an agent, he will become the agent of the corporation.⁶² The contract may be ratified when it was the purchase of property subject to equitable lien, or other liens;⁶³ when it was a lease, the corporation becomes liable to pay the rent;⁶⁴ when it was made for services on behalf of the corporation;⁶⁵ when a promissory note was given for goods afterward accepted by the corporation,⁶⁶ and when the corporation accepts benefits of the contract.⁶⁷ Bonds previously

15 Am. St. Rep. 193; *Queen City, etc. Co. v. Crawford*, 127 Mo. 356.

⁵⁸ 2 Kent's Com. 616; Story on Agency, § 239 *et seq.*; *Kelsey v. National Bank*, 69 Pa. St. 426.

⁵⁹ *Kelner v. Baxter*, L. R. 2 C. R. 174; *Melhado v. Porto Alegre, etc. Co.*, L. R. 9 C. P. 503.

⁶⁰ *Whitney v. Wyman*, 101 U. S. 392; *In re Heckman's Estate*, 172 Pa. St. 185; *Burden v. Burden*, 80 App. Div. 160, 159 N. Y. 287; *Paxton Cattle Co. v. First Nat. Bank, etc.*, 21 Neb. 621, 59 Am. Rep. 852; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

⁶¹ *Scadden, etc. v. Scadden*, 121 Cal. 33; *Stanton v. New York, etc. Ry. Co.*, 59 Conn. 272, 21 Am. St. Rep. 110.

⁶² *San Joaquin, etc. Co. v. West*, 94 Cal. 399.

⁶³ *Burt v. Batavia, etc. Co.*, 86 Ill. 66; *Bridgeport, etc. Co. v. Meader*, 72 Fed. 115.

⁶⁴ *In re Hickman's Estate*, 172 Pa. St. 185; *Van Schaick v. Third Ave. Ry. Co.*, 49 Barb. (N. Y.) 409.

⁶⁵ *Stanton v. New York, etc. Ry. Co.*, 59 Conn. 272, 21 Am. St. Rep. 110.

⁶⁶ *Paxton Cattle Co. v. First Nat. Bank, etc.*, 21 Neb. 621, 59 Am. Rep. 852.

⁶⁷ *Moore, etc. Co. v. Towers' Hardware Co.*, 87 Ala. 206, 13 Am. St. Rep. 23; *Seymour v. Spring, etc. Assn.*, 144 N. Y. 333; *Paxton Cattle Co. v. First Nat. Bank, etc.*, 21 Neb. 621, 59 Am. Rep. 852; *Rockford, etc. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587; *Weatherford, etc. Co. v. Granger*, 86 Tex. 350, 40 Am. St. Rep. 837; *Jackson-*

issued, may be ratified or adopted, and become valid bonds of the corporation.⁶⁸

Scope of Ratification.—No ratification can cure the illegality of an act. It can have no more force than a previous grant of authority to do an act prohibited, or otherwise in violation of the corporate charter, or in excess of corporate power.⁶⁹

§ 776. **Of unauthorized acts of officers and agents.**—It is a general rule, founded upon unbroken authority, that a corporation is bound only by such acts of its officers or agents, as have been either expressly or by implication authorized.⁷⁰ Acts, however, which are performed by officers within their apparent power, form an exception to the rule.⁷¹ And this exception goes so far, that even their fraudulent acts may operate to bind the company.⁷² But an incorporated company can not be called to answer, in an action of deceit for false representations made by its employes, unless it has authorized the false representations.⁷³ The general rule is further modified by the fact, that unauthorized acts may be ratified or acquiesced in by the corporation, and thus bind it.⁷⁴ In considering the effect of ratification, however, the distinction between unauthorized acts of officers, directors and agents, and acts done by them in excess of the corporate powers, should be

ville, etc. Co. v. Hooper, 160 U. S. 514; Lake Street, etc. Co. v. Carmichael, 184 Ill. 348; Hawkins v. Fourth Nat. Bank, etc., 150 Ind. 117; Alcott v. Tioga Ry. Co., 27 N. Y. 546, 84 Am. Dec. 298; Wayne, etc. Co. v. Schuykill, etc. Co., 191 Pa. St. 90.

⁶⁸ Wood v. Whelen, 93 Ill. 153.

⁶⁹ Kent v. Quicksilver Mining Co., 78 N. Y. 159; Hood v. New York, etc. Co., 22 Conn. 502.

⁷⁰ The general doctrine is applied in the following cases: Kelsey v. Sargent, 40 Hun, 150; De Bost v. Albert Palmer Co., 35 Hun, 386; Little v. Ker (1886), 44 N. J. Eq. 263; Mutual Ins. Co. v. McSherry (1888), 68 Md. 41; Rice v. Peninsular Club (1883), 52 Mich. 87; Gregory v. Lamb, 16 Neb. 205; Dale v. Donaldson Lumber Co. (1886), 48 Ark. 188; and in Moshannon Land Co. v. Sloan (1885), 109 Pa. St. 532, it was further held that if the principal was

not bound on an unauthorized contract made in its name by its agent, the agent was bound.

⁷¹ *Vide infra*, §§ 809, 812 and 817; Morawetz on Corp. (2d ed.), § 585; Eaglesfield v. Marquis of Londonderry, 4 Ch. Div. 693.

⁷² *Vide infra*, § 777.

⁷³ Houston & Texas Central R. Co. v. McKinney (1881), 55 Tex. 179. So, in an action against a corporation for deceit by false representations made by its agent on the sale of goods manufactured and sold by it for a particular purpose, there can be no recovery without proof of bad faith or absence of reasonable grounds of belief. Erie City Iron Works v. Barber (1884), 106 Pa. St. 125, 51 Am. Rep. 508.

⁷⁴ Mutual Life Ins. Co. v. McSherry, 68 Md. 41; Metropolitan, etc. Co. v. Domestic, etc. Co., 43 N. J. Eq. 626. *Vide supra*, §§ 721, 722, and *infra*, §§ 779, 780, 818.

borne in mind.⁷⁵ It is self evident that a corporation is not bound by engagements of its promoters, assuming to contract for it in advance; though it may, by adopting such contracts, make them its own.⁷⁶ It is just as plain, that even a president can not bind the company by an act, after he has ceased to hold the office.⁷⁷ A corporation will not be bound by contracts, or by a vote by the directors, to pay fictitious claims of large salaries to its president and secretary, under circumstances showing conspiracy.⁷⁸ And it has been decided, generally, that a person, in acting at the instance of a director, who assumes powers never delegated to him, does so at his own peril, and creates no charge against the corporation.⁷⁹ As, where the directors and officers of a domestic corporation, had fraudulently misappropriated its funds, it appeared that they had, without authority, removed the office and official business beyond the State, and held directors' meetings in another State, had made donations for political purposes, holding annual meetings of stockholders in the State only for election of directors, at each meeting approving all the acts for the directors and officers for the previous year. After the bringing of the suit, the directors held a regular meeting in the State, by resolution, ratifying all their own acts done without the State. These proceedings were held insufficient to show a ratification of the *ultra vires* acts.⁸⁰ A contract made by a director with the corporation, if not fraudulent or to the prejudice of the corporation, may be ratified by the stockholders, although the director was disqualified by his self-interest.⁸¹

⁷⁵ "The expression, 'unauthorized acts,' is used to designate those contracts or transactions which a corporation, without exceeding its charter or statutory powers, might have authorized its directors, officers and agents to perform, but which they have entered into without that authority, either express or implied." Beach on Railways, § 499.

⁷⁶ *Battelle v. Northwestern, etc. Co.* (1887), 37 Minn. 89.

⁷⁷ *New York, etc. Ry. Co. v. Bates* (1887), 68 Md. 184. In this case, in an action for personal services against a railroad company, defendant asked that the jury be instructed that if they found from the evidence that the

unpaid vouchers of plaintiff were not signed and approved by one P. until he had ceased to be president of the road, then, in the absence of proof that any other official of the company had authority to sign and approve them, the vouchers in themselves were not evidence of indebtedness, and the jury were not at liberty to consider them. This was improperly refused.

⁷⁸ *Kelsey v. Sargent*, 40 Hun, 150.

⁷⁹ *Rice v. Peninsular Club*, 52 Mich. 87.

⁸⁰ *McConnell v. Combination, etc. Co.* (Mont. 1904), 76 Pac. 194.

⁸¹ *Robertson v. H. E. Bucklen & Co.* (1903), 107 Ill. App. 369.

§ 777. By directors and other officers, of acts of subordinates.—Where the treasurer of a corporation, with full power to manage its business and to appoint other agents, sold land and personal property of the corporation in Alaska, and then left, having delegated his powers to the vice-president, who brought suit to recover the property alleging want of power in the treasurer to sell: *held*, the vice-president had no authority to disaffirm the sale, the directors having taken no action, were presumed to have acquiesced and ratified it.⁸² Any officer or agent of a corporation may give validity to the unauthorized acts of his subordinates, provided they be of a kind which he might have authorized them to perform.⁸³ Thus, directors may ratify the unauthorized acts of their appointees⁸⁴ or the acts of other corporate officers, which should not have been done without authority first obtained from the directors.⁸⁵ But, of course, the managers of a company can not ratify an act which, under the charter, can only be done with the consent of the stockholders.⁸⁶ Ratification by directors may be made by accepting the report of a committee stating the facts,⁸⁷ or by the acquiescence of a majority of the directors, with full knowledge of the contract so ratified.⁸⁸

⁸² *Alaska, etc. Co. v. Solner* (1903), 123 Fed. 855.

⁸³ *Pacific R. Co. v. Thomas*, 19 Kan. 256.

⁸⁴ *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Sherman v. Fitch*, 98 Mass. 59; *Fleckner v. Bank of United States*, 8 Wheat. 338, 368; *Scott v. Middletown, etc. R. Co.*, 86 N. Y. 204.

⁸⁵ *Perry v. Simpson, etc. Co.*, 37 Conn. 520; *Sherman v. Fitch*, 98 Mass. 59; *Darst v. Gale*, 83 Ill. 136.

⁸⁶ *Crum's Appeal* (1870), 66 Pa. St. 474.

⁸⁷ Thus, a ratification of the treasurer's use of the corporate seal on notes, may be presumed, where a committee of the directors pronounced the notes genuine, where interest was paid on them, and reports stating this fact were accepted. *St. James Parish v. Newburyport & Amesbury Horse R. Co.* (1885), 141 Mass. 500.

⁸⁸ In an action on a contract executed by the president of the defendant corporation without authority from the directors, where the plaintiff has performed all the acts required of him by the contract, and relies on the acquiescence of the directors as a ratification, a charge that "all directors are presumed to know what it is their duty to know, what they are able to know, and what they undertook to know when they accepted the position," and "that, in the absence of direct and positive evidence of the knowledge of the directors, jurors have the right to assume that they are doing what they were appointed to do, and that they know what they were appointed to know," is erroneous. The party relying on a ratification must show that the directors, or a majority of them, actually knew of the contract and its terms, and with such knowledge acquiesced in it. *Murray v.*

Ratification may also be presumed, from a failure to exercise promptly the right of disaffirmance.⁸⁹ The president and secretary may thus ratify acts brought to their notice.⁹⁰ But the president can not ratify his own wrongful act.⁹¹ In an action for breach of a contract, made by the treasurer of defendant for wharf privileges, where the superintendent of defendant testified that it "had used the plaintiffs' wharf since the date of the agreement, and acted under it," a charge that this was a sufficient ratification of the contract, if defendant accepted it, acted under it, and performed its terms, with full knowledge of its import, was sustained.⁹²

§ 778. Effect of ratification.—Ratification relates back to the inception of the contract, and is equivalent to original authority, except as to the intervening rights of third persons, strangers to the transaction.⁹³

Nelson Lumber Co. (1887), 143 Mass. 250.

⁸⁹ Under the by-laws of a corporation, its board of directors retained the power in their hands to control the president and superintendent whenever it was thought proper to do so; and where a release was made of a contract by the president, and reported to the board, but no act or resolution of disaffirmance of the release was passed till two years after notice of the transaction, and about a year and a half after suit had been commenced upon the original contract, it was held that a ratification of the release was presumed, the right of disaffirmance not being exercised promptly, and that the suit, having been begun six months after notice of the transaction, if it can be considered as a disaffirmance of the release, came too late. *Indianapolis Rolling-mill Co. v. St. Louis, Ft. S. & W. R. Co.* (1887), 120 U. S. 256.

⁹⁰ In an action by a tenant under a lease executed by an unauthorized agent of a corporation, it appeared that for more than a hundred days after the president and secretary had received notice of the lease, nothing was done

towards repudiating it, and meantime plaintiff was allowed by the agents in charge to expend labor and money in developing the property. During sixty days of the time plaintiff acted under a letter from the duly accredited agent of the company, which gave him to understand that the company had sanctioned the lease; accordingly he was held entitled to recover. *Hoosac Mining & Milling Co. v. Donat* (1888), 10 Colo. 529.

⁹¹ Where the president of a milling company incorporated for the purpose of converting and selling agricultural products, purchases flour in the name of the company, and ships it to a dealer in options in grain, and pledges the flour in payment of options on wheat, the purchase of flour and wheat being unknown to and unauthorized by the milling company, no benefit resulting to it by reason thereof, his acts will not amount to a ratification of the purchase. *Getty v. Barnes Milling Co.* (Kan. 1888), 19 Pac. Rep. 617.

⁹² *Taylor v. Albemarle Steam Navigation Co.* (1890), 105 N. C. 484, 10 S. E. Rep. 897.

⁹³ *Fleckner v. Bank of U. S.*, 8 Wheat. (U. S.) 338; *First Nat. Bank, etc. v. Fricke*, 75 Mo. 178,

Withdrawal by the Contractee.—Any time before the assumed principal is bound by ratification, the other party to a promoter's contract in behalf of the unorganized corporation, may withdraw, inasmuch as there is no mutuality or consideration to bind the contract.⁹⁴

§ 779. **Ratification by acquiescence. Acceptance of benefits.**—The ratification of the unauthorized acts of officers of corporations, may be presumed indirectly from acts of recognition and acquiescence, beyond the time during which disaffirmance should have been made,⁹⁵ or the corporation will be estopped to deny ratification.⁹⁶ This is true even in respect of the torts of its agents and servants; and a corporation, which ratifies or accepts the unauthorized malicious acts of its agents, is liable in exemplary damages.⁹⁷ But ratification is not to be lightly presumed from silence alone;⁹⁸ certainly not, where the act is wholly beyond the ordinary duties of the officers or agents performing it.⁹⁹ And where a corporation sues to set aside a contract, claimed to have been agreed to by its directors in fraud of its rights, the other

42 Am. Rep. 397; New York, etc. Trust Co. v. Saratoga, etc. Co., 88 Hun, 569, 157 N. Y. 689; Calumet Paper Co. v. Haskell, etc. Co., 144 Mo. 331, 66 Am. St. Rep. 425.

⁹⁴ Andrews v. Ætna Life Ins. Co., 92 N. Y. 596; McClintock v. South Penn. Oil Co., 146 Pa. St. 144, 28 Am. St. Rep. 785; Consolidated, etc. Co. v. Nash, 109 Wis. 490.

⁹⁵ Scott v. Jackson M. E. Church, 50 Mich. 528. A railroad corporation should be deemed to have ratified a settlement by its directors by giving notes, where for ten years its liability on the notes was not questioned, where it paid interest on them, and accepted reports in which they were referred to as outstanding obligations. Kelley v. Newburyport & Amesbury Horse R. Co. (1885), 141 Mass. 496. So the defense of *ultra vires* was held not available in an action by an artist to recover on a contract, made with the treasurer and performed in good faith, to make a statue of an inventor for whom the defendant corpora-

tion was named, to be erected in the New York Central Park; a scheme for voluntary subscriptions having proved abortive. Ellis v. Howe Machine Co., 9 Daly (N. Y.), 78. An allegation in the complaint of a corporation that the contract was entered into "with the plaintiff," and by setting forth the contract in terms by which it appeared to have been made by the president in behalf of the corporation, has been held sufficient to show authority in the president to make the contract. St. Paul Land Co. v. Dayton (1887), 37 Minn. 364.

⁹⁶ Union Pacific Ry. Co. v. Chicago, 163 U. S. 564; Wheeler v. Home, etc. Bank, 188 Ill. 34, 80 Am. St. Rep. 161; Mohrfeld v. Second German, etc. Assn., 194 Pa. St. 488.

⁹⁷ Galveston, Harrisburg, etc. Ry. Co. v. Donahoe (1881), 56 Tex. 162.

⁹⁸ Kersey Oil Co. v. Oil Creek & Allegheny R. Co., 12 Phila. 374.

⁹⁹ Kersey Oil Co. v. Oil Creek & Allegheny R. Co., 12 Phila. 374.

party to the contract, can not contend that the acquiescence of the corporation precludes its action.¹ The existence of a new board of directors, is no ground for denying to a corporation the right to rescind a fraudulent contract, entered into by a former board.²

Knowledge, by the corporation, of all the material facts and terms of the unauthorized contract, is essential to show, in attempt to hold that the corporation impliedly ratified it, but acquiescence implies such knowledge.³ If a person assuming to act as agent of a corporation, but without legal authority, or an agent in excess of his proper authority, make a contract, and the corporation knowingly receive and retain the benefit of it, this will be a ratification of the contract, and render the corporation liable as a party to it.⁴ The rule does not apply, unless the corporation itself received the money or property, or appropriated it under corporate agency.⁵ In this manner ratification may be presumed, of acts

¹ Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co. (1884), 11 Daly, 373.

² Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co. (1884), 11 Daly, 373.

³ Illinois Pneumatic Gas Co. v. Berry, 113 U. S. 322; Combs v. Scott, 12 Allen (Mass.), 493; Sanders v. Chartrand, 158 Mo. 352; Blen v. Bear, etc. Co., 20 Cal. 602, 81 Am. Dec. 132; Edwards v. Carson Water Co., 21 Nev. 469, 34 Pac. 381.

⁴ Kickland v. Menasha, etc. Co., 68 Wis. 34; Paxton Cattle Co. v. First National Bank, 21 Neb. 621, 59 Am. Rep. 852; Holmes v. Kansas City Board of Trade, 81 Mo. 137; Paulding v. London, etc. Ry. Co., 8 Ex. 867; Beverly v. Lincoln Gas Light, etc. Co., 6 Adol. & Ell. 829; Tuscaloosa, etc. Co. v. Perry (1888), 85 Ala. 158. The law upon this point is well stated by Chief Justice Shaw in a frequently cited case: "It seems to be now well settled in this commonwealth, since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions from

the largest to the minutest, and affect almost every individual in the community, are affected like private persons with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from acting upon contracts made by those professing to be their agents; and by those legal and equitable considerations which affect the rights of natural persons. Melledge v. Boston Iron Co., 5 Cush. 158, 175." See also Selma, etc. R. Co. v. Tipton, 5 Ala. 787; Philadelphia, etc. R. Co. v. Howard, 13 How. 307; Scaggs v. Baltimore, etc. R. Co., 10 Md. 268; 20 Cent. L. J. 412. It is provided by statute in New York that where directors have exceeded their authority in borrowing money for the corporation, the contracts are not to be deemed invalid as against the company by reason thereof. N. Y. Laws of 1845, ch. 230, § 1.

⁵ Franco-Texan Land Co. v. McCormick, 85 Tex. 416, 34 Am. St. Rep. 815.

of promoters,⁶ of the president,⁷ of a director,⁸ or other officer.⁹ Where a corporation borrows money, which is applied to the improvement of its property, and the stockholders, knowing of such improvement, and the loan to effect it, allow the creditor to advance the money, and the money to be used, without any indication of dissent on their part, they are estopped to object to the validity of the debt that it was not authorized by a previous meeting and consent of stockholders.¹⁰ But a board of directors, who have made a barter of the assets of the company for personal gain, can not, by an act purporting to be an acceptance of an equivalent for such assets, conclude the stockholders, or their representatives, from showing that no equivalent was actually received.¹¹

§ 780. Ratification of acts of promoters.—The transactions and contracts of persons engaged in promoting the organization

⁶ And, so it was held: Where the promoters of a corporation, after the signing but before the filing of articles of incorporation, and before the fixing of a time for the commencement of business, selected a president, and authorized him to make a note in payment for certain property, which came duly into the possession of the corporation and was used and employed by it, recovery was allowed an assignee of the note. *Paxton Cattle Co. v. First National Bank*, 21 Neb. 621, 59 Am. Rep. 852. But to impute to a corporation liability for services rendered prior to its creation, under an agreement with the promoter thereof, it must be shown that the services resulted to the interest of the corporation and were performed on the corporate credit rather than on the individual credit of the promoter. *Perry v. Little Rock & Fort Smith Ry. Co.*, 44 Ark. 383.

⁷ Thus in a case in the Alabama court, it was held that a company retaining the proceeds of a note executed by its president can not deny his authority to make it. *Tuscaloosa, etc. Co. v. Perry* (1888), 85 Ala. 158. And so a railway company, by accepting the benefits arising under a deed conveying to it a right of way, has

been held to be affected with notice of, and to be bound to perform certain covenants in another instrument, previously executed by its president, relating to the same subject matter, the two instruments being considered as one. *Mobile & M. Ry. Co. v. Gilmer* (Ala. 1889), 5 So. Rep. 138.

⁸ Where a director of a corporation, after proposing a loan to the corporation at a regular meeting of the directors, sought the advice of counsel as to the authority of the corporation to borrow, and a form of bond was drawn up by the corporation, though without his being actually employed by it, the corporation was declared liable for the services of the counsel. *Holmes v. Kansas City Board of Trade*, 81 Mo. 137.

⁹ Where a corporation had accepted a deed of land, bought by one of its officers, it was held estopped from denying the authority of the officer to agree to pay a price additional to the consideration set forth in the deed. *Kickland v. Menasha, etc. Co.* (1887), 68 Wis. 34.

¹⁰ *Manhattan Hardware Co. v. Boland* (1889), 128 Pa. St. 119.

¹¹ *Guild v. Parker* (1881), 43 N. J. 430.

of a corporation, are necessarily, from the nature of the case, unauthorized, and depend, for their validity as corporate acts, upon the ratification of the company subsequently formed. For the promoters of a corporation do not strictly represent it in any relation of agency, and have no authority to enter into preliminary contracts binding upon the corporation, when it shall come into existence.¹² The company can not, however, accept the benefits of a contract entered into in its behalf by its promoters, without also assuming the burdens thereof.¹³ When promoters' contracts

¹² *Munson v. Syracuse, etc. R. Co.* (1886), 103 N. Y. 58; *Double-day v. Musket*, 7 Bing. 110; *Money-penny v. Hartland*, 1 Car. & P. 35; *Kerridge v. Hesse*, 9 Car. & P. 200. In the first case the sanction of the contract of the promoter was obtained by the act or co-operation of a director who had a private interest, and it was held that the company might resist an action for specific performance, at least as it had not accepted the consideration or taken the benefit of the contract. The circumstances of this case were these: Plaintiffs were the owners of nearly the whole issue of mortgage bonds made by a railroad company. Said corporation having become insolvent and having abandoned the enterprise of constructing its road, plaintiffs entered into a contract with defendant Magee which recited that Magee represented persons and interests proposing to organize another railroad company. By the contract, plaintiffs agreed to foreclose the mortgage securing the bonds, to purchase the property covered by the mortgage on foreclosure sale, and to convey the same to Magee, or to the company proposed to be organized. Magee agreed to deliver to plaintiffs in payment for the property so conveyed first mortgage bonds of the new company to an amount specified. A new company was organized, which contemplated building a road on substantially

the same line as that of the old company, of which new company plaintiff Munson was president and a director. Its board of directors passed a resolution assuming the obligations of Magee, and subsequently a new contract was made between it and plaintiffs, which substituted the company in place of Magee in the contract. Munson, as a director, participated in the meeting of the board at which the resolution was passed and, as its president, executed the new contract. The new company subsequently located an entirely new line upon which to build its road. Plaintiffs foreclosed the mortgage and purchased the property, which consisted of rights of way and a road-bed, partially graded over a portion of the route of the old company.

¹³ See cases in last note, and *Gooday v. Colchester, etc. Ry. Co.*, L. R. 15 Eq. 596; *Edwards v. Grand Junction Ry. Co.*, 1 Mylne & C. 650; *Preston v. Liverpool, etc. Ry. Co.*, L. R. 7 Eq. 124; *Little Rock & Fort Smith R. Co. v. Perry*, 37 Ark. 164, 9 Am. & Eng. R. Cas. 610, 44 Ark. 383, 25 Am. & Eng. R. Cas. 44, 50; *Boomer v. American Spiral Hinge Manuf. Co.*, 81 N. Y. 468; *Despatch Line v. Bellamy Manuf. Co.*, 12 N. H. 205; *Grape Sugar, etc. Manuf. Co. v. Small*, 40 Md. 395; *Fister v. La Rue*, 15 Barb. 323. *Cf. Edwards v. Grand Junction R. Co.*, 1 Mylne & C. 650. In the first Arkansas

have been thus adopted by the new company, and their benefits received, they become the contracts of the corporation, and are enforceable against it.¹⁴ The same rule applies to contracts entered into with promoters of one company, by an amalgamated company, or a rival company that has assumed the first company's liabilities.¹⁵ A similar, but somewhat extended, rule has been enacted by the English Railway Construction Facilities Act of 1864,¹⁶ which provides that contracts, relative to the purchase or taking of lands for the railway, entered into by the promoters before the incorporation, shall be as binding on the company as though entered into by the company. So, also, the company may be bound by an express ratification of the promoters' contracts,¹⁷

case, at p. 190, Eakin, J., said: "The rule has been fully adopted in the American courts upon the English authorities and with the same limitations. The rule is thus defined by Mr. Redfield in his work on the Law of Railways, vol. 1, p. 16: 'Whenever a third party enters into a contract with the promoters of a railway, which is intended to inure to the benefit of the company, and they take the benefit of the contract, they will be bound to perform it upon the familiar principle that one who adopts the benefit of an act, which another volunteers to perform in his name and in his behalf, is bound to take the burden with the benefit.' This is a very well formulated expression of the rule, and on all points carefully guarded to conform with the decided cases, and limit its scope. It has also, in some cases, been held in America, that a corporation is liable at law upon an implied *assumpsit*, for services rendered before it came *in esse*, but which were necessary to perfect its organization, and which, after such organization was perfected, it accepted, and the benefits of which it enjoyed." And the judge cited *Low v. Connecticut & Passumpsic Rivers R. Co.*, 45 N. H. 375.

¹⁴*Paxton Cattle Co. v. First Nat. Bank* (1887), 21 Neb. 621;

Swisshelm v. Swisswald Laundry Co. (1880), 95 Pa. St. 367.

¹⁵*Stanley v. Chester, etc. Ry. Co.*, 3 Mylne & C. 773; *Greenhalgh v. Manchester, etc. Ry. Co.*, 9 Sim. 416; *Preston v. Liverpool, etc. Ry. Co.*, 1 Sim. N. S. 586; *Lindsey v. Great Northern Ry. Co.*, 10 Hall, 664; *Hacker v. Mid. Kent Ry. Co.*, 12 Law T. N. S. 669.

¹⁶27 & 28 Vic. ch. 121, § 30.

¹⁷*Payne v. New South Wales Coal Co.*, 10 Ex. 283; *Hutchinson v. Surrey Gas Assn.*, 11 C. B. 689. And in *Wood v. Whelen* (1879), 93 Ill. 153, where the promoters of a private corporation, acting as directors of the *de facto* organization, not yet incorporated, adopted a resolution that for the purpose of completing and putting in successful operation the works for the erection and carrying on of which the company had been organized, and to provide for the subsequent extension of such works, there should be issued a certain number of bonds of the company, to be secured by a mortgage upon its property, upon which to borrow money for the purpose indicated. In pursuance of this resolution and after the company became incorporated, the bonds were executed by the regularly constituted officers of the corporation, and also a mortgage under

or by the acceptance of a charter which recognizes and provides for the fulfilment thereof.¹⁸ There is a line of English cases which hold, that there can be no ratification by a corporation of the contracts of its promoters;¹⁹ that the apparent ratification is in fact, a new contract, and that the liability of the corporation depends upon the doctrine of equitable estoppel.²⁰ But late American cases, with sound reason hold, that while a corporation is not bound by engagements made on its behalf by its promoters, before it is organized, it may, after it is organized, make such engagements its contracts, by adopting them; and this it may do, precisely as it might make similar original contracts, formal action of its board of directors being necessary only where it would be necessary to a similar original contract.²¹ To the direct contrary, and in accordance with the English cases, American cases hold that where a contract is made in the name, and for the benefit of, a projected corporation, the corporation, after its organization, can not become a party to the contract, either by adoption or ratification of it.²² The ratification or adoption of a contract made by promoters, may be implied by conduct of stockholders or of-

the seal of the company. Subsequently, and while the bond and mortgage were still in the possession of the company, the directors of the corporation, by resolution, gave express authority to their agent to sell these bonds, upon certain prescribed terms, and to deliver the mortgage for their security. It was held that this action of the board of directors of the corporation was equivalent to an original authority to issue the bonds, and an adoption of the mortgage previously executed, as well as a ratification of the action of the promoters of the corporation in respect thereto, so that, irrespective of the question as to the power of the promoters of the corporation to bind the future corporation, the securities became the valid and binding obligations of the corporation by its own act of adoption and ratification through its directors.

¹⁸ *Tilson v. Waunek Gaslight Co.*, 4 Barn. & C. 962; *Shaw's*

Claim, L. R. 10 Ch. 177; *Caledonian, etc. Ry. Co. v. Helensburgh*, 2 Macq. 395.

¹⁹ *Melhado v. Porto Alegre Ry. Co.*, L. R. 9 C. P. 503; *Kilner v. Baxter*, L. R. 2 C. P. 174; *In re Empress Engineering Co.*, 16 Ch. 125; *In re Northumberland Avenue Hotel*, 33 Ch. 16.

²⁰ *Touche v. Metropolitan Ry. Warehousing Co.*, 6 Ch. 67; *Lindsey v. Great N. Ry. Co.*, 10 Hare, 664; *Edwards v. Grand Junction Ry. Co.*, 1 Mylne & C. 650; *Stanley v. Chester, etc. Ry. Co.*, 3 Mylne & C. 773; *Bedford, etc. Ry. v. Stanley*, 2 Johns. & H. 746.

²¹ *Battelle v. Northwestern Cement & Concrete Pavement Co.* (1887), 37 Minn 89.

²² *Abbott v. Hapgood* (1890), 150 Mass. 248, 22 N. E. Rep. 907, citing *Kellner v. Baxter*, L. R. 2 C. P. 174; *Gunn v. Insurance Co.*, 12 C. B. (N. S.) 694; *Melhado v. Porto Alegre Ry. Co.*, L. R. C. P. 503; *In re Engineering Co.*, 16 Ch. Div. 125.

ficers authorized to bind the corporation,²³ when such conduct indicates intention to bind the corporation.²⁴

C.

ADMISSIONS BY DIRECTORS AND OTHER OFFICERS.

§ 781. **Effect upon the corporation of admissions and declarations.**—To be admissible in evidence against the corporation, an admission or declaration of a corporate officer or agent must be made within the scope of his general authority, and made in the course of a transaction on behalf of the corporation.²⁵ A stockholder or member, as such, is not an agent of the corporation, and no declaration by any one of them is admissible, unless he is acting as officer or agent.²⁶ To prove the officer's authority, his admissions are not admissible, in evidence, unless known to and acquiesced in by the corporation.²⁷ His admissions, as to by-gone transactions, are inadmissible. They must be made as to current business, and in the course of the transaction.²⁸ Admissions by individual directors, when not acting as a board, are not admissible. Their admissions, only when acting collectively as a board, bind the corporation;²⁹ and only when made by a majority of the board.³⁰ The corporation may be bound by admissions of the general manager or superintendent, made in the course of a transaction within the scope of his general authority, or made by express authority of the directors.³¹ No admission made by the president, or secretary, or treasurer, unless within the scope of

²³ *White v. Westport, etc. Co.*, 1 Pick. (Mass.) 215, 11 Am. Dec. 158.

²⁴ *McArthur v. Times Prtg. Co.*, 48 Minn. 319, 31 Am. St. Rep. 653; *Shreyer v. Turner, etc. Co.*, 29 Oreg. 1, 43 Pac. 719.

²⁵ *Chicago, etc. Ry. Co. v. Belliwith*, 28 C. C. A. 358, 83 Fed. 437; *Wheeler v. Home, etc. Bank*, 188 Ill. 34, 80 Am. St. Rep. 161; *Gilmore v. Mittineague Paper Co.*, 169 Mass. 471; *First Nat. Bank, etc. v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181.

²⁶ *Fairfield County, etc. Co. v. Thorp*, 13 Conn. 173; *Dean v. Ross*, 125 Cal. 227.

²⁷ *Gould v. Norfolk Lead Co.*, 9

Cush. (Mass.) 38, 57 Am. Dec. 50; *City, etc. Ry. Co. v. First Nat. etc. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282.

²⁸ *Holmes v. Montauk Steamboat Co.*, 35 C. C. A. 556, 93 Fed. 731; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 36 Am. St. Rep. 710.

²⁹ *Kearney Bank v. Froman*, 129, Mo. 427, 50 Am. St. Rep. 456; *Tripp v. New Metallic, etc. Co.*, 137 Mass. 499.

³⁰ *Jones v. Planters' Bank*, 9 Heisk. (Tenn.) 455.

³¹ *McGenness v. Adriatic Mills*, 116 Mass. 177; *Hartford, etc. Co. v. Cambria Mining Co.*, 80 Mich. 491.

his authority, is admissible against the corporation.³² But if such officer, or any other, is entrusted with the general management of the corporate business, or of a particular transaction, his admission within the scope of such authority, is admissible in evidence.³³ The same rules apply to admissions made by the cashier of a bank.³⁴ The declarations of an agent or officer of a corporation are not admissible, except when made as a part of the *res gestae*, or in the performance of his duties, as agent or officer."³⁵ Admissions by directors when acting as a board, will bind the corporation, but not when acting singly, unless as the corporation's special agent. "A fact, once admitted by a corporation through its officer, duly and properly acting within the scope of his authority, is evidence against it, and cannot be withdrawn to the prejudice of any one who, in reliance upon it, has changed his situation in respect to the matter affected thereby. In such a case the doctrine of estoppel applies to a corporation as well as to an individual."³⁶ The statements of a treasurer as to the corporate bonds with which he had no duties to perform, are not admissible.³⁷ The admissions of the president of a construction company operating a railroad, are inadmissible against the railroad in proof of an accident.³⁸ Admissions of the president, having no extra powers, are inadmissible in proof of what is due a laborer,³⁹ but as managing agent, he may admit the performance of a contract.⁴⁰ Statements of an engineer in charge of a locomotive, as to its condition at a time before the happening of an accident, are inadmissible.⁴¹ The statement of an officer, without authority to speak for the corporation, whether certain stock is full-paid, are inadmissible.⁴² An admission by a receiver, is not admissible,

³² *Holmes v. Turner Falls Co.*, 150 Mass. 535; *Rumbough v. Southern Impr. Co.*, 112 N. C. 751, 34 Am. St. Rep. 528.

³³ *Chicago, etc. Ry. Co. v. Coleman*, 18 Ill. 297, 68 Am. Dec. 544; *Kilpatrick v. Home, etc. Assn.*, 119 Pa. St. 30.

³⁴ *Oakland, etc. Sav. Bank v. State Bank, etc.*, 113 Mich. 284, 67 Am. St. Rep. 463.

³⁵ *Cosgray v. New England P. Co.* (1897), 22 N. Y. App. Div. 455.

³⁶ *O'Leary v. Board of Education* (1883), 93 N. Y. 1.

³⁷ *Hardwick, etc. Co. v. Drenan* (1900), 72 Vt. 438; *Stanton v. Baird, etc. Co.* (Ala. 1902), 32 South. 299.

³⁸ *Chattanooga, etc. R. R. v. Liddell* (1890), 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169.

³⁹ *Truesdell v. Chumar* (1894), 75 Hun. 416.

⁴⁰ *Bullock v. Consumers' Lumber Co.* (Cal. 1892), 31 Pac. 367.

⁴¹ *Louisville, etc. R. R. v. Stewart* (1893), 56 Fed. 808.

⁴² *Browning v. Hinkle* (1892), 48 Minn. 544.

against the corporation, as to a fact existing before his appointment, and of which he had no personal knowledge.⁴³

Effect of admissions and declarations against stockholders.—Admissions by a corporate officer or agent, do not bind a dissenting stockholder, who is a corporate creditor, because the corporation herein does not represent him any more than it does any other creditor.⁴⁴ The acts and admissions of the president, acting as its general agent, binds the corporation.⁴⁵

Admissions against the company.—The representations, made by a physician employed by a railroad corporation, will bind the company, where he conspired with the company's claim agents to secure for inadequate sum, a release from liability for personal injury to a passenger.⁴⁶ The corporation was held liable to an investor, who paid money to the secretary of a real estate investment company, for investment by the company, where the investor accepted from the secretary a forged mortgage to her, purporting to be from the borrower, the secretary having embezzled the money.⁴⁷ But the corporation was held not liable, where all the paper of a corporation intended to be negotiated at the treasurer's private bank, was required to be executed by the general manager, and the treasurer, who had general authority to issue negotiable paper of the corporation, forged the general manager's signature thereto, and negotiated it, and converted the proceeds to his own use.⁴⁸ Representations by an agent of the corporation will not bind it, unless it be concerning authorized business of the corporation, and unless he, at the time, is acting within the scope of his authority.⁴⁹

D.

MISREPRESENTATIONS BY OFFICERS AND AGENTS.

§ 782: **Misrepresentations by officers and agents.**—(See also Subscription, secs. 255-266a.)—A corporation may be held responsible for false and fraudulent misrepresentations of its

⁴³ First National Bank v. Linn, etc. Bank (1897), 30 Ore. 296, 47 Pac. 614.

⁴⁴ Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401.

⁴⁵ Rapp v. Hutchinson, etc. Co., 87 N. Y. S. 459.

⁴⁶ International, etc. v. Schu-

ford (Tex. Civ. App. 1904), 81 S. W. Rep. 1189.

⁴⁷ Ring v. Long Island, etc. Co. (1904), 87 N. Y. S. 682.

⁴⁸ Merchants', etc. Co. v. Lufkin Nat. Bank (Tex. Civ. App. 1904), 79 S. W. 651.

⁴⁹ Com. Nat. Bank v. Trust Nat. Bank (Tex. 1904), 80 S. W. 601.

officers and agents while acting within the scope of their authority, in the same manner as other principals may be rendered liable by such acts on the part of their agents.⁵⁰ But if the officer was ignorant of the untruthfulness of the representations when he made them, and he alone transacted all the business in reference to the contract, it will be presumed, in the absence of evidence to the contrary, that the corporation was ignorant of the falsity of the representations.⁵¹ Where the authority of a corporate agent, to enter into a certain contract, apparently within the scope of his general powers, depends upon the existence of some fact particularly within his knowledge, the company is bound by his representations in respect thereof, whether they be true or false.⁵² Thus, where an applicant for insurance can neither read nor write, and has no knowledge of the contents of his application, which is made out by the insurer's agent, he is not bound by statements falsely made therein by the agent, who is the agent of the insurer, and not of the insured, in what he does, and the statements he makes, in preparing the application.⁵³ Again, where the questions asked the assured by an insurance agent, are answered truthfully, but the agent writes down false answers, and cheats the assured into signing a false warranty and paying the premium, a policy issued thereon can not be avoided on the ground that the warranty was false.⁵⁴ But in that case the insurer will not be estopped from setting up their falsity in an action on the policy, where a copy of the application was written on the back of the policy, and in the possession of the insured, before the loss occurred, as he is then chargeable with knowledge of its

⁵⁰ Mackay v. Commercial Bank, L. R. 5 P. C. 394; Weir v. Bell, 3 Ex. Div. 238; Weir v. Barnett, 3 Ex. Div. 32; Severe v. Francis, 3 App. Cas. 106; Barwick v. London Joint-Stock Bank, L. R. 2 Ex. 259; Swift v. Jewsbury, L. R. 9 Q. B. 301. Apparently *contra* is Western Bank v. Addie, L. R. 1 H. L. Sc. 145. In an action for misrepresentations as to the merits of a certain heating device, made by officers of the company owning the device, to certain persons who thereupon organized a corporation for the purpose of selling the heater, it was held that

such statements were in effect made to the corporation. Iowa Economic Heater Co. v. American Economic Heater Co. (1888), 32 Fed. Rep. 735.

⁵¹ Watson Coal & Min. Co. v. James (1887), 72 Iowa, 184.

⁵² Story on Agency, 452; New York, etc. R. Co. v. Schuyler, 34 N. Y. 30, 68; Griswold v. Haven, 25 N. Y. 601, 82 Am. Dec. 380; Beach on Railways, § 501.

⁵³ State Ins. Co. v. Jordan (Neb. 1890), 45 N. W. Rep. 792.

⁵⁴ Dwelling-House Ins. Co. v. Gould (Pa. 1890), 19 Atl. Rep. 793.

contents, whether he read it or not, and by failing to procure a correction or rescission of the contract, he becomes a party to the agent's fraud.⁵⁵ To render the declaration of an officer admissible in evidence, it must be shown either that he had authority to make the statement, or that he was held out as the proper officer to whom to apply for information, or that he had some duty to perform in the premises.⁵⁶

E.

FRAUDS BY CORPORATE OFFICERS.

§ 783. **Generally.**—Any single stockholder may sue on his own behalf, and that of other stockholders and the corporation, in case of breach of trust, fraud, *ultra vires* acts, or negligence by directors, stockholders or others, in the organization or management of the corporation.⁵⁷ Failure of such suit by the stockholder, will not make him liable for malicious prosecution or libel, in the absence of personal arrest or seizure of property.⁵⁸ For the torts of its officers, agents or servants, a corporation is liable to the same extent, and under the same rules of law, as apply, under like circumstances, to natural persons.⁵⁹ "As a corporation can only speak or act by agent, there is stronger reason for holding it answerable for the acts and representations of the agent, done within the ostensible scope of his authority, and while transacting the business of the principal, than when the principal is a natural person. However, the same rule applies alike to natural and artificial persons."⁶⁰ A corporation will be held liable for fraud of its directors, against another corporation under control of the same directors.⁶¹ And where all the stock of several companies is illegally combined in a corporation, the State will forfeit its charter.⁶²

⁵⁵ Johnson v. Dakota F. & M. Ins. Co. (N. D. 1890), 45 N. W. Rep. 799.

⁵⁶ Tuthill Spring Co. v. Shaver Wagon Co. (1888), 35 Fed. Rep. 644.

⁵⁷ Hawes v. Oakland (1881), 104 U. S. 450; Dickerman v. Northern T. Co. (1900), 176 U. S. 181.

⁵⁸ Cincinnati, etc. Co. v. Bruck (1900), 61 Ohio St. 489.

⁵⁹ Erie City Iron Works v. Barber, 106 Pa. St. 125, 51 Am.

Rep. 508; New York, etc. Ry. Co. v. Haring, 47 N. J. Law, 137, 54 Am. Rep. 123. *Vide supra*, § 768, and *infra*, § 961.

⁶⁰ Erie City Iron Works v. Barber, 106 Pa. St. 125, 51 Am. St. Rep. 508.

⁶¹ Fitzgerald v. Fitzgerald, etc. Co. (1894), 41 Neb. 374, 59 N. W. 838.

⁶² State v. Standard Oil Co. (1892), 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541.

§ 784. Frauds by directors. Personal interest in contracts.—

As trustees of the corporation, directors will be held accountable in equity, for any breach of their trust relations.⁶³ A director is liable to the corporation for all the profits, where he gets a building contract from the corporation on representation that the price is actual cost of the work, whereas he had sub-contracted it at a lower price.⁶⁴ He may be compelled to return to the corporation for cancellation, stock, which he had voted to outside parties, for property far below par value of the stock, and which was secretly transferred to him for control of the corporation.⁶⁵ Where rolling-stock for a railroad was purchased by the directors in the name of a "dummy" trustee of a car trust, with corporate funds, appropriated for construction of the road, the court ignored the car trust as purchaser, and held the rolling-stock to be property of the corporation.⁶⁶ A director may contract with the corporation, if the contract is a fair one, and open, and not secret, and is regularly approved by a majority of the stockholders. If it is unfair, the court may set it aside.⁶⁷ The creditors of a solvent corporation can not object to such a contract, where the stockholders assent to it.⁶⁸ A director or officer, having power to make a corporate contract, can not set it aside, if he is personally interested in it.⁶⁹ Where a director owns all the stock of the corporation, it may contract freely with him.⁷⁰ Where directors, who were creditors of the corporation, caused bonds and mortgage to be issued to themselves for a debt, with the purpose to assign them to one who had organized a rival corporation, and did so assign them, they were liable, for the consequences, to dissenting stockholders, in an action brought after they had ceased to be directors.⁷¹ No subsequent act of the corporation can, by

⁶³ *Bosworth v. Allen* (1901), 168 N. Y. 157.

⁶⁴ *Keystone, etc. Co. v. Bate* (1898), 187 Pa. St. 460; *Griffith v. Blackwater, etc.* (1899), 46 W. Va. 56, 33 S. E. 125.

⁶⁵ *Perry v. Tuskaloosa, etc. Co.* (1891), 93 Ala. 364, 9 South. 217; *Santa Ana Water Co. v. San Buena Ventura* (1895), 65 Fed. 324.

⁶⁶ *McGourkey v. Toledo, etc. Ry.* (1892), 146 U. S. 536.

⁶⁷ *Goodell v. Verdugo, etc. Co.* (Cal. 1903), 71 Pac. 354; *Munson v. Magee* (1900), 161 N. Y. 182;

Rumsey v. New York, etc. R. R. (1902), 53 Atl. 495.

⁶⁸ *Barr v. New York, etc. R. R.* (1891), 125 N. Y. 263; *Welsh v. Importers', etc. Bank* (1890), 122 N. Y. 177.

⁶⁹ *Continental Trust Co. v. Toledo, etc.* (1898), 86 Fed. 929; *Leonhardt v. Citizens' Bank, etc.* (1898), 56 Neb. 381, 76 N. W. 452. ⁷⁰ *McCracker v. Robison* (1893), 57 Fed. 375.

⁷¹ *Jacobus v. American, etc. Co.* (1904), 88 N. Y. S. 302, 99 App. Div. 366.

way of estoppel, validate any previous corporate act which was not within its express, or necessarily implied, corporate powers.⁷² The corporation may rescind a contract, made with a firm to act as selling agents, the directors being interested in the firm, and the contract being unfair to the corporation.⁷³

§ 785. **Accepting secret gifts.**—It is a breach of trust by a director to accept a secret gift from any person, at any time dealing with the corporation; for this, he is liable to account and to turn over to the corporation, the money, stock, or other property which he has so accepted;⁷⁴ as, where a treasurer was required to pay over to the corporation the amount of a commission, by him secretly received upon a sale of property made to the company.⁷⁵

§ 787. **"Dummy" directors.**—A "dummy" director is sometimes put in the board by the bondholder, and acts under their control. Bonds issued below par to holders, who have put in their "dummies" as directors of the company, are invalid and may be attacked by any dissenting stockholder, or creditor, or by the corporation.⁷⁶

§ 788. **Tramp corporations.**—Some States, by the laxity of their enabling acts, and low charge of fees, have invited incorporation by non-residents, having a nominal office and "dummy directors" within the State, but with no intent to do business there; on the contrary, intending to do business elsewhere where its principal directors and stockholders live. So much has the practice grown, that these corporations have become known as "tramp corporations." In cases of such evasion of the spirit of the law, some States have forfeited the charter.⁷⁷ Some ignore such incorporation and hold the incorporators liable as partners.⁷⁸ "No rule of comity will allow one State to spawn corporations, and send them into other States to do business there, when said first-mentioned State will not allow them to do business within its

⁷² *Traders', Mut. etc. Co. v. Humphrey* (1904), 109 Ill. App. 246.

⁷³ *United States, etc. Co. v. Browne* (C. C. 1903), 25 Ohio Cir. Ct. R. 347.

⁷⁴ *Paducah, etc. Co. v. Mulholland* (Ky. 1894), 24 S. W. 624. *Vide supra*. §§ 252-254, FRAUDULENT AGREEMENTS WITH SUBSCRIBERS.

⁷⁵ *Rutland, etc. Co. v. Bates*

(1896), 68 Vt. 579, 54 Am. St. Rep. 904.

⁷⁶ *Central T. Co. v. New York, etc. R. R.* (1887), 18 Abb. N. Cas. 381; *Central T. Co. v. Kneeland* (1891), 138 U. S. 414.

⁷⁷ *State v. Park, etc. Lumber Co.*, 58 Minn. 330.

⁷⁸ *Montgomery v. Forbes*, 148 Mass. 249; *Hill v. Beacn*, 12 N. J. Eq. 31.

own borders."⁷⁹ In Texas and in Massachusetts, such an incorporation will not protect its members from liability as partners.⁸⁰ But they will not be held liable as partners where there is no fraud or evasion of the laws of the State of incorporation.⁸¹

§ 789. **Frauds by promoters.**—As the promoter's relations with the corporation, are those of agency and trust, he will be liable to subscribers and to the corporation, for breach of trust in the sale of property to the corporation, at a secret profit to himself, where he had simply an option upon it and had not purchased it before such fiduciary relations began.⁸² Where a promoter, selling property to the corporation, misrepresents the price he paid for it, he is liable to the corporation for his profits, though the property was fully worth the price paid by the company.⁸³ Where the promoters of a new corporation of thirty-nine paper mills, which turned their property over to the new company for its stock and bonds, receiving about half the price so paid, the promoters secretly receiving the other half, the court held that the remedy of the original mill owners was against the promoters and not in defense of suit to foreclose the mortgage, and that though the promoters were entitled to reasonable compensation, they were bound to disclose the profit they made, and to account for it to the mill owners.⁸⁴

§ 790. **Frauds in sale of property to the corporation.**—A director who purchases property, expressly to sell it to the corporation, must account to it for whatever profit he makes in the transaction without the knowledge and consent of the stockholders. He can not retain a secret profit.⁸⁵

⁷⁹ *Landgrant, etc. Co. v. Coffey Co.*, 6 Kan. 245. *Vide*, §§ 132, 140, 675.

⁸⁰ *Empire Mills v. Alston* (Tex. Civ. App.), 15 S. W. 200, 12 L. R. A. 366, with notes; *Montgomery v. Forbes*, 148 Mass. 249.

⁸¹ *Demarest v. Flack*, 128 N. Y. 205, 13 L. R. A. 854; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Mis-souri, etc. Co. v. Reinhard*, 114 Mo. 218; *Lancaster v. Amsterdam, etc. Co.*, 140 N. Y. 176. Further, *Vide supra*, § 140, "DUMMY" CORPORATIONS, and *supra*, § 132, MIGRATION OF CORPORATIONS, and *infra*, § 1053, "HOLDING" CORPORATIONS.

⁸² *Franey v. Warner* (1898), 96 Wis. 222; *South Joplin, etc. Co. v. Case* (1891), 104 Mo. 572; *Hayden v. Green* (Kan. 1903), 71 Pac. 236; *West End, etc. Co. v. Nash* (W. Va. 1902), 41 S. E. 182; *Hayward v. Leeson* (1900), 176 Mass. 310, 49 L. R. A. 725; *Central T. Co. v. East Tenn., etc. Co.* (1902), 116 Fed. 743.

⁸³ *Yeiser v. United States, etc. Co.* (1901), 107 Fed. 340.

⁸⁴ *Dickerman v. Northern T. Co.* (1900), 176 U. S. 181. *Vide infra*, §§ 812-814, CORPORATE LIABILITY ON PROMOTER'S CONTRACTS.

⁸⁵ *Spaulding v. North Milwau-*

§ 791. **Fraud in purchase of corporate property.**—A purchase of corporate property by a director, is constructive fraud, if not actual, and may be set aside at the instance of any dissenting stockholder.⁸⁶ The purchase is voidable, regardless of the price paid.⁸⁷ Where a director temporarily resigned, and before re-election purchased property from the corporation, the court ignored his resignation, and held him liable to the corporation for difference between the price paid and the value of the property.⁸⁸

Purchase at foreclosure sale.—A director may directly or indirectly purchase the corporate property at a foreclosure sale, unless it was brought about at his instance, in violation of his duties as an officer of the company.⁸⁹

kee, etc. Co. (1900), 106 Wis. 481; Landis v. Sea Isle, etc. Co. (1895), 53 N. J. Eq. 654; Danville, etc. R. Co. v. Kase (Pa. 1898), 39 Atl. 301.

⁸⁶ Stanley v. Luse (1899), 36 Oreg. 25, 58 Pac. 75.

⁸⁷ Barnes v. Lynch (1899), 9 Okla. 156, 59 Pac. 995; Goodhue, etc. Co. v. Davis (1900), 81 Minn. 210; Morgan v. King (1900), 27 Colo. 539, 63 Pac. 416; Cumberland, etc. Co. v. Sherman (1859), 30 Barb. 553; Hoffman, etc. Co. v.

Cumberland, etc. Co. (1860), 16 Md. 456, 77 Am. Dec. 311.

⁸⁸ Millsaps v. Chapman (1899), 76 Miss. 942, 71 Am. St. Rep. 547.

⁸⁹ McKittrick v. Arkansas C. Ry. Co. (1894), 152 U. S. 473; Janney v. Minneapolis, etc. Co., 79 Minn. 488 (1900), 50 L. R. A. 273; Hayden v. Official, etc. Co. (1890), 42 Fed. 875; Osborne v. Monks, 21 S. W. 101 (Ky. 1893); Ready v. Smith (Mo. 1902), 70 S. W. 484; Webb v. Rockefeller (Kan. 1903), 71 Pac. 283; Horbach v. Marsh, 37 Neb. 22 (1893), 55 N. W. 286.

CHAPTER XXXI.

EXECUTIVE AND MINISTERIAL OFFICERS.

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A.

PRESIDENT.

§ 793. President has no power beyond that of any other director.—Except in a few jurisdictions, including Illinois, the rule is that the president has no implied power to contract for the corporation, or to direct its management, beyond that of any other director, his duties being limited to presiding at meetings, and to voting as a director.¹ It was formerly held that, in the absence of legislative enactment or provision made in the by-laws, corporations usually act through their president or those representing him. That he, being the legal head of the body, when an act, pertaining to the business of the company is performed by him, the presumption will be indulged that the act is legally done, and is binding upon the body.² But the later decisions are the other way. The mere fact that he is president, in the absence of any express authority, does not imply that he has any powers beyond those of any other director to bind the corporation.³ His power as an agent to bind the corporation, must be sought in the organic law of the corporation, or from express delegation of authority from the board of directors, or necessarily implied from a custom of doing business.⁴ The president, without express au-

¹ See 17 L. R. A. 356, president's powers; *Titus v. Cairo*, etc. R. R. (1874), 37 N. J. L. 98; *Groeltz v. Armstrong* etc. Co., 89 N. W. 21 (Iowa, 1902); *De La Vergne*, etc. Co. v. *German*, etc. Inst. (1899), 175 U. S. 40; *Worthington v. Schuylkill*, etc. Ry., 195 Pa. St. 211 (1900).

² *Smith v. Smith* (1872), 62 Ill. 493, 496. "The powers which are presumed to have been conferred on the president, but which may be shown not to have been so conferred, are those which are necessary to the doing of those things without the ordinary course of his duties which it would seem he should do, and which, therefore, the law presumes him authorized to do until the contrary appears. The powers which are exercised only by virtue of special authority granted by the directors, are

such as are not only without the ordinary course of his duties, but are within the legislative and judicial province of the directors." 21 Cent. L. J. 144, citing *Bank of East Tennessee v. Hooke*, 1 Coldw. 156; *Rhodes v. Webb*, 24 Minn. 292; *Bank of Com. v. Bank of Buffalo*, 6 Paige, 497; *Percy v. Millandon*, 3 La. 568; *Bank of Healdsburg v. Bailhall*, 65 Cal. 327.

³ *Lyndon Mill Co. v. Lyndon*, etc. Inst., 63 Vt. 581, 25 Am. St. Rep. 783; *Blen v. Bear*, etc. Co., 20 Cal. 602, 81 Am. Dec. 132; *National State Bank v. Vigo County Nat. Bank*, 142 Ind. 352, 50 Am. St. Rep. 330; *Mount Sterling*, etc. Co. v. *Looney*, 1 Metc. (Ky.) 550, 71 Am. Dec. 491.

⁴ *Rockefeller v. Lamora* (1904), 80 N. Y. S. 1.

thority, may bind the corporation by ordinary contracts, which, by custom or necessity are imposed in the routine business of the corporation.⁵ Where he is given general authority to manage the corporate business, his implied authority extends to making simple contracts incident to the ordinary business, but to no other.⁶ When he has no express authority, the corporation, by habit of allowing him to make contracts, and manage the business generally, thereby clothes him with such apparent authority, as to estop the corporation from denying his power to bind the company in the premises; or, if the corporation, by accepting benefits under such contracts, or otherwise, acquiesces therein, it, by implication, ratifies them.⁷ He has no implied authority, simply by virtue of his office as president, to make any contract for the corporation;⁸ or to compensate an officer, or promoter, or ratify their agreements in behalf of the corporation;⁹ or to purchase or lease property for the corporation;¹⁰ or to bind the corporation as guarantor of another's debt;¹¹ or to employ managers or other agents;¹² or to convey the property of the company;¹³ or to sell or assign the corporation's notes, bonds, or other assets;¹⁴ or to mortgage any of the corporate property;¹⁵ or to surrender or transfer corporate franchises.¹⁶

§ 794. President has no implied power by virtue of his office.—If the directors themselves make, or authorize the making of a contract, any special authority given the president

⁵ *Cozzens, etc. Co. v. Western, etc. Co.* (1904), 112 Ill. App. 309.

⁶ *Frost v. Domestic, etc. Co.*, 133 Mass. 363; *B. S. Green Co. v. Blodgett*, 55 Ill. App. 556, 159 Ill. 169.

⁷ *Pittsburgh, etc. Co. v. Keokuk, etc. Co.*, 46 U. S. 371; *Lake St. Elevated Ry. Co. v. Carmichael*, 184 Ill. 348.

⁸ *Mount Sterling, etc. Co. v. Looney 1 Metc. (Ky.)* 550, 71 Am. Dec. 491; *Wait v. Nashua Armory Assn.*, 66 N. H. 581, 49 Am. St. Rep. 630.

⁹ *Tift v. Quaker City Nat. Bank*, 148 Pa. St. 550; *Henry Woods Sons v. Schaefer*, 173 Mass. 433, 73 Am. St. Rep. 305.

¹⁰ *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 34 Am. Rep.

815; *Koch v. National, etc. Assn.*, 137 Ill. 497.

¹¹ *Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75.

¹² *Mount Sterling, etc. Co. v. Looney, 1 Metc. (Ky.)* 550, 71 Am. Dec. 491.

¹³ *Kansas City, etc. Co. v. Devol*, 72 Fed. 717; *Hadden v. Lynnville*, 86 Md. 210.

¹⁴ *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *Smith v. Lawson*, 18 W. Va. 212, 41 Am. Rep. 688.

¹⁵ *National State Bank v. Vigo County Bank*, 141 Ind. 352, 50 Am. St. Rep. 330; *Luse v. Isthmus, etc. Co.*, 6 Oreg. 125, 25 Am. Rep. 506.

¹⁶ *Appeal Penn. Ry. Co.*, 80 Pa. St. 265.

in the premises, will thereby be revoked.¹⁷ Unless the president is expressly authorized, or is given the general management of the corporation business, he has not the authority *ex officio* implied merely, to bring suit in the name of the company, or to appear for the company in a suit against it, or to employ legal counsel or service;¹⁸ or to compromise or arbitrate a suit;¹⁹ or to confess judgment against the corporation;²⁰ or to pay claims against the corporation;²¹ or to receive payment for debts due.²² He may bind the corporation for necessities of the usual course of corporate business, but not for any purpose foreign to the business of the corporation.²³ The president, when entrusted with such general management, has implied authority to purchase furniture and whatever other materials and supplies for use of the corporation, and may rent premises for office, or for other corporate purposes;²⁴ employ clerks, laborers, and other servants; and attorneys to attend to the ordinary legal business of the corporation;²⁵ employ physicians and nurses for persons injured in the company's employment;²⁶ and in the usual course of business may sell its personal property;²⁷ pay the corporate debts;²⁸ bring and defend suits.²⁹ Where, under its charter, a corporation can only act through its board of directors, its president can not, without the authority of the board, enter into contracts in its behalf, except as to matters of simple administration, which, of necessity, should be managed without express authority from them.³⁰ And it has been claimed that, in the absence of anything

¹⁷ East Rome Town Co. v. Brower, 80 Ga. 258.

¹⁸ Pacific Bank v. Stone, 121 Cal. 202; Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688.

¹⁹ Beach v. Wakefield, 107 Iowa, 567; Michigan Central Ry. Co. v. Gougar, 55 Ill. 503.

²⁰ Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902.

²¹ Sampson v. Fox, 109 Ala. 662, 55 Am. St. Rep. 950.

²² Dougherty v. Hunter, 54 Pa. St. 380.

²³ Gaene v. Loemeo Printing Co., 46 Ill. App. 456.

²⁴ Hawley v. Gray Bros., etc. Co., 106 Cal. 337.

²⁵ Hooker v. Eagle Bank, etc.,

30 N. Y. 83, 86 Am. Dec. 351; Calvert v. Idaho Stage Co., 25 Oreg. 412, 36 Pac. 24.

²⁶ Louisville, etc. Ry. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770.

²⁷ Peterson v. Mil Lacs, etc. Co., 51 Minn. 90; Gregg v. Riordan, 99 Cal. 316.

²⁸ Africa v. Duluth, etc. Co., 82 Minn. 283; McKiernan v. Lenzen, 56 Cal. 61.

²⁹ Frost v. Domestic, etc. Co., 133 Mass. 563.

³⁰ Bright v. Metairie Cemetery Assn. (1881), 33 La. Ann. 58. And, generally, the president has by virtue of his office but little authority to bind the corporation except upon such contracts as come plainly within its ordinary rou-

in the incorporating act conferring special powers upon the president, he is by reason of his official position, vested with no more power than any other director.³¹ But it has been held that a managing director may properly have the custody of the assets; and if the corporation allows him, without objection, to hold himself forth as competent to dispose of its assets, strangers are entitled to presume that he has authority to do so.³² And under authority from the directors, the president may convey the property of the company.³³ So, also, where the management of the affairs of a corporation is entrusted to a general managing agent, he has the power to assign its choses in action to its creditors, either in payment of, or as security for, a debt of the corporation, without express authority from the directors.³⁴ Although, as a general rule, the president can not, without express authority, mortgage the property of the company,³⁵ when authority is delegated to him by the directors to perform a specific act, his powers in respect thereto, are measured by the resolution of the board, and his general powers as president, have no bearing upon the case.³⁶ If the president die, his place may be taken by the vice-president, although the office of vice-president was created by the directors, merely under a general provision in the by-laws empowering them to create other officers.³⁷

§ 795. The president's power to contract must be expressly conferred.—The corporation acts through its president and executes its contracts through him; any act pertaining to the corporate business done through him, is presumed to have been authorized by the corporation, in absence of proof to the contrary.³⁸ The president or a director or other officer, acting for

tine business. Taylor on Corporations, § 236; *Risley v. Indianapolis, etc. R. Co.*, 1 Hun, 202.

³¹ *Titus v. Cairo, etc. R. Co.*, 37 N. J. 98, 102 (1874); *Walworth County Bank v. Farmers' Loan & Trust Co.* (1861), 14 Wis. 325. But see *Smith v. Smith* (1872), 62 Ill. 493, 496.

³² *Walker v. Detroit Transit Ry. Co.* (1881), 47 Mich. 338.

³³ *State v. Glenn*, 18 Nev. 34.

³⁴ *McKiernan v. Lenzen* (1881), 56 Cal. 61.

³⁵ *Luse v. Isthmus Transit Ry. Co.*, 6 Oreg. 125, 25 Am. Rep. 506. Not even where a person owns

nearly all the stock of a company and is its president, superintendent and general manager, can he in that capacity mortgage the corporate property. *Chicago & N. W. R. Co. v. Jones*, 24 Wis. 388; *Stow v. Wise*, 1 Conn. 214, 18 Am. Dec. 99; *England v. Dearborn*, 141 Mass. 590; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

³⁶ *Second Ave. R. Co. v. Mehrbach* (1883), 46 N. Y. Super. Ct. 267.

³⁷ *Coleman v. West Virginia Oil, etc. Co.*, 25 W. Va. 148.

³⁸ *Chicago, etc. Co. v. Munsell* (1903), 107 Ill. App. 344.

another person with whom he is personally interested in any transaction, is not therein to be treated as an agent of the corporation.³⁹ His acts bind the corporation only when he is expressly authorized to act, or when he has been accustomed to contract for the company. Where the president has been allowed to exercise power, without dissent of the corporation and with its acquiescence, the law presumes that he has the power;⁴⁰ and his contract binds the corporation where it has accepted the benefit of such contract.⁴¹ The contracts of the president must be based upon authority conferred upon him, but such authority may be given in general terms.⁴² But a contract, regular on its face, executed on behalf of a corporation, and within the scope of its business, by the president and secretary, is *prima facie* evidence of their authority to execute it, and in an action for its breach, the burden of proof is on the party denying such authority. Accordingly, where a contract is executed on behalf of a corporation by the president and secretary, who, with the acquiescence of the directors, act publicly as its agents in making such contracts, the corporation will not be relieved from liability for its breach merely, on the ground that the requisite authority was not conferred on the officers executing it, by resolution of the board of directors, entered on the records of the corporation.⁴³ So, a contract executed and sealed in the name of a corporation by its president and secretary, though without the express consent of the directors, is binding on the corporation when it has received benefits under

³⁹ Leigh v. American, etc. Co., 107 Ill. App. 444.

⁴⁰ Chambers v. Lancaster, 160 N. Y. 342 (1899); First Nat. Bank v. G. V. B. Min. Co., 89 Fed. 439 (1898); Scribner v. Flagg, etc. Co. (1900), 175 Mass. 536.

⁴¹ West Salem, etc. Co. v. Montgomery, etc. Co. (1892), 89 Va. 192, 15 S. E. 524.

⁴² Defendant corporation was organized to buy and sell land, cattle, etc., and to do business incidental to stock-raising. In addition to the powers usually conferred on the general officers of corporations, defendant's president and secretary had been duly empowered to purchase certain ranches, with the horses and stock

thereon. They accordingly entered into an agreement with plaintiff, who was not a member of the corporation, in order to procure the money to pay the purchase price. And it was held that the agreement was within the scope of their authority, notwithstanding the existence of a by-law, of which plaintiff had no notice, forbidding the officers to contract debts for the corporation except by order of the board of directors. Arapahoe Cattle & Land Co. v. Stevens (Colo. 1890), 22 Pac. Rep. 823.

⁴³ Sherman Center Town Co. v. Swigert (Kan. 1890), 23 Pac. Rep. 560.

the contract, and conducted its business in compliance therewith in such a manner that the director must have known of it.⁴⁴ But where the president and general manager of a company, incorporated for the purposes of "conversion and disposal of agricultural products by means of mills, elevators, stores, or otherwise,"—purchases flour, and such purchase is unknown and unauthorized by the company, and no benefit results to it by reason of such purchase, such facts alone will not create a liability against the company.⁴⁵ And, of course, where a corporation adopts a by-law providing that all contracts by it, involving a liability for a certain amount or more, must be in writing executed by both the president and treasurer, and attested by the seal of the company, it can not be held liable on a lease upon a rental exceeding that amount, executed by the president alone, without the seal of the company; and this, whether the lessor had notice of the by-law or not.⁴⁶ The president can not, of course, bind his corporation to an *ultra vires* contract;⁴⁷ nor by a fraudulent one.⁴⁸ His contract, made in his own name, may inure to the benefit of his corporation.⁴⁹

⁴⁴ *Jourdan v. Long Island Ry. Co.* (1889), 115 N. Y. 380, 6 Ry. & Corp. Law J. 457. A deed signed by the president and secretary without authority of the trustees and without the corporate seal is void. *Mott v. Danville Seminary*, 21 N. E. Rep. 927. And if a corporation, when sued on a contract, would rely on the fact that the president had not the written authority to make it that the statute requires, such fact must be pleaded. *Kenner v. Lexington Mfg. Co.* (1885), 91 N. C. 421.

⁴⁵ *Getty v. Barnes Milling Co.* (Kan. 1888), 19 Pac. Rep. 617.

⁴⁶ In such a case, no ratification can be based on the treasurer's knowledge of the facts where his testimony that he refused to sign the lease is wholly uncontradicted. *Bohm v. Loewer's Gambrinus Brewery Co.* (1890), 9 N. Y. Supp. 514.

⁴⁷ *Holt v. Winfield Bank*, 25 Fed. Rep. 812.

⁴⁸ As where A., the president of

a street railroad company, by fraudulently representing to B., his aunt, that a loan of her shares of the company's stock was needed by the company, induced her to part with them. He immediately pledged them for his own debt. The company paid her interest on the shares for some time. A. conspired with other officers of the company to procure a fraudulent over-issue of stock, some of which he transferred to B. in lieu of her own; and it was held that this stock was worthless in B.'s hands, and that as A. had acted, in obtaining her stock, as her agent, and not as the agent of the company, the loss of her stock must fall on her and not on the company. *Wright's Appeal* (1882), 99 Pa. St. 425.

⁴⁹ *Clubb v. Davidson* (1888), 95 Mo. 467. Where the president of a packet company having failed to make a contract for his company with the government for carrying the mails, and subse-

§ 796. **Incidental powers of the president.**—The authority of the president may be extended, so that without express authority he may do any acts necessarily incident to others which he has been authorized to perform.⁵⁰ And it has been decided that, although the president of a corporation should have consulted the board of directors before authorizing certain expenditures, yet, if he acted in good faith, and only did what they probably would have authorized, he is not liable to the corporation for damages; nor can it set up his conduct, by set-off, or otherwise, in bar of his action for salary.⁵¹ He may defend prosecutions against the company, petition for a writ of error, and engage or discharge counsel, in the absence of any restraining acts on the part of the directors, or any restrictions in the constitution and by-laws of the company.⁵² He may also, in some cases, bring suit in the

quently succeeding in making such a contract in his own behalf, employing the boats of his company to the extent of its capacity so long as the said company operated boats on that route, but employing other boats when necessary, will be required to use all the facilities afforded by the company, and to account to the company for all money received for the service performed by it, but not for that received for services rendered by the other boats. In *Davis v. Gemmell* (1889), 70 Md. 356, it was held that where third persons had actual notice that the contract made by the president in his own name related to the corporate property, and that complainant claimed to be a stockholder to a large amount, and proposed to assert his rights as such, they dealt with the president, in relation to the contract, at their peril. Moreover it appearing that the directors of the corporation were the relatives of the president, and had not held a meeting for eight years, and that without notifying complainant, who was also a director and owner of one-half stock, they called a meeting, and approved and ratified a contract made by

the president in his own name, to furnish to a railroad company large quantities of coal belonging to the corporation at a certain price per ton, the only advantage to the corporation being the payment by him of a small royalty, it cannot be said that the directors acted in good faith for the benefit of the corporation.

⁵⁰ *Northern Central Ry. Co. v. Bastian*, 15 Md. 494. The president and superintendent of a corporation having authority to buy and sell material, and to make contracts for it, their authority extended to releasing the purchaser (who had become unable to meet his payments), and to substituting a third person in his stead. *Indianapolis Rolling Mill Co. v. St. Louis, Fort Scott, etc. R. Co.*, 26 Fed. Rep. 140.

⁵¹ *Davis v. Memphis City Ry. Co.*, 22 Fed. Rep. 883.

⁵² *Coleman v. West Virginia Oil, etc. Co.*, 25 W. Va. 148. And an indictment under U. S. Rev. Stat., § 5209, charging the defendant with committing the offense charged as *president and agent*, is good. *United States v. Northway* (1887), 120 U. S. 327. But it is not within the power of a president of a corporation to execute a

name of the company.⁵³ And there is evidence to support a finding that the president of a corporation had authority to agree to pay plaintiff for legal services in stock, where it appears that prior to the hiring of plaintiff, other attorneys, hired by him with the approval of the directors, had been paid in stock, and that plaintiff's services were performed with the knowledge of the directors.⁵⁴ And the president of company, who is also a director, may authorize and maintain an action for an accounting and an injunction in the name of the corporation, without the authority of the board of directors, or against its express direction, where a majority of the directors or trustees have wrongfully converted corporate funds, and threaten to convert others, and, where the neglect of the board of directors to sue, and its resolution to discontinue the suit already commenced, are simply acts in furtherance of the unlawful design of such majority.⁵⁵ Where a board of directors refers a matter to a committee of three, one of whom is the president of the corporation, the president can not act alone so as to bind the corporation.⁵⁶ And a by-law, giving the president of a corporation "the general charge and direction of the business of the company, as well as all matters connected with the interests and objects of the corporation," does not authorize him to do an act which, by another by-law, is expressly given to a separate committee.⁵⁷ But there is nothing to prevent the company's president from acting as its secretary, also at a meeting of its board of directors.⁵⁸ A president of a solvent corporation has the right to demand that he be relieved of his stock as a condition precedent to his resignation.⁵⁹ The president of a company has power to employ counsel, and pay reasonable compensation for defense of a suit against the corporation.⁶⁰

§ 797. Power to issue negotiable paper.—The authority of the president, when he is managing agent of a corporation, to

bond and warrant of attorney for the entering of judgment against the corporation. *Stokes v. New Jersey Pottery Co.*, 46 N. J. 237.

⁵³ As, for example, a suit to enjoin a party from illegally using water belonging to the corporation has been held to have been properly brought by the president. *Reno Water Co. v. Leete* (1883), 17 Nev. 203.

⁵⁴ *Merrill v. Consumers' Coal Co.* (1889), 114 N. Y. 216.

⁵⁵ *Recamier Manuf. Co. v. Seymour* (1889), 5 N. Y. Supp. 648.

⁵⁶ *Third Avenue R. Co. v. Ebling* (1885), 12 Daly, 99.

⁵⁷ *Twelfth Street Market Co. v. Jackson* (1883), 102 Pa. St. 69.

⁵⁸ *Budd v. Walla-Walla, etc. Co.*, 2 Wash. 347.

⁵⁹ *Joseph v. Raff* (1903), 81 N. Y. S. 546, 82 App. Div. 1118.

⁶⁰ *Campbell v. Pittsburgh, etc. Co.* (1903), 23 Pa. Super. Ct. 138.

borrow money in its behalf, may be implied from the circumstances of the case.⁶¹ Thus, a general vote of the directors of a corporation, that the president have full power and control of its business, authorizes him to purchase the materials to be used in its operations, and to borrow money for the corporation, and give its note for the money borrowed.⁶² Where also the president of the company is permitted for several years, to act and to represent himself as the general manager and director of its business, the corporation can not set up its by-laws as countervailing his authority to represent that a certain person is the authorized agent of the corporation for the sale of its goods, and to take, indorse, and procure the discount of notes for goods sold.⁶³ The president, when so having full management, may bind the corporation to one who pays its notes at his instance,⁶⁴ or to one who advances money to the corporation through him, which is spent for the benefit of the corporation and recognized by it as a debt.⁶⁵ His personal signature, as president, binds the company following whose name it is placed.⁶⁶ But a claim that de-

⁶¹ *Spangler v. Butterfield*, 6 Colo. 356 (1883). In an action by K. to recover of a corporation money raised by K. at the request of F., its president and financial agent, and delivered to F. as a loan to the corporation, it was held, that in the absence of any showing that K. knew F. intended not to use the money in the corporation business, evidence that it was not so used was immaterial; and that evidence that the board had passed no resolution authorizing F. to borrow money, and that some trustees did not know of the loan, was also immaterial. *Kraft v. Freeman Printing, etc. Assn.* (1881), 87 N. Y. 628.

⁶² *Castle v. Belfast Foundry Co.* (1881), 72 Me. 167.

⁶³ *Marine Bank v. Butler Colliery Co.* (1889), 5 N. Y. Supp. 291.

⁶⁴ *Seeley v. San Jose Independent Mill, etc. Co.* (1882), 59 Cal. 22, in which case plaintiff, at the request of the president and superintendent of a corporation, and to save the corporation from a

threatened law suit, paid certain notes of the corporation; and it was held, that the corporation could not be heard to deny the authority of its president, and that the original consideration for the notes could not be inquired into.

⁶⁵ *Poole v. West Point Butter & Cheese Assn.*, 30 Fed. Rep. 513.

⁶⁶ *Vide supra*, § 728, AUTHORITY OF MANAGING OFFICER TO ISSUE NEGOTIABLE PAPER; *Liebscher v. Kraus* (1889), 74 Wis. 387, 6 Ry. & Corp. L. J. 455, deciding that a promissory note containing the words "we promise to pay," and signed "San Pedro Mining and Milling Company, F. Kraus, President," shows no ambiguity on its face, as it is in law the note of the company, and parol evidence is inadmissible to show that Kraus signed it in his individual capacity. But, to the contrary, a promissory note, signed "Independence Mfg. Co., B. I. Brownell, Pres.," purporting to bind both signers, and having nothing on its face to indicate that the last

fendant had received the proceeds of a note, indorsed in its name by its president, is not sustained by the testimony of an officer of a corporation to which it was transferred, that it was delivered in part payment of a running account in favor of his company against defendant for goods sold, where he does not state what goods were sold to defendant, and the books of neither company are produced to show the account, and the existence of any dealings between the two companies, is denied by defendant.⁶⁷ In the case, however, of one who receives from the president of a corporation, and pays full value therefor, a negotiable note there-

signer was president of the corporation, or had signed the note for it or on its behalf, binds the last signer personally; and the letters "Pres." must be regarded simply as descriptive of the person to whose signature they are appended. *Heffner v. Brownell*, 78 Iowa, 648, 31 N. W. Rep. 947, annotated. In this case a warehouse corporation was authorized to make advances on property stored with it. Its president assumed to bind it by indorsing a note for one per cent., which amount the corporation received. The indorsement was based on tobacco on storage. A bank discounted the note for the maker, to whose order it was drawn, and who presented it indorsed as aforesaid. The corporation had recognized similar transactions as valid, and the president had been given by the corporation general power to manage its business; and it was held, that the corporation could not dispute its liability on the indorsement. *Park Bank v. German-American Mut. Warehousing, etc. Co.* (1885), 53 N. Y. Super. Ct. 367. But in an action to enforce defendant company's liability on a note indorsed in the name of the company by its president, there was no proof that the president had direct authority to indorse the note in suit, and the only evidence from which authority could be inferred consisted of numerous former indorsements of the com-

pany's name by the president, in which cases the paper had been transferred, and the apparent obligation of the company as indorser satisfied, but plaintiff knew nothing of these indorsements at the time it discounted the note. If the payments in such cases were in fact made from the funds of the company, it did not appear that there were any book-entries disclosing them, but rather that the president conducted all the transactions personally. And it was decided that the evidence was insufficient to establish his authority. *Fifth Nat. Bank v. Navassa Phosphate Co.*, 6 N. Y. Supp. 1. In a subsequent action, however, against the same company, evidence that that officer had indorsed three or four hundred similar notes, and had them discounted; that entries were made in the books of the company of the proceeds of such notes; and that like notes had been discounted by plaintiff, and subsequently paid, was thought to justify the submission to the jury of the question of estoppel on defendant's part to dispute its president's authority, and the mere ignorance of the trustees would not relieve it of liability. *National Bank v. Navassa Phosphate Co.* (1890), 8 N. Y. Supp. 929.

⁶⁷ *National Bank v. Navassa Phosphate Co.* (1890), 8 N. Y. Supp. 929.

of, payable to itself and indorsed by the president, as such, and individually, with notice that the proceeds are to be applied to the discharge of a personal debt, he is put upon inquiry as to the authority by which it was issued and negotiated; but he is, nevertheless, a *bona fide* holder, when, if he had inquired, he would have discovered the record of an apparently legal vote of the directors authorizing the issue to pay a debt recited to be due their president.⁶⁸ Where the president, in the course of business, is accustomed to receive promissory notes, payable to the corporation, he is presumed to have authority to transfer them.⁶⁹ Where the managing officials of a corporation secretly agreed with a third person to form a new corporation, in which they were to have controlling interest, and after its formation, they, without the knowledge of the directors or stockholders of the old corporation, contracted on its behalf with the new corporation, *Held*, in equity, that the court on application of the directors would annul the contract, without regard to whether or not it was unfavorable to the old corporation.⁷⁰ A promissory note of the corporation, made by a corporate officer having general authority to make and issue promissory notes, is, when taken by a stranger, presumed to be issued for corporate purposes, but the contrary is the presumption where the note so issued by the officer, is made payable to himself. In such case the corporation is not bound by such general authority, and no recovery can be had except upon proof of express authority given to make that particular note.⁷¹

§ 798. **Power of bank presidents.**—A bank president has power to transact the usual business of the bank in the usual way.⁷² He is its general fiscal agent, and whatever he does within the apparent scope of his authority binds the bank.⁷³ But as

⁶⁸ *Wilson v. Metropolitan Ry. Co.* (N. Y.), 24 N. E. Rep. 384.

⁶⁹ *Iowa Nat. Bank v. Sherman*, etc. (S. D. 1903), 97 N. W. 12.

⁷⁰ *Attalla Iron Ore Co. v. Virginia*, etc. Co. (Tenn. 1903), 77 S. W. 714.

⁷¹ *Park Hotel Co. v. National Bank*, 86 Fed. 742.

⁷² 21 Cent. L. J. 144, citing *Minor v. Bank of Alexandria*, 1 Pet. 46; *Neiffer v. Bank of Knoxville*, 1 Head, 162; *Wyman v.*

Hallowell & Augusta Bank, 14 Mass. 58; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Foster v. Essex Bank*, 17 Mass. 479; *Austin v. Daniels*, 4 Denio, 299.

⁷³ *Cake v. Pottsville Bank*, 116 Pa. St. 264 (1887), 2 Am. St. Rep. 601. But a bank with whom a draft is deposited for collection has no general agency to employ an attorney to sue thereon, or compromise the claim; and in absence of special authority is not

between the corporation and himself, a president of a bank ordinarily, has no authority to sell the property of the corporation, unless he have authority under the charter, the direction of the board of directors, the managing committee, or by usage; and where the property of a bank, is sold by a president without authority, and the bank suffers loss thereby, he may be held to respond in damages to the extent of the loss.⁷⁴ In the absence of special authority from the directors of a bank, the president can not authorize the cashier to pay the checks of a person who holds a claim against the president, but has no deposit in the bank.⁷⁵ And, where checks are so paid, the amount of the checks cashed can be recovered by the bank from the drawer of the checks, in an action for money paid out.⁷⁶

§ 799. **Powers of railroad president.**—The powers of a railroad president are generally more limited in their scope than are those of banks or manufacturing companies. He may not let a contract for construction of the railway, nor appoint an agent to sell the company's lands.⁷⁷

B.

VICE-PRESIDENT.

§ 800. **The vice-president's powers.**—The vice-president has like powers, duties, and liabilities, as the president, but only when acting in his stead. He may sign a corporate deed where the president refuses to sign it.⁷⁸ The mere fact that a deed was signed by the vice-president, instead of by the president, requires no additional proof why he signed it in place of the president.⁷⁹ Where a pleading in a suit is signed by the vice-president, the suit is presumed to be authorized.⁸⁰ By reason of long conduct of the business, the vice-president of a bank may have power to assign a judgment.⁸¹

liable for the president's representations therein unless benefited by his acts. *Ryan v. Manufacturers' & Merchants' Bank*, 9 Daly, 308 (1881).

⁷⁴ *First Nat. Bank of Central City v. Lucas* (1887), 21 Neb. 280.

⁷⁵ *Dowd v. Stephenson* (1890), 10 S. E. Rep. 1101.

⁷⁶ *Dowd v. Stephenson* (N. C. 1890), 10 S. E. Rep. 1101.

⁷⁷ *Vide infra*, § 1060, RAILWAY PRESIDENT.

⁷⁸ *Smith v. Smith* (1872), 62 Ill. 492.

⁷⁹ *Ellison v. Branstroter* (1899), 153 Ind. 146.

⁸⁰ *Lacaze v. Creditors* (1894), 46 La. Ann. 237, 14 So. 601.

⁸¹ *Cox v. Robinson* (1897), 82 Fed. 277.

C.

OFFICER ACTING AS GENERAL MANAGER, OR SUPERINTENDENT.

§ 801. **General manager's authority.**—The general manager of a corporation, formed to care for cattle consigned for sale, has no authority to sign a petition for street pavement, whereby to charge the cost upon property of the corporation.⁸² The treasurer of a corporation, authorized to "have charge of" its securities, has no power to sell registered bonds of the corporation, without express authority.⁸³ A general manager has no implied power to make notes, or to borrow money for the corporation,⁸⁴ but if he does so, and the corporation uses the money, it is liable to repay it.⁸⁵ He has no implied power to issue notes,⁸⁶ or to sell corporate real estate,⁸⁷ or to engage an employe for five years,⁸⁸ or to mortgage the corporate property,⁸⁹ or to render the corporation liable for his own debts,⁹⁰ or to guarantee another's note,⁹¹ or to endorse commercial paper, except for collection,⁹² or to prefer a creditor,⁹³ or to assign for the benefit of creditors.⁹⁴ He may purchase land necessary for conduct of the corporate business.⁹⁵ He may employ a superintendent temporarily.⁹⁶ He may engage an attorney.⁹⁷ The corporate authority is in the directors only when acting collectively as a board, in legal meetings, but, as it does not usually meet from day to day to attend to the current details of the business, it usually appoints, or elects, some subordinate officer, to whom it delegates,⁹⁸ subject to its own general direction, the management and control, entire, or of

⁸² *Traphagen v. City of South Omaha* (Neb. 1903), 96 N. W. 248.

⁸³ *Jennie Clarkson, etc. v. Chesapeake, etc. Co.* (1903), 83 N. Y. S. 913.

⁸⁴ *Union, etc. Co. v. Rocky Mt., etc.* (1872), 1 Colo. 531.

⁸⁵ *Topeka, etc. Co. v. March*, 61 Pac. 876 (Kan. 1900).

⁸⁶ *Elwell v. Puget Sound, etc. R. R.* (1893), 7 Wash. 487, 35 Pac. 376.

⁸⁷ *Schelter v. Southern, etc. Co.* (1890), 19 Oreg. 192.

⁸⁸ *Camacho v. Hamilton, etc. Co.* (1896), 2 N. Y. App. Div. 369.

⁸⁹ *First Nat. Bank v. Kirby*, 32 So. 881 (Fla. 1901).

⁹⁰ *Barnhardt v. Star Mills*, 123

N. C. 428 (1898), 31 S. E. 719.

⁹¹ *Dobson v. More* (1896), 164 Ill. 110, 56 Am. St. Rep. 184.

⁹² *Railway Equipment Co. v. Lincoln Nat. Bank* (1894), 82 Hun, 8.

⁹³ *Hadden v. Dooley* (1899), 92 Fed. 274.

⁹⁴ *First Nat. Bank v. Asheville, etc. Co.* (1895), 116 N. C. 827.

⁹⁵ *New, etc. Co. v. Shuck* (Ky. 1899), 50 S. W. 681.

⁹⁶ *Sandberg v. Victor, etc. Co.* (1901), 24 Utah, 1, 66 Pac. 360.

⁹⁷ *Ceeder v. Loud, etc. Co.*, 86 Mich. 541 (1891), 24 Am. St. Rep. 134.

⁹⁸ *Burden v. Burden*, 8 App. Div. 160, 159 N. Y. 287.

some particular branch of the business. Such manager, whether called superintendent, general manager, or by what other designation, may at the same time be a director, or the president, or secretary, or other officer, or agent, of the corporation, but that fact does not limit or otherwise affect his power as such general manager.⁹⁹ The extent of his authority is prescribed by the board of directors, and may, at its pleasure, be enlarged or revoked. His implied power and authority are limited to do only those things which are incident to the usual business of the corporation,¹ or to that branch of it entrusted to his management. Such general manager's authority is as broad as, and no broader than, the scope of his employment and agency, and the nature of the corporate business.² A contract by the superintendent of a corporation, to pay an injured employe what would in effect be a pension for life, will not bind the corporation.³ The powers of general managers and superintendents are much similar to those of presidents of corporations. A corporation is liable on a contract within the scope of the corporate business, made by a superintendent and manager, appointed to do the general work, and keep the books of the concern.* An extreme case decides that one who expends money to promote the purposes of the

⁹⁹ *Ceeder v. Loud & Sons, etc.* Co., 86 Mich. 541, 24 Am. St. Rep. 134.

¹ *Green v. Blodgett*, 55 Ill. App. 556, 159 Ill. 169, 50 Am. St. Rep. 146; *Sarmiento v. Davis, etc. Co.*, 105 Mich. 300, 55 Am. St. Rep. 446; *Matson v. Alley* 141 Ill. 284.

² *Boynton v. Lynn Gas Light Co.*, 124 Mass. 197; *Baird Lumber Co. v. Devlin*, 124 Ala. 245.

³ *Smith v. Crum, etc. Co. (Pa.* 1904), 57 Atl. 953.

⁴ *Whitaker v. Kilroy* (1888), 70 Mich. 635. In *Siemen's Regenerative Gas-Lamp Co. v. Horstman* (Pa. 1889), 24 W. N. Cas. 396, the appellee wishing to light his factory, applied to defendant company, and shortly afterwards received a proposition to furnish lamps. This proposition was written on the company's business paper, and signed "B., Gen'l Agent." B. placed the lamps in the factory, and, at appellee's re-

quest, furnished, on the same paper, a memorandum that, if the lamps were not satisfactory after a year's trial, "I will purchase them back at half price," signed, "B., Gen'l Agent." The price was paid by check to the company. B. was acting as sole manager and so advertised himself, using the company's wood-cut. A change was made afterwards, but no notice was given to the public. The company requested of appellee the privilege of inspecting the lamps. The lamps failing to work, appellee applied to the president, who promised to arrange the matter, but soon wrote, refusing to interfere, as it was B.'s contract. The evidence was held to be sufficient to justify a submission to the jury, and to sustain a finding that B. was authorized to make the stipulation for the return of part of the price.

corporation, under the direction of a general manager invested with the entire control of the business of the corporation, and in accordance with a prevailing custom recognized by the members, may recover therefor from the corporation, although express authority was not conferred by its directors.⁵ But, generally, one who makes a special contract with the manager of a corporation is bound to take notice of limitations upon his authority.⁶ Thus, a corporation is not liable for supplies furnished its superintendent without its authority, where it had previously adopted a by-law providing that "no debts shall be contracted by any officer or agent of the company, nor any obligation created, imposing any liability on it, unless expressly authorized by a majority of all the members of the board of directors present at any meeting of said board," even though the seller of the supplies had no actual notice of the by-law;⁷ and a general manager can not indorse the corporation's notes without authority,⁸ though he may receive notes so as to make their delivery to him valid if by the direction of the acting president.⁹ The superintendent

⁵ *Topeka Primary A. U. B. v. Martin* (1888), 39 Kan. 570.

⁶ *Smith v. Co-operative Dress Assn.*, 12 Daly, 304.

⁷ *Rathburn v. Snow* (1889), 22 N. Y. St. Rep. 227. Especially is it true that a corporation will not be liable when the supplies were furnished by the superintendent to be used in improving land owned by himself and others, of which the corporation never became the owner, and where the trustees were in a distant country, and had no knowledge of the transaction, and no express ratification is shown, though the corporation had agreed to take the land in exchange for stock when the land was developed, and had furnished the superintendent funds to be used in developing it. *Rathburn v. Snow* (1889), 22 N. Y. St. Rep. 227.

⁸ In an action to charge a corporation as indorser of notes indorsed in its name by "L. Hirsch, Manager," a judgment against the corporation is unauthorized, in the absence of evidence of Hirsch's

authority, or that the notes related to the corporation's business, or that it ever received any value for or benefit from the indorsement. *Middlesex Co. Bank v. Hirsch Bros. Veneer Manuf. Co.* (1889), 4 N. Y. Supp. 385, annotated, 24 N. Y. St. Rep. 297.

⁹ Thus, in *Whitaker v. Kilroy* (1888), 70 Mich. 635, notes were received by the general manager in the presence and by the direction of the president, who though informing the maker that the manager had no authority to collect money did not inform him in whom that authority was vested, and it was held that the delivery of the notes to the manager was under the circumstances sufficient to bind the company. And where the general manager of a corporation, who was authorized to collect its checks, etc., presented a check belonging to it to a bank for payment, and by mistake the bank overpaid him, it was held, that the corporation was liable for the amount of the overpayment without regard to whether

may contract for the corporation in certain cases,¹⁰ and he may release from a contract he would have had the power to make.¹¹ Conversely, the novation of a debt due from a corporation, is within the authority of a general agent having power to pay its debts.¹² Where the general manager enables the owner of a judgment to purchase effects of the corporation, at execution sale, for less than their actual value, he acts as the agent of the purchaser, and his acts do not bind the company.¹³

§ 802. Admissions and declarations, by general manager.—A superintendent's admissions of obligation do not necessarily bind the company.¹⁴ Thus, the fact that a manager of a corporation employed a surveyor to run at a certain place a boundary line between the land of the corporation and that of an adjoining owner, does not, in the absence of any evidence that the manager was authorized to establish the boundary, bind the company to acquiesce in the boundary thus established.¹⁵ But it has been held that a railroad superintendent may bind the company by issuing a circular, though no authority to do so has been granted him by the board of directors; such an act being within the scope of his general duties.¹⁶ And when, in response to a letter sent to a railroad superintendent, the circular is received through the mail in an official envelope, addressed in the handwriting of the superintendent's secretary, the presumption is, in the absence of rebutting evidence, that it is an offer made by the superintendent

the manager accounted to the corporation for the amount. *Kansas Lumber Co. v. Central Bank*, 34 Kan. 635 (1885).

¹⁰ Where the president and vice-president of a corporation instruct a person to deal with the superintendent, and the corporation receives the benefit of an oral agreement made by him for the corporation, it cannot deny his authority to act. *Morrell v. Long Island R. Co.* (1888), 22 N. Y. St. Rep. 30.

¹¹ *Indianapolis Rolling-Mill Co. v. St. Louis, Ft. S. & W. R. Co.* (1887), 120 U. S. 256.

¹² *Mulcrone v. American Lumber Co.* (1885), 55 Mich. 622.

¹³ *Welch v. Woodruff* (1889), 51 Hun, 637.

¹⁴ The declarations of a superintendent of a company which has

offered a reward for the arrest of certain persons, made after the arrest, and in acknowledgment of the obligation under the offer, are not admissible where no evidence appears to show his authority to bind the company by such admissions, and the authority is expressly denied. *Blain v. Pacific Ex. Co.* (1888), 69 Tex. 74.

¹⁵ *Hartford Iron Min. Co. v. Cambria Min. Co.* (Mich. 1890), 45 N. W. Rep. 351.

¹⁶ *Central Railroad & Banking Co. v. Cheatham* (1888), 85 Ala. 292, holding also that such a circular, when headed with the names of two railroad companies and signed by their superintendent, is the contract of the companies, and not of the superintendent personally.

on behalf of the company.¹⁷ The representations of the superintendent of a corporation that he has a quantity of rice stored with the company, together with a special receipt of the corporation, signed by the superintendent, acknowledging that it held the rice, will not bind the corporation; but where he represented that another had in store a certain quantity of rice, and thereby induced an advance of money upon a receipt by which the corporation acknowledged that the rice was in store, which receipt was signed by such general superintendent, the corporation was liable.¹⁸

§ 802a. **Authority of general manager to engage legal and medical service.**—When the general manager of a company retains a practicing attorney to attend to legal business for the corporation, it is liable for the services rendered, unless the attorney knew, or might have known by using ordinary diligence, that the manager had no authority to retain him.¹⁹ So, a general manager and agent of a corporation must be presumed, *prima facie* at least, to have authority to direct the issue of a replevin writ, for the improper service of which the corporation is sued.²⁰ The general or managing local agent of a foreign corporation, is not, however, an "officer" who may make the affidavit required upon an application for change of venue.²¹ A general manager and a police inspector, whose duty it was to proceed to the scene of an accident, have been held authorized to bind the company for medical services, hotel charges and such other necessary expenses of passengers injured in a railway accident.²² But where the general manager of a corporation sends a request to a physician by telegram, signed in the name of his company, to attend an employe, wounded in a private brawl, he is acting beyond the scope of his authority, apparent and real, and the company is not liable to the physician.²³

§ 803. **Secretary's duties and powers.**—Though the secretary has, practically, no implied power,²⁴ the corporation may

¹⁷ Central Railroad & Banking Co. v. Cheatham (1888), 85 Ala. 292.

¹⁸ Planters' Rice Mill Co. v. Olmstead (Ga. 1887), 3 S. E. Rep. 647.

¹⁹ St. Louis, etc. R. Co. v. Grove (1888), 39 Kan. 731.

²⁰ Frost v. Domestic Sewing Machine Co. (1882), 133 Mass. 563.

²¹ Wheeler & Wilson Manuf. Co. v. Lawson (1883), 57 Wis. 400.

²² Langan v. Great Western Ry. Co., 30 L. T. (N. S.) 173; Walker v. Great Western Ry. Co., L. R. 2 Ex. 228; 36 L. J. Ex. 123; Browne & Theobald's Ry. Law, 108.

²³ Dale v. Donaldson Lumber Co. (1887), 48 Ark. 188.

²⁴ Hastings v. Brooklyn Life Ins. Co. (1893), 138 N. Y. 473.

ratify his contracts which he has made, and when it has received the benefits, the corporation is liable for his acts, as, where corporate notes were given by the secretary, without authority, to a bank, and it used the money in its business, it was held liable.²⁵ Where it has allowed him to conduct the corporate business, the corporation is bound by his contracts made on its account.²⁶ The secretary has no power, by reason of his office, to contract in the name of the corporation, or to borrow money, or to pay notes, or endorse securities.²⁷ The secretary's duties are to keep records and make entries of all proceedings of the stockholders and directors, requiring a record.²⁸ Though he may have bought, with his own money, the books containing the records, they belong to the corporation. His possession of them is its possession, and he can not take them, when he ceases to be secretary.²⁹ He is the custodian of the records and of the corporate seal.³⁰ By virtue of his office, merely, he has no authority,³¹ and none to bind the corporation, unless it be expressly conferred.³² The secretary is not, ordinarily, a fiscal agent of the corporation nor empowered to bind it in transactions of a financial character. Thus, a secretary of a corporation can not, in the absence of special authority, bind the corporation by a "due bill" given a stockholder in consideration of his surrender of his stock.³³ And, though a corporation furnishes its secretary with money to pay its employes, and an employe delivers monthly to the secretary, receipts for the month's salary, and leaves the money with the secretary, the corporation is not liable for the default of the secretary in failing, afterwards, to pay over the amounts.³⁴ So, where the

²⁵ *Pauley v. Sloane* (1901), 66 N. Y. App. Div. 522.

²⁶ *Hess v. Sloane* (1901), 66 N. Y. App. Div. 522.

²⁷ *Chemical National Bank v. Wagner* (1892), 93 Ky. 525, 40 Am. St. Rep. 206; *Security Bank v. Kingsland* (1895), 5 N. D. 263, 65 N. W. 697; *Oak, etc. Co. v. Foster* (1895), 7 N. M. 650, 41 Pac. 522; *Usher v. Raymond Skate Co.* (1895), 163 Mass. 1.

²⁸ *Leary v. Blanchard*, 48 Me. 269; *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447.

²⁹ *State v. Goll*, 32 N. J. Law, 285.

³⁰ *Evans v. Lee*, 11 Nev. 194; *Wolf v. Davenport, etc. Co.*, 93 Iowa, 218.

³¹ *Blood v. Marcuse*, 38 Cal. 590, 99 Am. Dec. 435; *Reed v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131.

³² *City Electric, etc. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282; *Pauley v. Pauley*, 107 Cal. 8, 48 Am. St. Rep. 98; *Famous Shoe, etc. Co. v. Eagle Iron Works*, 51 Mo. App. 66.

³³ *Gregory v. Lamb* (1884), 16 Neb. 205.

³⁴ *Gardner v. Omnibus R. Co.* (1883), 63 Cal. 326.

constitution of a building association required the payment of dues at regular stated meetings, it was held, that the association was not bound by payments made at other times to the secretary, and embezzled by him.³⁵ Upon the same principle, an assignment of an account for goods manufactured and sold by a corporation, made in its name by its secretary, who has general charge of its letters and orders for goods, is invalid, in the absence of other proof of his authority to make it.³⁶ But, where the by-laws of a savings society required its secretary to keep on hand all the moneys, securities, or property received by him on account of the society, until they were disposed of by direction of the board of directors, and that he should not use, lend, exchange, or otherwise dispose of them, these provisions were considered to have entered into the contract of the sureties, and they were held liable for all moneys received by him on account of the society, and not merely for such as he was required, as secretary, to collect.³⁷ The secretary may, however, bind the company by declarations as to facts properly within his knowledge as custodian of the company's book. Thus, where the secretary of a corporation, having told a purchaser of some land on which the corporation held a mortgage, what amount was required to release his land, having directed him to pay that amount to the corporation's solicitor, the payment of that amount to the solicitor was held to extinguish the mortgage as to the land.³⁸ When the statute requires the officer, having charge of corporate books, to furnish the names of the shareholders, on demand of a civil officer holding an execution against the corporation, the demand must be made before the court will order the names to be furnished.³⁹ With

³⁵ *Morrow v. James*, 4 Mackey (D. C.), 59. In one case an information charged defendant, the secretary of a corporation, with embezzling a certificate of stock issued to him, which he had deposited with the corporation as security for such stock, and of which, as secretary, he had possession. It appeared that defendant had deposited the certificate with a bank as security for his individual note, but there was no evidence that he claimed to be the absolute owner of the certificate, or tried to pledge the corporation's interest therein. Upon this state

of facts the court refused to entertain the presumption that he attempted to pledge more than his own interest, and it was held that a conviction could not be sustained. *State v. Williamson*, 74 Wis. 263 (1889).

³⁶ *Read v. Buffum* (1889), 79 Cal. 77.

³⁷ *Humboldt Sav. & Loan Soc. v. Wennerhold* (Cal. 1890), 22 Pac. Rep. 920.

³⁸ *Kilpatrick v. Home Building & Loan Assn.* (1888), 119 Pa. St. 30.

³⁹ *Cleveland Rolling Mill Co. v. Texas & St. Louis Ry. Co.* (1884),

respect to the term of office of the secretary and the liability of his bondsmen, it has been held as to the secretary of a savings society, that, although he was chosen by the directors, the tenure of his office did not depend on their official term, which was one year; but, that as they were authorized by the by-laws to fix his term of office, and to summarily dismiss him, they could, by electing him once, without further action, continue him in office indefinitely, and during that time his sureties were liable.⁴⁰

E.

TREASURER.

§ 804. Duties and authority. Is a mere depositary.—*Powers*.—"The treasurer is the mere depositary of the money of the corporation in his hands, and is not a trustee thereof, so as to confer jurisdiction on a court of equity."⁴¹ In the absence of contrary provision, he is the only proper officer to receive, keep and disburse the corporate funds.⁴² The authority incident to his office is to receive and receipt for whatever moneys are due the corporation.⁴³ He can not bind the corporation by any act not within the scope of his ordinary business duties.⁴⁴ He has no implied authority to draw, endorse or accept bills, or notes

23 Fed. Rep. 720. Under the Vermont General Statute, chapter 86, sections 7, 8, 13, a stockholder of a corporation may maintain an action against its clerk or recording officer for wilfully neglecting or refusing to exhibit its records. In such case the county court has jurisdiction; the measure of damage is \$10 for each day during which the refusal continued. Stock books and transfer books are within the meaning of the act. The declaration must allege the request to have been made at defendant's office. *Lewis v. Brainerd* (1881), 53 Vt. 510; Vt. Gen. St., ch. 86, §§ 7, 8, 13. In such an action, the declaration of defendant, shortly before the demand, that he "would not show the books, even if the directors should order him to do so," is admissible; also his statement to plaintiff's attorney, after the demand,

that, "when he got ready to show the books he would let him know." And the ledger, containing debits of assessments and credits of payments thereon, is admissible in connection with testimony tending to show that it was in defendant's custody at the time of the demand, and that he made and kept the entries. *Lewis v. Brainerd* (1881), 53 Vt. 519.

⁴⁰ *Humboldt Sav. & Loan Soc. v. Wennerhold* (Cal. 1890), 22 Pac. Rep. 920. See, also, § 717, *supra*.

⁴¹ *Taylor v. Taylor*, 74 Me. 582.

⁴² *Pearson v. Tower*, 58 N. H. 215; *Danbury, etc. R. Co. v. Wilson*, 22 Conn. 435.

⁴³ *People v. Carter*, 122 Mich. 668; *Brown v. Winnicommet Co.*, 93 Mass. 326.

⁴⁴ *First Nat. Bank, etc. v. Asheville, etc. Co.*, 116 N. C. 827.

or orders,⁴⁵ or to pay debts, or compromise claims,⁴⁶ or to release debtors, or surrender securities,⁴⁷ or to sell or pledge the corporation notes or other assets.⁴⁸

§ 805. **The treasurer as fiscal agent.**—The rule is well settled that if a corporation permit the treasurer to act as its general fiscal agent, and hold him out to the public as having the general authority implied from his official name and character, and by its silence and acquiescence suffer him to draw and accept drafts, and to indorse notes payable to the corporation, it is bound by his acts within the scope of such implied authority.⁴⁹ Accordingly, drafts accepted by the treasurer are presumed to be properly accepted by the corporation; and in an action by the holder on such acceptance, the burden of proof is on the defendant, to show that the plaintiff is not the *bona fide* holder.⁵⁰ The acceptance even of accommodation paper by the treasurer, will bind the corporation, as against persons having no notice of its character.⁵¹ Under a treasurer's power, within the scope of his authority to make contracts for the payment of money, he may compromise a disputed claim.⁵² But a person acting as secretary and treasurer, has no implied authority to release, without consideration, one of

⁴⁵ *Jewett v. West Somerville, etc. Bank*, 173 Mass. 54, 73 Am. St. Rep. 259.

⁴⁶ *Carver Co. v. Manufacturers' Ins. Co.*, 72 Mass. 214; *Brown v. Weymouth*, 36 Me. 414.

⁴⁷ *Moshanon, etc. Co. v. Sloan*, 109 Pa. St. 532, 7 Atl. 102.

⁴⁸ *Bradlee v. Warren, etc. Bank*, 127 Mass. 107, 34 Am. Rep. 351.

⁴⁹ *Lester v. Webb*, 1 Allen, 34. In *Page v. Fall River W. & P. R. Co.* (1887), 31 Fed. Rep. 257, the treasurer of a railroad corporation for several years had been in the habit of borrowing money, although without authority, on the notes of the corporation signed by himself as treasurer. Most of these notes were indorsed by one of the directors; some, by himself individually. In an action against the corporation, on an agreement signed in its behalf by the treasurer, whereby a loan obtained from a banking house took the form of a purchase of exchange

on London, it appeared that railroad corporations were not in the habit of borrowing money in this mode, while on the other hand it was shown that banking houses like the plaintiff were in the habit of lending it in this manner; and it was held that the directors, by their course of conduct, had held out their treasurer to the public as the fiscal agent of the corporation, and as having authority to make and endorse notes for it; and that there was nothing in the transaction so unusual as to have put plaintiff on inquiry.

⁵⁰ *Credit Co., Limited, v. Howe Machine Co.* (1887), 54 Conn. 357, 1 Am. St. Rep. 123.

⁵¹ *Credit Co., Limited, v. Howe Machine Co.* (1887), 54 Conn. 357, 1 Am. St. Rep. 123.

⁵² *Gafford v. American Mortgage & Invest. Co.* (1889), 77 Iowa, 736, 42 N. W. Rep. 550.

several makers of a note owned by the corporation, from his liability thereon.⁵³ And so it is no defense, in an action by a corporation on a note given in renewal of another note, to show that it was given by defendant under agreement with the secretary and treasurer of the corporation, that defendant would not be called upon to pay it, without proof of power in the secretary and treasurer to make such agreement.⁵⁴ A paper under the corporate seal and signature of the treasurer, agreeing to pay one-third of the proceeds of certain claims, in case of their collection, is not admissible to bind the corporation in the absence of proof of special authority in the treasurer.⁵⁵ A writing, purporting to be signed by the treasurer of a corporation, does not bind it, in absence of proof that the person named was authorized to bind the corporation.⁵⁶ A corporation will be bound by the act of one who has been accustomed to act as its agent, with its knowledge, though he acts without consideration.⁵⁷

§ 806. Treasurer's authority to borrow money and give security.—The treasurer of a savings bank is not, by virtue of his office, invested with the power of borrowing money for the institution, and giving its notes therefor.⁵⁸ Neither has the treasurer of a company engaged in the business of operating

⁵³ *Moshannan Land & L. Co. v. Sloan* (Pa. 1887), 7 Atl. Rep. 102.

⁵⁴ *Moshannan Land & Lumber Co. v. Sloan* (Pa. 1887), 7 Atl. Rep. 102. One who was book-keeper, cashier and corresponding clerk of a lumber company called upon a customer to collect a bill for lumber, and was refused; the customer claiming damages for failure to ship lumber in fulfillment of a previous order. He then offered to ship a car-load, which, if satisfactory, was to be the basis of an order, and, if unsatisfactory, he agreed to make no charge therefor, and cancel the former bill. Under these circumstances, and the charter and by-laws of the company not defining the duties of a cashier, and no evidence of usage being given, the agreement was unauthorized, and did not bind the company. *Delta Lumber Co. v. Williams* (1889), 68 Mich. 261.

⁵⁵ *Backer v. United States, etc. Co.* (1903), 84 N. Y. S. 149.

⁵⁶ *Coney Island, etc. Co. v. Boynton* (1903), 84 N. Y. S. 347.

⁵⁷ *Culver v. Pocono, etc. Co.*, 206 Pa. 481.

⁵⁸ *Fifth Ward Sav. Bank v. First Nat. Bank* (1887), 48 N. J. 513. Here, a treasurer of a savings bank, without authority, signed two notes of his bank as treasurer, and discounted them at another bank, and also, without authority, pledged certain coupon bonds payable to bearer, belonging to his bank as collateral security for the money advanced, which was not received by the bank, but applied by the treasurer to his personal uses. It was decided in an action of trover for the bonds by the savings bank, that the bank discounting the notes, in dealing with the treasurer of the savings bank, dealt with one whose authority was de-

waterworks, by virtue of his office, any implied authority to borrow money.⁵⁹ Upon the same principle, a corporation will not be bound upon such notes, especially when tainted with fraud.⁶⁰ Nor has the superintendent and treasurer of a corporation any authority to mortgage its property, or to confess judg-

fining by the charter of the bank of which he was an officer, and by common usage, and assumed the risk, should the pledge prove unauthorized. *Fifth Ward Sav. Bank v. First Nat. Bank* (1887), 48 N. J. 513. In a suit against a treasurer of a company for misappropriating funds, where it appears that he had made an official report of moneys in his hands, which was largely in excess of the amounts sued for, evidence that, about the time of the report, he was endeavoring to borrow money, to pay benefits in the association, is inadmissible to contradict the report, as the act of borrowing the money was not in the course of his official duty. *Screwmen's Ben. Assn. v. Smith* (1888), 70 Tex. 168.

⁵⁹ The corporation provided for all its obligations by the issue of bonds. Parties, among whom was its treasurer, became possessed of these bonds by agreeing to pay the debts of the company. To discharge the personal liability thus incurred the treasurer discounted notes of the company made by him without its authority or knowledge, or that of its officers. It was held that this did not warrant a finding that the proceeds of the notes went to the benefit of the company, so as to create a liability on its part for the acts of its treasurer in subsequently issuing its notes for his own benefit. *First Nat. Bank v. Council Bluffs City Water Works Co.* (1890), 9 N. Y. Supp. 859.

⁶⁰ A negotiable note indorsed in the name of a manufacturing corporation by the treasurer, for the accommodation of the maker, cannot be enforced against the cor-

poration, and there was no by-law concern any business of the corporation where the note did not or resolution authorizing the treasurer to indorse negotiable paper, or any proof of a recognized course of business by which the treasurer was held out as possessing such power, or any evidence that the corporation ratified the act, or derived any benefit from it, though the note is in the hand of a *bona fide* holder. *Wahlig v. Standard Pump Mfg. Co.* (1890), 9 N. Y. Supp. 739. And in an action against a corporation on a promissory note, it appeared that the note had been given by its treasurer for money borrowed, ostensibly for the corporation, and was signed, in the corporate name, by him, as such treasurer. The by-laws of the defendant provided that all notes should be signed by the treasurer and countersigned by the president; but of this plaintiff was ignorant. The treasurer had never been authorized to borrow money for the defendant, nor to sign any notes in its behalf, nor had the defendant ever represented that he had such authority. Plaintiff could not recover on the note although it appears that money borrowed from plaintiff by the treasurer of a corporation on a note given by him without authority was used to pay the debts of the corporation, but that the treasurer, being a defaulter, had borrowed the money to cover up his shortage; nor could he recover the amount thus borrowed under a count for money had and received. *Craft v. South Boston R. Co.* (Mass. 1890), 22 N. E. Rep. 920.

ment against it, from the fact that he is in the habit of borrowing money for the use of the corporation.⁶¹

§ 807. **Liability of the treasurer, and of the corporation, for his fraudulent acts.**—The treasurer may make the corporation liable for a deposit which he receives and appropriates.⁶² The treasurer of a corporation is responsible to the company for the amount he receives, where he fraudulently issued stock in excess of the amount authorized to be issued, and converted the proceeds from the sale thereof to his own use, the stock, in the course of time, having become so intermingled with the lawful stock of the corporation as to be indistinguishable from it, and the corporation being obliged to accept it as legal stock.⁶³ When the treasurer of a savings bank, who had been authorized by a vote of the directors to discharge and release mortgages, fraudulently interpolated in the record of the vote, the word "assign" between the words "discharge" and "release," it was held, that as between the bank and one who, misled by the record, took an assignment of a mortgage, for value, in good faith, the bank must bear the loss.⁶⁴ The bond of the treasurer of a private corporation is not forfeited by his exposing property of the corporation to be attached, or by his refusal to assist a collector, by furnishing bills and papers, or by seeking with others a dissolution of the corporation.⁶⁵ The treasurer of a corporation, purchasing a claim against it at a discount paid out of the corporate funds, who paid to himself the claim in full, is liable to the corporation for the secret profits which he realized in the transaction.⁶⁶

F.

CASHIER OF BANK.

§ 808. **Powers of cashiers of banks.**—The implied powers of a cashier of a bank, exceed those of any other officer of the

⁶¹ Stokes v. New Jersey Pottery Co., 46 N. J. 237.

⁶² As where an employee of a corporation was accustomed to leave part of his wages on deposit with the treasurer, the amount being endorsed on the pay-roll, supposing it was deposited with the corporation. This practice was not known to the other officers, and the treasurer appropriated the funds, and it

was held, that the company was liable to the employee. Carroll v. People's Ry. Co. (1884), 14 Mo. App. 490.

⁶³ Rutland R. Co. v. Haven, 62 Vt. 39 (1890), 19 Atl. Rep. 769.

⁶⁴ Holden v. Phelps (1885), 141 Mass. 456.

⁶⁵ Literati v. Heald (1885) 141 Mass. 326.

⁶⁶ The Telegraph v. Lee (Iowa, 1904), 98 N. W. 364.

corporation. He may do any act, or make any contract in the usual and customary course of its ordinary banking business. He may certify checks, and issue other certificates of indebtedness.⁶⁷ He may pledge stock to the bank, in his own name or that of another.⁶⁸ Though unauthorized to borrow money for the bank, if he does so, and the bank uses it, it is liable for repayment.⁶⁹ If he has the power to borrow money for the bank, he may pledge its securities as collateral.⁷⁰ He may indorse bank papers, except to himself.⁷¹ He can not indorse the name of the bank upon his own accommodation paper.⁷²

⁶⁷ *Citizens' Bank v. Blakesley* (1885), 42 Ohio St. 645.

⁶⁸ *Brady v. Mt. Morris Bank*, 65 N. Y. App. Div. 212 (1901).

⁶⁹ *Aldrich v. Chemical Bank*, 176 U. S. 618 (1900); *Armstrong v. Chemical Bank* (1897), 83 Fed. 556.

⁷⁰ *Sloan v. Kansas City, etc. Bank* (1900), 158 Mo. 431.

⁷¹ *Preston v. Cutter* (1888), 64 N. H. 461.

⁷² *West St. L., etc. Bank v. Shawnee City Bank* (1877), 95 U. S. 557.

CHAPTER XXXII.

PROMOTERS.

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| <p>§ 809. Definition and status of promoter. His liabilities.</p> <p>810. Promoters' rights on contracts of the corporation.</p> <p>811. Liability of corporation to promoter for his service.</p> <p>812. Liability of the corporation on contracts of promoters.</p> <p>813. His fiduciary relation.</p> <p>814. Dealing with the corporation. Secret profits.</p> | <p>§ 815. Sales of land to the corporation by promoters.</p> <p>816. Liability for fraudulent prospectus.</p> <p>817. Partnership liability of promoters, for acts prior to incorporation.</p> <p>818. Enforcement by the corporation of promoters' contracts. "Flotation" of enterprises, by promoters. What is a "going concern."</p> |
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References:

Directors and other officers and agents. Sections 705-745.

Partnership liability. Sections 126-140.

Subscription induced by misrepresentations of a promoter.
Section 262.

§ 809. Definition, and status of promoter. His liabilities.—A promoter is one who aids in incorporating and organizing a corporation, by framing the prospectus, procuring subscriptions, and making conditional contracts for purchase of its prospective property. The court, in *McMullen v. Ritchie*, described the "promoter" as "a boomer unrivaled, a man of great ability, enormous energy, and towering ambition for great enterprises, . . . a man of large general information, robust constitution, extraordinarily sanguine, desperately pugnacious, generous as a prince, and possessing no degree of caution, whatever; his ambition,—to make millions."¹ The word "promoter" has no technical legal meaning. It applies to anyone who actively assists in inducing the organization of a corporation, and acts, or assumes to act, in its behalf by procuring subscription to its capital stock, etc., and whether or not he becomes a member or stockholder of the corporation. Promoters are a class of *quasi* agents, voluntary officials in advance, who are neither officers nor agents

¹ Luxton, J., in *McMullin v. Ritchie* (1894), 64 Fed. 253.

of the new company, but who do it the service of bringing it into being, and who are held to sustain a fiduciary relation to the company, similar to that of an agent to a principal.² Mr. Cook's definition:—"A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself. . . .

A person who procures subscriptions, aids in organizing the company, frames the papers, and manages the procuring of options, and the vesting of title. He may also be a subscriber. It has recently been well said that, the business promoter seems temporarily to have fallen into disrepute. He is regarded with the same sufferance and suspicion as was the financier in the fifteenth century. . . . The task of a promoter is not only essential for industrial progress, but it demands for its successful exercise a high grade of intelligence and judgment; it is he who seeks out new opportunities for investment, who formulates plans for working those opportunities, and who so organizes the conditions and forces at his disposal, as to give market value to an enterprise which first existed only as an idea in his mind."³ The promoter is liable as a partner for goods furnished to an inchoate corporation, one that never reaches organization.⁴ He is liable for preliminary debts and obligations, incurred prior to incorporation.⁵ One promoter is liable at law in damages to another, for breach of contract in promotion of the corporation.⁶ Where one promoter refuses to divide the profits with another promoter, in accordance with agreement, the former may have an accounting and division of profits, in compliance with the contract,⁷ and decree for its specific performance.⁸ When promoters, who are also stockholders, agree with the others to divide

² *Chandler v. Bacon* (1887), 30 Fed. 538.

³ *Cook Corp.*, pp. 1470, 1471, 1697; *Woodbury, etc. Co. v. Loudenslager* (1896), 55 N. J. Eq. 78; *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900).

⁴ *Hub Publishing Co. v. Richardson* (1891), 13 N. Y. Supp. 665.

⁵ *Sandusky Coal Co. v. Walker*, 27 Ont. (Can.) 677 (1896); *Friedman v. Janssen* (Ky. 1902), 66 S.

W. Rep. 752; *Whetstone v. Crane, etc. Co.* (1895), 1 Kan. App. 320, 41 Pac. 211; *Mosier v. Parry*, 60 Ohio St. 388 (1899).

⁶ *Mosier v. Parry* (1889), 60 Ohio St. 388; *Brehm v. Sperry* (1901), 92 Md. 378; *De Lery v. Rogers*, 71 N. Y. App. Div. 99 (1902).

⁷ *Suns v. Tyrer* (Va. 1897), 26 S. E. 508.

⁸ *Macklem v. Fales*, 89 N. W. 581 (Mich. 1902).

the profits of a construction contract, and some of them make secret profits, the others may compel a full accounting and division.⁹ A subscriber for stock, is not liable to creditors, upon abandonment of the enterprise before incorporation. "Those who acted as agents for the inchoate corporation, acted without a principal behind them, because there was no body-corporate capable of appointing agents, and so became principals in the transactions."¹⁰ The promoters of an attempted corporation which was never organized, are liable to the subscriber for his deposits. The subscriber can not recover expenses which he authorized. It is the rule, that the corporation is not bound by contracts made in its behalf by its promoters, before it is organized;¹¹ but when fully organized, the corporation may adopt any lawful contract made by its promoters.¹² The corporation is not liable to its promoters for their service, or expense incurred in bringing about the incorporation;¹³ but a corporation may legally contract to pay a commission, on all subscriptions which a promoter may obtain to the stock.¹⁴ "A corporation is liable at law, upon an implied *assumpsit*, for services rendered before it came *in esse*, but which were necessary to perfect its organization, and which, after such organization was perfected, it accepted, and the benefits of which it enjoyed."¹⁵ A corporation is not bound upon its promoter's contracts, unless it has ratified them.¹⁶

Preliminary expenses.—Persons engaged in floating and organizing a company, are liable for such of the preliminary expenses incident thereto, as they may have authorized to be incurred.¹⁷ It is a question of fact for the jury, how far each of

⁹ Krohn v. Williamson (1894), 62 Fed. 869.

¹⁰ Ward v. Brigham (1879), 127 Mass. 24.

¹¹ Security Co. v. Bennington, etc. Assn. (1887), 70 Vt. 201 40 Atl. 43; Winters v. Hub Min. Co., 57 Fed. 287 (1893); First Nat. Bank v. Armstrong (1890), 42 Fed. 193; Park v. Modern, etc. Co. (1899), 181 Ill. 214.

¹² Stanton v. New York, etc. R. R. Co. (1891), 59 Conn. 272, 21 Am. St. Rep. 110; McArthur v. Times, etc. Co. (1892), 48 Minn. 319, 31 Am. St. Rep. 653; Case Manuf. Co. v. Soxman (1891), 138 U. S. 431.

¹³ Wilson v. Trenton, etc. R. R. (1898), 56 N. J. Eq. 783; Hecla, etc. Co. v. O'Neill (1892), 19 N. Y. Supp. 592.

¹⁴ Hix v. Edison, etc. Co. (1896), 10 N. Y. App. Div. 75.

¹⁵ Law v. Conn., etc. R. R. Co. (1894), 45 N. H. 370; Farmers' Bank v. Smith (Ky. 1899), 49 S. W. 810.

¹⁶ Seacoast R. Co. v. Wood, 56 Atl. 337 (N. J. 1903).

¹⁷ Hersey v. Tully, 8 Col. App. 110, 44 Pac. 854; Queen, etc. Co. v. Crawford, 127 Mo. 356; *In re* Heckman's Estate, 172 Pa. St. 185.

those who have participated in floating a company, thereby authorized his credit to be pledged for expenses, necessarily incident thereto, and how far credit was given on the faith of his responsibility.¹⁸ The promoters of a projected corporation, who enter into contract to incorporate, are personally liable upon the contract, in the absence of contrary understanding, that the other party shall look to the corporation when formed.¹⁹

§ 810. Promoter's rights on contracts.—A promoter may personally enforce contracts made on behalf of the prospective corporation.²⁰ He may enforce contribution by his fellow promoters for money expended in promoting the corporation, in the absence of any contrary agreement, but not for his own services, unless upon their agreement to pay him therefor.²¹

§ 811. Liability of corporation to promoter for his service.—The corporation is not liable to a promoter for his service and expense in procuring subscriptions to its stock, without express promise to pay, made after its organization, and such express promise is a sufficient consideration,²² without any new consideration.²³ A promoter may rely upon an implied contract of the corporation to compensate him for his services rendered, where it repudiates its express contract with him for such service.²⁴ The corporation is not liable to its promoters, for their service or expense incurred in bringing about the corporation.²⁵

§ 812. Liability of the corporation on contracts of promoters.—The prospective corporation, until organized, can have no being, franchises, or faculties. It can not be a principal, and can therefore have no agent to act or contract for it. When organized, the corporation is not liable for any contract made in its name, by any promoter, before its organization, unless it adopts

¹⁸ *Smith v. Parker*, 148 Ind. 127; *Case Manuf. Co. v. Soxman*, 138 U. S. 431; *Chicago, etc. Co. v. Talbotton, etc. Co.*, 106 Ga. 84, 31 S. E. 809.

¹⁹ *Bell v. Francis*, 9 Car. P. 66; *Munson v. Syracuse, etc. Co.*, 103 N. Y. 58; *American, etc. Co. v. Van Nortwick*, 52 Fed. 752; *Martin v. Fewell*, 79 Mo. 401.

²⁰ *Abbott v. Hapgood*, 150 Mass. 248, 15 Am. St. Rep. 193.

²¹ *Baily v. Burgess*, 48 N. J. Eq.

411; *Rockford, etc. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587.

²² *Winter v. Hub Min. Co.*, 57 Fed. 287; *Ritchie v. McMullen (C. C. A.)*, 79 Fed. 522.

²³ *Western Screw Mfg. Co. v. Cousley*, 72 Ill. 531.

²⁴ *Sullivan v. Detroit, etc. Co. (Mich. 1904)*, 64 L. R. A. 673.

²⁵ *McArthur v. Times Printing Co. (1892)*, 48 Minn. 319, 31 Am. St. Rep. 653; *Seymour v. Spring Forest etc. Assn. (1895)*, 144 N. Y. 333.

it afterward;²⁶ or unless the act of incorporation authorized the incorporators to bind the future organization for services in its behalf.²⁷ The directors or other agents of the corporation, have no power to adopt any contract originally made by promoters, unless it appears to be a reasonable means of carrying out the company's authorized purposes. In that event, they have implied authority to adopt it. In this respect, there is no difference between the adoption of an agreement, originally made by the promoters, and the making of an entirely new contract. "A corporation can not be charged with the acts or contracts of its promoters, by virtue of the technical doctrine of ratification. This doctrine applies only to acts performed on behalf of an existing principal. Ratification operates retrospectively, and amounts, in legal effect, to an original grant of authority. By virtue of this doctrine, a principal, by simply giving his assent, is made responsible for an act or contract, to which he was not, in fact, a party, and which he never authorized. On the other hand, the adoption by a corporation, of an agreement made with its promoters, involves the creation of a new agreement, and is governed by all the rules, applicable to the formation of a contract, under the common law."²⁸ Adoption by the corporation, of such a contract, may be implied by conduct of the stockholders, or directors, when they are authorized to bind the corporation, and by conduct which shows intention to be bound by such contract;²⁹ as, by acceptance of its benefits. Such adoption, will, in a court of equity, bind the corporation to fulfill the contract, made with express or implied understanding of the parties that it would be adopted, after organization of the company.³⁰ While a corporation is not bound by engagements made on its behalf by promoters before its organization, it may after its organization, make such engagements its own contracts by adoption, precisely as it might make similar

²⁶ *Merrick v. Consumers', etc. Co.* (1902), 11 Ill. App. 153; *Martin v. Reming-Martin Co.* (N. Y. 1904), 88 N. Y. Supp. 573; *Tift v. Quaker City Nat. Bank* (1891), 141 a. St. 550; *Sellers v. Greer*, 172 Ill. 549, 40 L. R. A. 589; *Park v. Modern Woodman, etc.*, 181 Ill. 214; *Abbott v. Hapgood*, 150 Mass. 248, 15 Am. St. Rep. 193, 5 L. R. A. 586.

²⁷ *Gent v. Manufacturers', etc. Ins. Co.*, 107 Ill. 652; *Bells Gap R. Co. v. Christy*, 79 Pa. St. 54, 21 Am. Rep. 39.

²⁸ *Morawetz Pr. Corp.* 549.

²⁹ *McArthur v. Times Prtg. Co.*, 48 Minn. 319, 31 Am. St. Rep. 6.

³⁰ *Seymour v. Spring, etc. Assn.*, 144 N. Y. 333; *Wheatherford, etc. Co. v. Granger*, 86 Tex. 350, 40 Am. St. Rep. 837.

original contracts. Such adoption is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date; it is not ratification, because the corporation was not in existence when the promoter made the contract, and therefore the making of the contract by such adoption is not within the statute of frauds.³¹

§ 813. **Fiduciary relation.**—The promoter's relation to the corporators, and subscribers to stock, are those of trust and confidence, insomuch that he may not violate the trust, to make secret profits out of dealings on their behalf, or that of the corporation, without liability to them in equity, to account, or to answer in damages.³² A promoter of a corporation must not make sale of property to it at secret profit to himself, where he acts, or assumes to act, on behalf of the corporators, or prospective corporation, or where any other fiduciary relation exists between them.³³ But the rule does not apply when, after incorporation one who has acted as promoter, deals with it through its authorized officers or agents, and sells to it property owned by him, but not purchased when acting as promoter. After incorporation there is no longer any fiduciary relation between them, and the promoter is then as free as any other person to deal with the company.³⁴ "There are two principles applicable to all partnerships or associations, for a common purpose of trade or business, which appear to be well settled on reason and authority. The first is, that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there is no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit they may realize by the transaction. They were in no sense agents or trustees in the original

³¹ *McArthur v. Times Printing Co.*, (1892) 48 Minn. 319, 31 Am. St. Rep. 653.

³² *Vide*, 25 L. R. A. 90, *Fiduciary Relations of Promoters*; *Bosher v. Richmond, etc. Co.*, 89 Va. 455, 37 Am. St. Rep. 879; *South Joplin Land Co. v. Case*, 104 Mo. 572; *Adelbert Hamilton* in 16 Am. L. Rev. 671; *Woodbury v. Loudenschlager* 55 N. J. Eq. 78; *Simons*

v. Vulcan, etc. Co., 61 Pa. St. 202, 100 Am. Dec. 628; *Burbank v. Dennis*, 101 Cal. 90; *Milwaukee, etc. Co. v. Dexter*, 99 Wis. 214.

³³ *Exter v. Sawyer*, 146 Mo. 202; *Bosher v. Richmond, etc. Co.*, 89 Va. 455, 37 Am. St. Rep. 879; *Rice's Appeal*, 79 Pa. St. 168.

³⁴ *Simons v. Vulcan, etc. Co.*, 61 Pa. St. 202, 100 Am. Dec. 629.

purchase, and it follows that there is no confidential relation between them, which affects them with any trust. It is like any other case of vendor and vendee. They deal at arm's length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy. . . . The second principle is, that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs."³⁵

§ 814. **Dealing with the corporation. Secret profits.**—Promoters of a corporation occupy a fiduciary relation towards the new company, such that they have no right to derive any advantage over other members without a full and fair disclosure of their transactions.³⁶ They are accountable to the company for any profit so derived.³⁷ If the vendors of property, purchased

³⁵ Judge Sharswood in *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43.

³⁶ *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43; *Central Land Co. v. Obenchain*, 92 Va. 130; *St. Louis, etc. Co. v. Tierman*, 37 Kan. 606; *Chandler v. Bacon* (1887), 30 Fed. Rep. 539.

³⁷ *Wardell v. Union Pac. R. Co.*, 4 Dill. 330, 103 U. S. 651; *Hoffman v. Reichert* 147 Ill. 274 37 Am. St. Rep. 219; *Bird, etc. Co. v. Humes*, 157 Pa. St. 278, 37 Am. St. Rep. 727; *Rutland, etc. Co. v. Bates*, 68 Vt. 579, 54 Am. St. Rep. 904; *Densmore Oil Co. v. Densmore* (1870), 64 Pa. St. 43; *McElhenny's Appeal* (1869), 61 Pa. St. 188; *Simons v. Vulcan Oil, etc. Co.*, 61 Pa. St. 202; *Emery v. Parrott* (1871), 107 Mass. 95; *Getty v. Devlin* (1873), 54 N. Y. 413; *Bagnall v. Carlton*, 6 Ch. Div. 371; *Whaley, etc. Co. v. Green*, 5 Q. B. Div. 109; *Short v. Stevenson* (1869), 63 Pa. St. 95; *Phosphate*

Sewage Co. v. Harmont, 5 Ch. Div. 394; *Hickens v. Congreve*, 1 Russ. & M. 150; *Beck v. Kantorowicz*, 3 Kay & J. 230; 2 *Lindley on Partnership*, 580; *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. Div. 73; *Emma Silver Min. Co. v. Grant*, 11 Ch. Div. 918. The case of *Chandler v. Bacon* (1887), 30 Fed. Rep. 538, more at large was this: Two persons, B. and C., as promoters of a projected corporation, negotiated an agreement between the owners of certain patents, and the corporation to be formed, by which B. and C. were to receive 3,750 shares of the capital stock of the new company, less 625 shares which they were to assign to P., B. and C. offered the public an option to take the stock in the new company, disclosing the purchase of the patents, and that a portion of the stock was to be issued to the former owners in part payment, but not informing purchasers that

by a corporation, make any payment to a promoter thereof by way of commission or gift, he is liable to his company for the amount thus paid, less the amount of his disbursements in its behalf expended, though the sale was a fair one.³⁸ Recovery for a gift or commission may be had; even from the vendors of the property, if the agreement therefor is found out before it has been paid.³⁹ A promoter who has given away part of his secret profits, is, it would seem, not thereby relieved of liability to account to the corporation for the whole amount.⁴⁰ The promoter must inform his company of any profit acquired by him from a transaction, and deal with it, it is said, "at arm's length;"⁴¹ and this from the time he begins or starts the project of the new company.⁴² So, where the promoter of a corporation had detached overdue coupons from bonds of the corporation before disposing of the bonds, and delivered them to material-men in part payment of their demands,—it was held that, as it would be inequitable to permit the promoter to use these coupons as a basis of a preference over purchasers of the bonds from which they had been cut, the material-men, who had taken them after maturity, had no greater rights.⁴³ To impose upon a person the

they were to have stock on any different terms or conditions. It was further agreed that B. should be president and C. treasurer of the corporation, and they were so elected, and placed a large amount of stock at seven dollars a share, obtaining their own stock for nothing. In this case, the corporation was held to have a right to elect (1) whether the shares should be transferred back to it; or, (2) if the shares had been sold, that the entire profits made by the sale should be turned over; or (3) that it should be paid the sum lost by reason of being deprived of the right to place the shares with other persons at seven dollars per share.

³⁸ *Emma Silver M. Co. v. Grant*, 11 Ch. Div. 918; *Beach on Railways*, § 3.

³⁹ *Whaley, Bridge, etc. Co. v. Green*, 5 Q. B. Div. 109; *Bagnall v. Carlton*, 6 Ch. Div. 371; *In re Murrah Co.*, 24 W. R. 49.

⁴⁰ *Getty v. Devlin* (1873), 54 N. Y. 413.

⁴¹ *Emma Silver M. Co. v. Grant*, 11 Ch. Div. 918.

⁴² *Densmore Oil Co. v. Densmore* (1870), 64 Pa. St. 50.

⁴³ *Wood v. Guarantee Trust & Safe Deposit Co.* (1889), 128 U. S. 416. In this case, in proceedings to foreclose a mortgage securing coupon bonds of a corporation, material-men filed their petition, alleging that the promoter of the corporation had become indebted to them for the construction of the works, which he turned over to the company; that in payment thereof he transferred to them coupons of the company at par value; that the coupons fell due before the completion of the work, but that the promoter advanced the amounts to the holders, and took a transfer of the coupons; that the money thus used ought to have been applied to the intervenors' indebtedness; and

liability of promoter, however, it is necessary that it be affirmatively shown that he was acting in behalf of the projected corporation or that he so assumed to act.⁴⁴ Promoters, for their own profit, conspired to promote the organization of a corporation, for the ostensible purpose of developing a mine, but for the real purpose of cheating those whom they induced to purchase the stock. They falsely represented that the mine cost a large sum of money, whereas the promoters received the most of it, and the mine owners only a small portion. In this case the promoters were compelled to pay over the profits to the corporation. The court held that the promoters, as agents and trustees of the corporation, having sold their mining option to the corporation and received from it a large sum of money, three times what they were entitled to receive,—they in law and equity held the money in trust for the corporation from which they received it.⁴⁵

§ 815. Sales of land to the corporation.—A person owning property, may afterwards become the promoter of a corporation, and sell the property to it without reference to its original cost,—because he was not a promoter when he acquired it.⁴⁶

claimed priority, etc. But it was held that since it was shown that the promoter was essentially the company, and that he had instructed his agents to call in the coupons as if for payment, and that many of them were canceled by him, a finding that the coupons had been paid before they were turned over to intervenors would not be disturbed. *Wood v. Guarantee Trust & Safe Deposit Co.* (1889), 128 U. S. 416.

⁴⁴ *St. Louis, F. S. & W. R. Co. v. Tiernan* (1887), 37 Kan. 606. In this case it was held that merely signing the charter of the projected railway some time before it was filed with the Secretary of State does not place a person in a fiduciary position with respect to the corporation. And after describing the English methods of getting up companies, out of which the word "promoter" grew, the court continued: "That has no resemblance to our methods of organizing corporations.

It is true that the word has been found to have its uses in our jurisprudence, but in a much more restricted sense than that used in the English reports."

⁴⁵ *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149.

⁴⁶ *Densmore Oil Co. v. Densmore* (1870), 64 Pa. St. 49; *Taylor on Corporations*, § 83. But Mr. Taylor thinks that, even in such case, he may not sell at unfair or exorbitant price, if at the time of the sale he occupies towards the corporation, as promoter or otherwise, a position of trust or confidence. And he cites *McElhenny's Appeal* (1869), 61 Pa. St. 188, a case in which a person not acting as a promoter sold property to persons who were organizing a company, and afterwards united with them, and they together as promoters, consummated a sale of the property to the company at a large advance, it was held that the original owner

The rule.—One who has acted as a promoter of the corporation before its organization, may afterward deal with it regularly, and sell to it his property, which he purchased before acting as promoter. The relation then was not fiduciary, and he might have purchased, intending afterward to sell to the company as sole promoter, at whatever profit, and yet be as free as any other person to sell to the corporation.⁴⁷ So, a promoter may effect a valid sale of his own property to the corporation, provided the latter be fully cognizant of his interest therein. But, if the corporation have no knowledge thereof, it may repudiate the contract, and, upon relinquishment of the property, recover the purchase-money.⁴⁸ Where the promoter has first purchased the property with that intention, and afterwards sells it to the company at an advance upon the original purchase price, he may be compelled to make restitution to the corporation of the profit so acquired by him.⁴⁹ If the payment for property, taken of promoters, is made in the stock of the company, having no marketable value, the par value of the stock may be very disproportionate to the cost of the property for which it is given.⁵⁰ The rule as to

of the property, or his estate, he being dead, was entitled to retain the profit derived from the first sale, but must pay back his proportion of profit derived from the second.

⁴⁷ *Simons v. Vulcan, etc. Co.*, 61 Pa. St. 202, 100 Am. Dec. 628; *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43.

⁴⁸ *Phosphate Sewage Co. v. Hartmont*, 5 Ch. Div. 394; *Lindsay Petroleum Co. v. Hurd*, L. R. 6 C. P. 221. In the case of *New Sombbrero Co. v. Erlanger*, 5 Ch. Div. 73, 103, 3 App. Cas. 1218, the vendors of the property suppressed the fact of their ownership, together with the further fact that they had purchased at half the sum charged the company.

⁴⁹ *Simons v. Vulcan Oil, etc. Co.*, 61 Pa. St. 202, 100 Am. Dec. 628; *McElhenny's Appeal*, 61 Pa. St. 188; *In re Hereford, etc. Co.*, 2 Ch. Div. 182; *Hichens v. Congreve*, 4 Russ. 562; *Bank of London v. Tyrrell*, 5 Jur. N. S. 924. And in

Densmore Oil Co. v. Densmore (1870), 64 Pa. St. 50, the court said "that where persons form such an association or begin or start the project of one, from that time they stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs."

⁵⁰ *Stewart v. St. Louis, etc. R. Co.* (1890), 41 Fed. Rep. 736. In this case, T. and A., having, for a small sum, purchased a road-bed, the construction of which cost only \$2,000, caused a railroad company to be organized, and, with others, became directors thereof, and while in this relation contracted with the directors to sell the road-bed to the company for

promoter's sales of land to the corporation is that, where the promoter became the owner of the land before he began promoting the company, he may sell to the corporation at whatever advance, without disclosing the profit.⁵¹ But, if the promoter acquires only an option on the property, and thereupon promotes the formation of a corporation, and transfers the property to it at a profit to himself, he must account to the subscribers for the amount of the profit.⁵²

§ 816. **Liability for fraudulent prospectus.**—The promoter of a corporation usually formulates a prospectus, for use in "floating" the enterprise, by presenting its prospect of profits as inducement to subscribers to take stock. Any one who is induced by the promoter, by fraudulent misrepresentations in the prospectus, or otherwise, to subscribe to such stock, may recover from him the damages resulting. In England, the original subscriber, allottee of shares, is alone entitled to maintain the action; upon the theory that no subsequent purchaser is so connected with the prospectus, as, in case of loss, to entitle him to indemnity as against him who had issued it.⁵³ But in the United States, a promoter or officer of the corporation, who knowingly issues a false prospectus, misstating material facts, tending to deceive and mislead any investor in corporate stock, may be by him held responsible, when he is injured by his investment, so fraudulently induced.⁵⁴ Of the English doctrine, Judge Seymour D. Thompson, in his work on Corporations, after criticising the rule in *Peek v. Gurney*,⁵⁵ adds, "It is a subject of congratulation that a doctrine, so plainly destitute of any founda-

\$200,000 cash or bonds, and \$3,600,000 of the capital stock. The sale was formally ratified at a meeting of the directors, and entered on the records of the company; and afterwards the stockholders unanimously approved the purchase. At the time of the sale there were no stockholders, and the stock thus issued was all that had been subscribed. The company had no property except its charter and the road-bed, and the notes and stock issued to T. and A. had no marketable value. Even this transaction was not deemed fraudulent.

⁵¹ *Spaulding v. N. Milwaukee,*

etc. Co. (1900), 106 Wis. 481; *Milwaukee, etc. Co. v. Dexter* (1898), 99 Wis. 214, 40 L. R. A. 837.

⁵² *Franey v. Wauwatosa, etc. Co.* (1898), 99 Wis. 40; *South Joplin, etc. Co. v. Case* (1891), 104 Mo. 572; *West End, etc. Co. v. Nash* (W. Va. 1902), 41 S. E. 182.

⁵³ *Peek v. Gurney* (1873), L. R. 6 H. L. 377.

⁵⁴ *Vide Supra*, § 263, MISREPRESENTATIONS IN A PROSPECTUS, and *supra*, § 262, MISREPRESENTATIONS INDUCING SUBSCRIPTION; *Morgan v. Skidds*, 62 N. Y. 319; *Watson v. Cramhall*, 7 Mo. App. 233.

⁵⁵ *Peek v. Gurney* (1873), L. R. 6 H. L. 377.

tion in reason, and so opposed to common opinion of justice and business morality, has not obtained a foothold in this country. We follow the doctrine of the overruled decisions in England, and hold that it is not necessary, in order to support an action, that the false representations were made directly to the plaintiffs. It will be sufficient if they were contained in circulars, prospectuses, or other advertisements, with a view to influence the public at large, or any member of the public who might be influenced to purchase shares; and that the plaintiff saw them, and on the face of the statements contained in them, became a purchaser of shares. It is not necessary that the representations should have been communicated directly to the persons thereby induced to purchase the shares. Nor is it necessary that they should have been concocted with a view of deceiving those particular persons; it is sufficient that they were concocted with a view of deceiving any person whom the deception might catch and impose upon."⁵⁶

§ 817. **Partnership liability of promoters for acts prior to incorporation.**—The promoter is not personally liable when it is not understood that the other party shall look only to the corporation when it is organized.⁵⁷ Persons engaged in organizing a company, become personally liable upon transactions entered into by them on its behalf, unless their contracts be expressly conditioned upon the successful formation and incorporation of the company and its ratification of their acts.⁵⁸ This liability rests upon the law of agency, their position being that of agents of an undisclosed principal.⁵⁹ Accordingly, persons dealing with them, may, upon the incorporation of the company and its ratification of the contracts made in its behalf, elect to have their remedy either against the individuals with whom the contract was made, or against the company,⁶⁰—unless, of course, plaintiffs had agreed

⁵⁶ Thompson on Corporations, § 1472.

⁵⁷ Queen City, etc. Co. v. Crawford, 127 Mo. 356; *In re Heckman's Estate*, 172 Pa. St. 185.

⁵⁸ Landman v. Entwistle, 7 Ex. 632; Rennie v. Clarke, 5 Ex. 292; Higgins v. Hopkins, 3 Ex. 163.

⁵⁹ Hurt v. Salisbury, 55 Mo. 310; Hopcroft v. Parker, 16 L. Times, N. S. 561.

⁶⁰ Scott v. Ebury, 36 L. J. C. P. 161. In *Kelner v. Baxter*, L. R. 2 C. P. 174, it appeared that a com-

pany was projected for carrying on a hotel, and the promoters thereof signing "on behalf of" the company, contracted with the plaintiff for the purchase of certain goods. The goods were delivered to the representatives of the proposed company, and were consumed in its business. The company became incorporated, and ratified the agreement, but collapsed before the purchase-money was paid. It was decided that the promoters were person-

to look to the company alone, and the latter has assumed the liability.⁶¹ Under such an agreement, the plaintiff may be left without redress by the insolvency of the company.⁶² In the absence of such an agreement, even a charter provision that the company alone shall be liable, is insufficient to deprive the creditor of his remedy against the persons contracting the liability.⁶³ But a promoter may show, that by the terms under which he and the other members of a provisional committee consented to enter upon the work of organization, they were to incur no personal liability, and to have no power to bind each other.⁶⁴

§ 818. Enforcement by the corporation of promoters' contracts. "Flotation" of enterprises by promoters. A "going concern."—Upon its ratification of the promoters' contracts, depends the company's right to enforce them.⁶⁵ When, however, the corporation has ratified the contract and performed the obligations undertaken by the promoters, it may compel the other contracting party to comply with the terms of the agreement.⁶⁶ "Flotation" of property, in England means the profitable sale of the enterprise, organized by its promoters,—to a "going concern," by which is meant any substantial corporation doing business.⁶⁷

ally liable for the price of the goods, that without the consent of the plaintiff no subsequent ratification by the company could relieve them of this liability, and that parol evidence was not admissible to prove that personal liability was not intended.

⁶¹ Whitwell v. Warner, 20 Vt. 425.

⁶² Landman v. Entwistle, 7 Ex. 632.

⁶³ Witmer v. Schlatter, 2 Rawle, 359.

⁶⁴ Rennie v. Clarke, 5 Ex. 292.

⁶⁵ Scadden, etc. Co. v. Scadden, 121 Cal. 33; Abbott v. Hapgood, 150 Mass. 248, 15 Am. St. Rep. 193; Burrows v. Smith, 10 N. Y.

550; Penn Match Co. v. Hapgood (1886), 141 Mass. 145. Allen, J., said in this case: "The power of a corporation to make contracts can be exercised in accepting and adopting proposed contracts made in its name and behalf before its incorporation. Such a contract must derive its validity from the meeting of minds when both parties are in existence; until then, it can be nothing more than an offer by one party."

⁶⁶ Bedford & C. Ry. Co. v. Stanley (1862), 2 J. & H. 746. See 3 Ry. & Corp. Law J. 482.

⁶⁷ Torva v. Kelly (1900), A. C. 612.

CHAPTER XXXIII.

POWERS.

§ 819. Corporate powers generally.

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References:

- Power of perpetual succession. Sections 5, 79.
 Powers of quasi-public corporations. Sections 1037-1065, 847.
 Powers of railroads to lease the corporate property. Sections 1044-1051.
 Power to consolidate. Sections 1262-1291.
 Power to assign, for benefit of creditors. Sections 1205-1217.
 Power to increase or reduce the capital stock. Sections 188-200.
 Power to issue new stock. Section 467e.
 Power to issue preferred stock. Sections 467f-487.
 Power to declare dividends. Section 434.
 Power to confess judgment, or compromise suit. Section 872a.
 Power of eminent domain. Sections 873-876.
Ultra vires acts and contracts. Sections 887-921.

§ 819. **Corporate powers generally.**—A corporation exists only as a creature of the State, and therefore, has no powers except such as are expressly or impliedly conferred upon it, delegated to it by its special charter, or by the general incorporation laws. It can not derive any power from its by-laws. They are merely its own regulations. The analogy between the powers of congress and those of a corporation is, that they are only such as are delegated by the States;—in the one case by the corporate charter, and in the other by the federal constitution. In each case they may do only that which the States have permitted them to do, while the States, themselves the source of power, may, by their legislature, exercise whatever powers they have not surrendered, by prohibitions in the Federal Constitution, or by those of the several States. The charter powers of a corporation, are exercised, in the first instance, by the corporators. Then, upon organizing the corporation, and accepting subscriptions to stock, the stockholders succeed to the corporate powers long enough to elect directors, whereupon they in turn succeed to the corporate powers. A corporation has only such powers as are expressly conferred, or which are necessarily implied, in carrying out its authorized purposes.¹

¹ Bankers' Union, etc. v. World (Kan. 1903), 73 Pac. 79.

A.

POWERS INCIDENTAL TO CORPORATE EXISTENCE.

§ 820. **Enumeration of incidental powers.**—Five powers were enumerated in the old books, as necessarily and inseparably belonging to a corporation: (1) To have perpetual succession; and hence, all aggregate corporations have the power, necessarily implied, of admitting members in the place of such as are removed by death or otherwise. (2) To sue and be sued, implead and be impleaded, grant and receive by its corporate name, and do all other acts as natural persons may. (3) To purchase lands and hold them for the benefit of themselves and their successors. (4) To have a common seal; and, (5) To make by-laws, which are considered as private statutes for the government of the corporate body.² The General Corporation Act of New York of 1890, which is a codification of the statutes, also enumerates five general powers.³ This act further provides that in addition to the powers therein enumerated, and those expressly given in the law under which it is, or shall be, incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given.⁴ This is but a legislative expression of a general principle of law, that the character and purposes of an incorporated

² Angell and Ames on Corporations, § 110, citing Kyd on Corporations, 69.

³ Every corporation as such has power, though not specified in the law under which it is incorporated: (1) To have succession for the period specified in its certificate of incorporation or by law; and perpetually when no period is so specified. (2) To have a common seal and alter the same at pleasure. (3) To acquire by grant, gift, devise or bequest, and to dispose of such property as the purposes of the corporation shall require, not exceeding the amount limited by law. (4) To appoint such subordinate officers and agents as its business shall require, and to allow them a suitable compensation; and (5) To make by-laws, not inconsistent

with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock. But no by-law regulating the election of directors or officers shall be valid unless published for at least two weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election. N. Y. Laws of 1890, ch. 563, § 8.

⁴ N. Y. Laws of 1890, ch. 563, § 9. The former law in New York included in its statement powers given by charter. 2 N. Y. Rev. Stat. (7th ed.) 1530; *Curtis v. Leavitt*, 15 N. Y. 9; *Halstead v. New York*, 3 N. Y. 439. There was a similar statute in New Jersey. *Morris, etc. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542.

institution are to be gathered from its charter or act of incorporation alone,⁵ and that corporations have such power only as the act creating them grants, and the powers incidental to those grants;⁶ that a corporation is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers;⁷ that while natural persons may do with themselves and theirs, whatever is not forbidden, artificial persons can not rightfully do anything that is not expressly or by necessary implication permitted by the law of their being.⁸ A corporation has the incidental power to make contracts, and to do any other lawful act necessary to accomplish the objects and purposes of its creation.⁹ Whether or not any powers are expressly granted, or prohibited to a corporation, its mere creation, nevertheless, confers upon it the powers which are incident to its corporate existence.¹⁰ An incidental power is one that is directly and immediately appropriate to the execution of the specific powers expressly granted,¹¹ and is bounded by the purpose of the corporate enterprise, and by the terms and intention of the charter.¹² This binds corporations to the exercise of their

⁵ *Nicholson's Succession*, 37 La. Ann. 346. The constitutions of Alabama, Louisiana, Missouri, California and Pennsylvania prohibit corporations from engaging in any business other than that expressly authorized by their charters or the law under which they are formed. *Stimson's Am. Stat. Law* (1886), § 446.

⁶ *Chicago Gas Light Co. v. People's Gas Light Co.* (1887), 121 Ill. 530; 2 Am. St. Rep. 124; *Elevator Co. v. Memphis & Charleston R. Co.* (1887), 85 Tenn. 703, 4 Am. St. Rep. 798.

⁷ *Davis v. Old Colony R. Co.* (1881), 131 Mass. 258.

⁸ *Pittsburgh, etc. Ry. Co. v. Lyon* (1889), 123 Pa. St. 140, 10 Am. St. Rep. 517.

⁹ *Jacksonville, etc. Co. v. Hooper*, 160 U. S. 514; *Malone v. Lanchester, etc. Co.*, 182 Pa. St. 309; *Toledo, etc. Co. v. Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484.

¹⁰ *Sutton's Hospital Case*, 10 Coke, 23a.

¹¹ *People v. Chicago Gas Trust Co.* (1889), 130 Ill. 268, 7 Ry. & Corp. L. J. 23; *Hood v. New York, etc. R. Co.*, 22 Conn. 1; *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43.

¹² *Utica Ins. Co. v. Scott*, 19 Johns. 1; *Ohio v. Washington Library Co.*, 11 Ohio, 96; *People v. Utica Ins. Co.*, 15 Johns. 358; *Korn v. Mutual Assur. Soc.*, 6 Cranch, 182; *New York Ins. Co. v. Ely*, 5 Conn. 560, where loaning money was held not necessary to effectuate the business of insurance. *Gozzler v. Georgetown*, 6 Wheat. 593; *Utica Bank v. Smedes*, 6 Cowen, 684; *McMullen v. City Council*, 1 Bay, 46; *Mayor of Jonesboro v. McKee*, 2 Yerg. 167; *Webb v. Manchester*, 4 Mylne & C. 116; *Pearce v. New Orleans Bldg. Co.*, 9 La. 395 and 461; *Stewart v. Stebbins*, 1 Stew. (Ala.) 299; *State v. Mayor of Mobile*, 5 Port (Ala.) 279; *Betts v. Menard*, 1 Breese, 10; *Jackson v. Brown*, 5 Wend. 590; *Ohio Ins. Co. v. Mer-*

powers over their respective members, for the accomplishment of limited and well defined objects.¹³ But corporations, within the scope of their authority, have all the powers of ordinary persons.¹⁴ And, unless prohibited by charter, they have the implied power to make any contract requisite for the purposes of their creation.¹⁵

chants' Ins. Co., 11 Humph. 1, in which case the distinction between incidental powers exercised as a means necessary and proper for executing the purposes granted, and incidental powers which should amount to an inclusion of another object or business, which is of course prohibited, was clearly brought out. *Sumner v. Marcy*, 3 Woodb. & M. 105; *Bangor Boom Co. v. Whiting*, 29 Me. 123; *Perrine v. Chesapeake Canal*, 9 How. 172; *Blanchard Gunstock Co. v. Warner*, 1 Blatch. 258; *Trustees v. Peaslee*, 15 N. H. 317; *Chicago R. Co. v. Wilson*, 17 Ill. 123; *Curtis v. Leavitt*, 15 N. Y. 9, 60. In this last case *Comstock, J.*, held that borrowing money was incidental to the banking business, and also borrowing capital. "An individual banker may certainly do this. So can a partnership which has no corporate privileges. And why then can not a partnership which has power to incorporate itself and does so under the general law? Corporations, it is said, can act only in accordance with the law which creates them. But if the law authorizes them to do acts specifically, and is silent as to the manner and means of doing those acts, where is the restriction, except such as the nature of the business implies? Banking, I repeat, is a business and not a franchise. The public have a special concern in the circulation only, and that is guarded in the act of 1838 by a series of very peculiar and exact provisions. Beyond that, I have no doubt the legislature intended to leave the business essentially

free. It allowed all persons to associate, to become incorporated by their own act, and it conferred the most ample banking powers, without a single restriction in the use of those powers."

¹³ *Spaulding v. Lowell*, 23 Pick. 71, 75.

¹⁴ *Deringer's Adm'r v. Deringer's Adm'r* (1878), 5 Houston, 416, 1 Am. St. Rep. 150. And in this case it was held that a corporation may be trustee both of realty and personalty, and its authority as a trustee is the same as that of an individual so acting. And so a corporation, all of whose members are citizens of the United States, is competent to locate a mining claim. *Thomas v. Chisholm* (1889), 13 Colo. 105.

¹⁵ *Deringer's Adm'r v. Deringer's Adm'r* (1878), 5 Houston, 416, 1 Am. St. Rep. 150. Mr. Wood states the matter thus: It would be impossible to specify or enumerate in a charter all the acts which a corporation may perform; accordingly it is left for the courts to say what powers, as incident to those granted, the corporation may be deemed to possess; looking at the actual powers and the purposes of the grant, the courts uphold all acts which are necessary to give effect thereto. *Wood's Railway Law*, 467. To this effect are many cases, including *The Central R. & B. Co. of Georgia v. Collins*, 40 Ga. 582; *Mobile, etc. R. Co. v. Franks*, 41 Miss. 494; *Baltimore v. Baltimore, etc. R. Co.*, 21 Md. 50; *State v. Baltimore, etc. R. Co.*, 6 Gill (Md.), 363; *Davis v. Old Colony R. Co.*, 131 Mass. 256, 41 Am. Rep. 221; *Commonwealth v. Erie,*

§ 821. **The power of perpetual succession.**—The power of perpetual succession, which is incident to corporate existence, is one of the principal objects of incorporation,—the capacity of continued existence, notwithstanding the death, or other cause of loss of its members. This attribute is essential to the accomplishment of the purposes of the corporation, in the perpetuity of its powers, privileges and property rights.¹⁶ Thus, its engagement in enterprises is without danger of defeat by the death or withdrawal of the projectors, the identity of the corporation being preserved by succession of its membership. Where the charter is granted by special act, without limitation as to time, the corporation has the capacity of perpetual existence, and may have thus been created to exist forever, and, though its existence is generally now limited, by the legislature, to a certain number of years, the corporate life may be continued indefinitely, by successive re-incorporation.¹⁷ Perpetual succession, as applied to corporations, means indefinite duration of existence, or unbroken continuity, rather than length of time of existence.¹⁸

B.

EXPRESS POWERS EXTENDED BY STATUTE.

§ 822. **Statutory powers, and powers implied from express powers.**—Besides the extension by way of incidental powers, general laws are now very comprehensive, so that corporations can scarcely fail to find statutory expressions under which they

etc. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Delaware, etc. Canal Co. v. Camden, etc. R. Co., 16 N. J. Eq. 321; Morris Canal, etc. Co. v. Central R. Co., 16 N. J. Eq. 419; Morris, etc. R. Co. v. Sussex R. Co., 20 N. J. Eq. 542, where corporations were held to contract within the existing powers of their charters; Hurlbut v. Marshall, 62 Wis. 590; Attorney-General v. Great Eastern Ry. Co., L. R. 5 App. Cas. 473. See, also, Railway Co. v. McCarthy, 96 U. S. 258; Green Bay, etc. R. Co. v. Steamboat Co., 107 U. S. 98, Gray, Justice, saying: "The general doctrine is now well settled, the charter of a corporation, read in con-

nection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

¹⁶ Thomas v. Dakin, 22 Wend. (N. Y.) 9.

¹⁷ Bradley v. Reppell, 133 Mo. 545, 54 Am. St. Rep. 685.

¹⁸ Scanlan v. Crawshaw, 5 Mo. App. 357. *Vide supra*, §§ 5, 79.

may accomplish their purposes. Thus, certain laws, like the expression "or other lawful business," authorize the formation of corporations for carrying on any kind of lawful business, for pecuniary profit, not elsewhere specially provided for, although not of the same kind as any of those previously enumerated in the enabling act.¹⁹ And a corporation, formed for buying, selling, and dealing in real estate, live-stock, bonds, securities, and other properties of all kinds, on its own account and for commission, may be incorporated under an act which provides that a corporation may be created for the purposes therein enumerated, "and for any other purpose intended for mutual profit or benefit, not otherwise specially provided for, and consistent with the constitution and laws of the State."²⁰ So, where no corporation can be organized under a certain law, except for an exclusively manufacturing or mechanical business, if the purpose for which a corporation is formed, as stated in its articles of association, is to carry on a manufacturing or mechanical business, and to purchase the stock and evidences of indebtedness of an insolvent corporation, it will belong to the class of corporations authorized to be formed under another law providing for the organization of companies for the purpose of carrying on any lawful business,—although the articles recite that it is formed under the former law.²¹ But an act, defining the rights of companies, incorporated for the manufacture of gas, or the supply of light to the public by any other means, and conferring upon such companies power to enter upon the public streets for the purpose of laying pipes, but not for the purpose of erecting poles and placing wires,—does not embrace electric-light companies.²² Though it has been held that the charter of a company, incorporated to carry on an iron furnace, by implication confers the power to keep a "supply store" connected therewith.²³ And it is also held that a corporation, whose object is to mine lime-stone, and to manufacture and sell lime, with power to buy and hold real or personal property, in such amounts as it may deem necessary to accomplish the purposes of

¹⁹ *Brown v. Corbin* (1889), 40 Minn. 508; Minn. G. S. 1866, ch. 34, § 45, as amended by Laws 1873, ch. 13.

²⁰ *National Bank v. Texas Investment Co.* (1889), 74 Tex. 421; Tex. Rev. Stat., art. 566, and sub-div. 27.

²¹ *State v. Minnesota, etc. Co.* (1889), 40 Minn. 213.

²² *Appeal of Scranton Electric Light, etc. Co.* (1888), 122 Pa. St. 154.

²³ *Searight v. Payne*, 6 Lea, 283.

its creation, can not purchase goods, to be resold, except to carry on a supply store, or otherwise aid in its principal business.²⁴

§ 822a. **Power to take and hold land.**—One of the five powers and capacities, which Kyd enumerates as inseparable from every corporation, is the power to purchase lands and hold them for the benefit of themselves and their successors.²⁵ The deed to land, though executed before corporate organization, may be accepted by the corporation afterward, so as to vest title in the corporation.²⁷ In the meanwhile, the deed may be held in escrow, and delivered to the corporation, after its creation;²⁸ or, the conveyance may be to a trustee, to convey upon incorporation;²⁹ then the title inures to its use by way of estoppel against the grantor, to deny the validity of the conveyance.³⁰ A grantor who, for a consideration received, has conveyed and delivered property to the representatives of an association, and for its use, when incorporated, holds the property in trust, in equity may be compelled to make conveyance to the company upon its incorporation.³¹ When such an association has acquired a *de facto* corporate existence, it has capacity to take conveyance of land, and personalty, subject only to right of question by the State. Such capacity to take conveyance is not affected by non-performance of conditions subsequent in the organization of the corporation.³² Usually, the charter expressly grants the power to take and hold real estate in the corporate name, but express power is unnecessary,³³ in the absence of any constitutional or statutory restriction.³⁴ The power is incidental to the existence of a corporation, as to that of a natural person, to acquire and hold real property,³⁵ consistent with the purposes and objects of the corporation.³⁶

²⁴ *Chewacla Lime-Works v. Dismukes* (1889), 84 Ala. 344, 6 So. 122, 5 L. R. A. 100.

²⁵ 1 Kyd, Corp. 69.

²⁷ *Rotch's Wharf Co. v. Judd*, 108 Mass. 224.

²⁸ *Spring Garden Bank v. Huling's Lumber Co.*, 21 Colo. 263.

²⁹ *Hecla, etc. Co. v. O'Neill*, 19 N. Y. Supp. 592.

³⁰ *White Oak, etc. v. Murray* (1898), 145 Mo. 622; *San Diego v. Frame* (Cal. 1902), 70 Pac. 295.

³¹ *African M. E. Church v. Conover*, 27 N. J. Eq. 157.

³² *Rathbone v. Tioga Nav. Co.*, 2 Watts & S. (Pa.) 74.

³³ *Dewey v. Toledo, etc. Ry. Co.*, 91 Mich. 351.

³⁴ *Lathrop v. Commercial Bank, etc.*, 8 Dana (Ky.), 114, 33 Am. Dec. 481.

³⁵ *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378.

³⁶ *Old Colony, etc. v. Evans*, 6 Gray (Mass.), 25, 66 Am. Dec. 394; *Richardson v. Massachusetts, etc. Assn.*, 131 Mass. 174.

Fee Simple.—It may take the fee simple title and hold the property and transfer it, during the period of corporate existence.³⁷

C.

POWER TO ACQUIRE AND HOLD LAND AND OTHER PROPERTY.

§ 823. **Enumeration of purposes as a limitation.**—If its charter expressly enumerates the purposes for which the corporation may take and hold land, it impliedly is prohibited from acquiring property for any other purpose.³⁸ Corporations are impliedly prohibited from acquiring and holding real estate for any purpose, foreign to the corporate objects, and sometimes the prohibition is expressed in constitutions or statutes.³⁹ The purchase of real property by a corporation, will be presumed to be for an authorized purpose, until the contrary is affirmatively shown.⁴⁰ In the absence of express restriction, a corporation may take a lease of real property in like manner as it may take it by purchase, when necessary to the corporate purposes.⁴¹ To purchase a permanent building in which to transact the business, or carry out the purposes for which the corporation was created, is always within its legitimate power to provide.⁴² And, where the charter of a corporation only empowers it to sell the real estate necessary for the transaction of its business, when not required for the uses of the corporation, it can not lease such real estate, nor main-

³⁷ *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378; *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 594.

³⁸ *Case v. Kelly*, 133 U. S. 21; *Pacific R. Co. v. Seeley*, 45 Mo. 212, 100 Am. Dec. 369.

³⁹ *Trustee's, etc. v. Manning*, 72 Md. 116; *United States Trust Co., etc. v. Lee*, 73 Ill. 142; *Blunt v. Walker*, 11 Wis. 334, 78 Am. Dec. 709.

⁴⁰ *Gilmer v. Stone*, 120 U. S. 586; *Brewer, etc. Co. v. Boddie*, 181 Ill. 622; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

⁴¹ *Crawford v. Longstreet*, 43 N. J. L. 325; *Brewer, etc. Co. v. Boddie*, 181 Ill. 622.

⁴² So the charter of a corporation authorized it to purchase and hold, "in fee simple or otherwise,"

real and personal estate to a certain amount; and provided that it might appropriate its funds to charitable purposes, and that its annual income should be employed, among other purposes, "to promote inventions and improvements in the mechanic arts, by granting premiums for said inventions and improvements." Neither the charter nor subsequent statutes relating to it directed the manner in which the provisions for granting these premiums should be carried out, and it was held that it might purchase land and erect a permanent building thereon, in which to hold exhibitions and its meetings. *Richardson v. Massachusetts Charitable, etc. Assn.*, 131 Mass. 174.

tain an action for rent, under its lease, such leasing not being necessary to the exercise of the purposes for which the charter was given.⁴³ A turnpike company has, as incident to the purposes of its incorporation, a right to take and hold, under lease, premises necessary for its use.⁴⁴ A railroad corporation, authorized to buy land for the purpose of procuring stone and other material necessary for the construction of the road, has power to buy land for the purpose of getting cross-ties and fire-wood.⁴⁵ Such acts will be construed liberally, to allow companies, whose business requires large buildings, to accomplish their objects. Accordingly, where, by its act of incorporation, an elevator company was given power to acquire, free from condemnation, any real estate on the Mississippi river, not exceeding a certain frontage in any one locality, and also the power to erect one or more grain elevators upon the public wharves, with the consent and under the direction of the city authorities, it was held that, although defendant owned and occupied five hundred feet of river frontage, it had power to lease and occupy a portion of the public wharf contiguous thereto.⁴⁶ A charitable society, incorporated under a different law, and not subordinated to the law which provides that charitable societies shall be incapable of taking bequests when the will is not executed at least two months before the death of the testator, may take a legacy, though the will was not executed two months before the testator's death.⁴⁷ A corporation may hold land by tenancy in common, as may a natural person.⁴⁸ Where a conveyance is made to the trustees of a corporate body, without naming them, or any of them, the title vests in the corporation named in the deed.⁴⁹ The fact that an alien owns stock in a corporation which has acquired title to real estate, does not affect the title of the corporation to the real estate.⁵⁰

⁴³ *Metropolitan Concert Co. v. Abbey*, 52 N. Y. Super. Ct. Rep. 97.

⁴⁴ As in the case of a turnpike company for storing implements used in road repairs, and for sheltering its servants. *Crawford v. Langstreet*, 43 N. J. 325.

⁴⁵ *Mallett v. Simpson*, 94 N. C. 37.

⁴⁶ *Belcher's Sugar Refining Co. v. St. Louis Grain Elevator Co.* (Mo. 1890), 13 S. W. Rep. 822.

⁴⁷ *Porter v. Carolin* (1888), 50

Hun, 603; N. Y. Laws 1852, ch. 250; N. Y. Laws 1848, ch. 319, § 6, and Laws 1860, ch. 360. See, further, as to devises to corporations and the statutes of mortmain, *Beach on Wills*, §§ 127, 128 and 133.

⁴⁸ *Estell v. University of the South*, 12 Lea, 476.

⁴⁹ *Keith, etc. Co. v. Bingham* (1889), 97 Mo. 196.

⁵⁰ *Princeton Min. Co. v. First Nat. Bank* (1888), 7 Mont. 530.

§ 824. **Quantity or extent of land that may be held.**—In the absence of statutory restriction, a corporation may acquire and hold any extent of land reasonably necessary to carry out the authorized purposes for which the corporation was created.⁵¹ But it has no implied power to acquire or hold real estate for any purpose entirely foreign to the corporate objects and purposes.⁵² The ownership by a manufacturing corporation, of a town or city of more than 2,000 houses, with streets, alleys, sewer systems, dwellings, tenement houses, churches, schools, business buildings, etc., no one of which is occupied by any other than a tenant of the corporation, is contrary to public policy, and is in excess of the implied powers of the corporation.⁵³

§ 825. **Prohibited holdings.**—No party except the State can object that a corporation is holding real estate in excess of its rights.⁵⁴ A corporation may hold land, which *ultra vires* it has purchased and received deed of conveyance for, and may sell and convey good title to it, and may recover any unpaid price.⁵⁵ Accordingly, under an act which forbids a foreign corporation to “acquire and hold” real estate, a deed of conveyance of land to such corporation, is not void. It passes the title, and the corporation may hold the land subject to the commonwealth’s right of escheat.⁵⁶ If any provision therefor has been made by statute, in the absence of any such express provision, the State can not confiscate the property of a corporation, on the ground that it had no authority to purchase it, though it may proceed to forfeit its charter.⁵⁷ In case of purchase of land by a corporation, beyond its authorized power, it may hold and enjoy the property, and convey it, regardless of the objection of any private person. No one can complain, except the State. Until it supervenes, to impeach its power to hold the land, the corporation is vested with good title against all the world, defeasible only upon “office

⁵¹ Bank of Michigan v. Niles, Walk. (Mich.) 99; People v. Pullman’s Palace Car Co., 175 Ill. 125.

⁵² Hamsher v. Hamsher, 132 Ill. 273, 8 L. R. A. 556; Gilmer v. Stone, 120 U. S. 586.

⁵³ People ex rel. Maloney v. Pullman P. Car Co. (Ill. 1904), 64 L. R. A. 366.

⁵⁴ Alexander v. Tolleston Club, 110 Ill. 65.

⁵⁵ Natoma Water, etc. Co. v.

Clarkin, 14 Cal. 544; Mallett v. Simpson, 94 N. C. 37; Southern Pac. Ry. Co. v. Orton, 6 Sawy. (C. C., U. S.) 157; Jones v. Habershaw, 107 U. S. 174.

⁵⁶ Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co. (1887), 32 Fed. Rep. 22; 1 Purd. Dig. 361; Pa. Laws of April 26, 1855.

⁵⁷ Commonwealth v. New York, etc. Co., 132 Pa. St. 591, 7 L. R. A. 634.

found;”⁵⁸ and, only in a proceeding, instituted by the State for that purpose.⁵⁹ The same principle applies to personal property, transferred *ultra vires* to a corporation, and to the purchase of shares in another corporation,⁶⁰ and to choses in action,⁶¹ negotiable paper, and other contracts assigned to the corporation without authority in its charter.⁶² The commonwealth alone can object to the legal capacity of a corporation to hold real estate.⁶³ There must be a direct proceeding by the State for the purpose of vacating the deed.⁶⁴ It was so held also where the plaintiff railroad company bought certain lands from the receiver of an insolvent railroad company, and then filed a bill to quiet its title to the lands.⁶⁵ So, where a corporation, authorized to receive grants of land for its purposes, brings suit against a trespasser to re-

⁵⁸ Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931.

⁵⁹ Federal Land Co. v. Louisville, etc. Ry. Co., 93 Va. 274.

⁶⁰ Germania Nat. Bank, etc. v. Case, 99 U. S. 628; Holmes, etc. Co. v. Holmes & Wessell Metal Co. 127 N. Y. 252, 24 Am. St. Rep. 448.

⁶¹ National, etc. Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235.

⁶² Prescott Nat. Bank, etc. v. Butler, 157 Mass. 548; Merchants' Nat. Bank, etc. v. Hanson, 33 Minn. 40, 53 Am. Rep. 5.

⁶³ Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co. (1887), 32 Fed. Rep. 22. In this case the court shortly reviews the authorities: "The leading case in Pennsylvania on the subject of the effect of a conveyance of real estate to a corporation forbidden by law to purchase and hold the same, is that of Leazure v. Hillegas, 7 Serg. & R. 313, in which it was held that such corporation might purchase and take title to the real estate, its title, however, like that of an alien, being defeasible at the pleasure of the commonwealth. That case, and the later case of Goundie v. Water Co., 7 Pa. St. 233, settle the principle that the commonwealth alone can object to a want of capacity in a corporation to hold land. In Run-

yan v. Lessee of Coster, 14 Pet. 122, the supreme court of the United States following the ruling in Leazure v. Hillegas, sustained the right of a foreign corporation to maintain an action of ejectment for land which it was not licensed to hold under the laws of Pennsylvania, the commonwealth not having exercised its right of escheat. The supreme court of Pennsylvania had occasion to consider the act of April 26, 1855, in the case of State Co. v. Savings Bank, 8 Week. N. Cas. 430, and therein declared that it was a mortmain act, disabling foreign corporations from acquiring and holding real estate, but the commonwealth only can take advantage of the disability, and that it was not intended that a deed to a foreign corporation should be void so as not to pass the estate of the grantor. Evidently these cases are decisive in favor of the plaintiff's right, upon the agreed facts, to maintain this action." Hamsher v. Hamsher (1890), 132 Ill. 273, 23 N. E. Rep. 1123, is a late case to the same effect.

⁶⁴ Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594.

⁶⁵ Russell v. Texas, etc. Ry. Co. (1887), 68 Tex. 646.

cover possession of lands granted to it, such trespasser will not be heard to question its title on the ground that it had no authority to take them. Whether a corporation has misused or abused its franchise, is a question between it and the State, which can not be raised in an action between it and private parties.⁶⁶ But it has been held that where no general statute authorizes corporations to hold lands without regard to their uses, a railroad company, incorporated by special act authorizing it to acquire lands for railroad purposes, of a certain width for right of way, and the land necessary for depots or other railroad buildings, and for purposes connected with the building of the road,—it can not maintain an action to recover lands granted to it, where they are to be used for purposes not specified in the act of incorporation.⁶⁷ Where lands purchased by a company, were to vest in it for the use of a certain navigation, but for no other use or purpose whatever, it was held that the company could be restrained at the suit of a neighboring land-owner, from using a reservoir constructed upon the purchased lands, for the purpose of letting boats for hire.⁶⁸ In accordance with the general principle, that statutes can not operate retroactively, an act of the legislature, passed after the death of a testatrix, removing the limitation upon the power of a university to hold property, even if it waives the right of the State to forfeit the charter of the university for accepting the devise, can not affect the rights of her heirs, vested at her death, and before its passage.⁶⁹ In an action of ejectment by plaintiff, tracing his title to certain lands in Utah by mesne conveyances, through a certain corporation organized in California, it was not necessary that he should show by the laws of California that said corporation was authorized to hold real estate.⁷⁰ And where the grantee, in a deed, is therein stated to be a corporation, and the deed contains covenants of warranty, binding the grantor and his heirs, neither he, nor they, can afterwards deny the grantee's corporate existence, or its capacity to take and

⁶⁶ *Southern Pac. R. Co. v. Orton*, 6 Sawy. C. Ct. 157.

⁶⁷ *Case v. Kelly* (1890), 133 U. S. 21, 7 Ry. & Corp. L. J. 162.

⁶⁸ *Bostock v. North Staffordshire Ry. Co.*, 5 De G. & S. 584; 4 El. & B. 798; 3 Smale & G. 283; *Browne & Theobald's Ry. Law*, 96.

⁶⁹ *In re McGraw's Estate*, 111

N. Y. 66 (1889). In this case the devise to the corporation was illegal, as the title to the property vested in the heir, and no question as to the forfeiture of the charter for an illegal holding of property arose.

⁷⁰ *Tarpey v. Deseret Salt Co.*, 17 Pac. Rep. 631 (Utah, 1888).

hold the land conveyed, as against those claiming under the deed.⁷¹ But, where defendant admits that he holds land in trust for plaintiff corporation, the question as to whether defendants shall be left in possession of property fraudulently acquired, and for which they gave no consideration, can not be raised by the plaintiff who has no right to take the land.⁷² Though the federal courts may hesitate to declare a title to lands, to be held without authority of law, on the principle that the matter concerns the State alone, they will not aid a corporation to violate a State law, and obtain a title which it has no authority to hold.⁷³ A corporation, prohibited from holding property acquired by foreclosure beyond a certain time, may give a good title, though it has held the land longer than the law allowed.⁷⁴

§ 826. **A purchase for illegal purposes is void.**—A purchase of property by a corporation, in pursuance of its attempt to control, generally, a particular business, and establish a monopoly, is contrary to public policy, and void.⁷⁵

§ 827. **Grants for charitable or public uses.**—At common law, a grant may be made for charitable, or public use, before existence of the grantee, and meanwhile remain in abeyance, as in case of a corporation, until it is organized, and then the title vests.⁷⁶ "When a corporation is to be brought into existence by some future acts of the incorporators, the franchises remain in abeyance until such acts are done, and when the corporation is brought into life, the franchises instantly attach to it. There is no difference between the case of a grant of land, or franchise to an existing corporation, and a grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is *in esse*, and the franchise and property become vested and executed, it is as much an executed contract, as if its prior ex-

⁷¹ Ragan v. McElroy (1889), 98 Mo. 349, 11 S. W. Rep. 735.

⁷² Case v. Kelly (1890), 133 U. S. 21, 7 Ry. & Corp. L. J. 162.

⁷³ Case v. Kelly (1890), 133 U. S. 21.

⁷⁴ As where, under the statute, insurance companies acquiring real estate by foreclosure must sell the same within five years, unless the superintendent of the insurance department shall certify that the interests of the com-

pany will suffer by a forced sale; it has been held, that as the statute did not assume to divest title because of a failure to comply with the law, a company after five years could convey an estate thus acquired, although the certificate had not been obtained. Home Ins. Co. v. Head, 30 Hun, 405.

⁷⁵ Distilling, etc. Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200.

⁷⁶ Trustees of Vincennes, etc. v. Indiana, 14 How. (U. S.) 268, 274.

istence had been established for a century.”⁷⁷ General statutes for the organization of corporations usually grant power to purchase, hold and possess so much real and personal estate as shall be necessary for the transaction of its business.⁷⁸ A legislative grant of franchises to individuals, in contemplation of their incorporation, vests in the corporate body, upon its organization, and without necessity for assignment from the individuals.⁷⁹ In the meanwhile, the franchise remains in abeyance, and may be revoked before incorporation.⁸⁰

§ 828. Holding in joint tenancy. Tenancy in common.—As corporations may be perpetual, they have no right of survivorship, and therefore can not hold land in joint-tenancy; but they may hold the unity of possession, as tenants in common with another individual or corporation.⁸¹

§ 829. Power to take and hold by devise.—A corporation can not take property by devise or bequest, unless under express power conferred by charter or other statute, nevertheless, the title vests in the corporation as against every person, except the State.⁸² Most of the States have enacted the statute of wills, and hold that corporations may take by devise.⁸³ The old common law rule, that there is no inherent incapacity in a foreign corporation to take land by devise, prevails in the United States, whenever it is necessary to carry out the objects of the corporation, except where the power is expressly forbidden by statute; as by the English statute of wills, which excepted devise of lands to bodies politic and corporate.⁸⁴ Such disability, created by a statute of wills, does not follow the corporation into another State, but similar disability, created by charter or general incorporation law, follows the corporation everywhere.⁸⁵ A distinction is observed between the effect of statutes prohibiting devises to corporations, and statutes restricting the corporate power to take property; the policy of the latter being to prevent the ownership

⁷⁷ Mr. Justice Story in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518.

⁷⁸ N. Y. Laws of 1875, ch. 611, § 2.

⁷⁹ *Spring Valley, etc. v. City & Co. of San Francisco*, 22 Cal. 434, 6 L. R. A. 756.

⁸⁰ *Aspen, etc. Co. v. City of Aspen*, 5 Colo. App. 12, 37 Pac. 728.

⁸¹ *Telfair v. Howe*, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637.

⁸² *Jones v. Habersham*, 107 U. S. 174. *Vide supra*, §§ 125a, 370, POWER TO TAKE BY DEVISE.

⁸³ *White v. Howard*, 38 Conn. 342.

⁸⁴ *In re McGraw*, 111 N. Y. 166; *Downy v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290.

⁸⁵ *Thompson, Corp.*, § 2785.

of real estate by corporations, without express authority of the State; while the purpose, often of statutes restricting testamentary capacity, is to prevent testators under undue influence, from devising their estates to religious institutions to the disinheritance of their heirs.⁸⁶ A statute of New York prohibits devises of real estate to corporations, unless expressly authorized by their charter or by statute to take by devise, and declares prohibited devises to be absolutely void. It has been held that such a devise divests no right of the heirs, which the legislature can affect by attempt by subsequent act to validate the devise.⁸⁷ A statute of wills regulating the use and disposition of corporate property in its jurisdiction, is not unconstitutional, because prohibiting devise to companies previously incorporated with authority to take by devise, unless by contract with the State they were expressly invested with irrevocable right to receive future devises.⁸⁸

§ 829a. Power to take and hold personal property, and choses in action.—For any authorized purpose, a corporation may take and hold personal property of any kind required in its business.⁸⁹ But it can not purchase personal property for any purpose foreign to the objects of its creation,⁹⁰ or for business not authorized by its charter. For example, a railroad corporation can not purchase steamboats for transportation beyond the terminus of its railway line.⁹¹ In the absence of any charter restriction, a corporation, in its business, may take promissory notes and bonds, and enforce their payment.⁹² But a banking corporation, authorized merely to discount negotiable paper, can not deal therein as a broker, by buying and selling it.⁹³

§ 829b. Power to take and hold property as trustee.—In any transaction, not foreign to its authorized business, a corporation the same as an individual, may hold in trust any character of property. "Although it was in early times held, that a corporation could not take and hold real or personal estate in trust,

⁸⁶ Morawetz, Corp., § 331.

⁸⁷ White v. Howard, 46 N. Y. 144.

⁸⁸ Ayres v. Methodist Church, 3 Sandf. 351.

⁸⁹ Blanchard, etc. Factory v. Warner, 1 Blatchf. 277; Rosenbaum v. Horton, 89 Iowa, 692.

⁹⁰ Pearce v. Madison, etc. R. Co., 21 How. (U. S.) 441; Jemison v.

Citizens' etc. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482.

⁹¹ Downing v. Mt. Washington, etc. Co., 40 N. H. 230.

⁹² Wayland University v. Boorman, 56 Wis. 657; Hart v. Missouri, etc. Co., 21 Mo. 91.

⁹³ Atlantič, etc. Bank v. Savery, 82 N. Y. 291; Smith v. Exchange Bank, etc., 26 Ohio St. 141.

upon the ground that there was a defect of one of the requisites to create a good trustee, namely, the want of confidence in the person; yet that doctrine has long since been exploded as unsound, and too artificial; and it is now held, that where a corporation has a legal capacity to take real and personal estate, there it may take and hold it upon trust, in the same manner, and to the same extent, as a private person may do."⁹⁴ If for any reason the corporation can not execute the trust, a court of equity will appoint a trustee for that purpose.⁹⁵ Where the purposes of the trust are within the corporate powers, the corporation may be a trustee.⁹⁶

D.

POWER TO SELL AND CONVEY PROPERTY.

§ 830. Power of strictly private corporations.—Ownership of property, whether real or personal, carries with it the same general power of disposition, in corporations as in individuals, except when that power is restrained by statute, or by considerations of public policy.⁹⁷ "As a general rule, corporations may be said to have an incidental power to dispose of their property, real and personal, either by sale absolute, or by mortgage or other mode of security, for any debt which they may rightfully contract, to the same extent as natural persons, except so far as that power may be restrained by their charter, by considerations connected with the purposes of their creation, or limited by express provision or just implication of some statute, or by the general policy

⁹⁴ Mr. Justice Story in *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 187; *Killingsworth v. Portland, etc. Co.*, 18 Oreg. 351, 17 Am. St. Rep. 737; *Trustees, etc. v. Peaslee*, 15 N. H. 317.

⁹⁵ *Sheldon v. Chappell*, 47 Hun (N. Y.), 59.

⁹⁶ *White v. Rice* (1897), 112 Mich. 403; *Central, etc. Co. v. Farmers', etc. Co.* (1901), 116 Fed. 700.

⁹⁷ *Angell & Ames on Corp.*, § 187; 1 Kyd, *Corp.* 107; *White Water, etc. Co. v. Vallette*, 21 How. 424. In this case Campbell, J., says: "It is well settled that a corporation without special authority, may dispose of lands,

goods, and chattels, or of any interest in the same, as it deems expedient, and in the course of its legitimate business may make a bond, mortgage, note or draft; and also may make compositions with creditors, or an assignment for their benefit, with preferences, except when restrained by law." *Partridge v. Badger*, 25 Barb. 146; *Barry v. Merchants' Exch. Co.*, 1 Sand. Ch. 280; *Burr v. Phoenix Glass Co.*, 14 Barb. 358; *Dater v. Bank of United States*, 5 Watts & S. 223; *Frazier v. Wilcox*, 4 Rob. 517; *United States Bank v. Heth*, 4 B. Mon. 423; *State v. Bank of Maryland*, 6 Gill & J. 323; *Pierce v. Emery*, 32 N. H. 486; *Reynolds*

of the State to be deduced from its legislation."⁹⁸ It may grant an easement though for a use not within its own corporate powers; as, a railroad may grant right-of-way over its own land, to an oil transportation company to lay its pipes, for that use, though beyond the railroad's corporate power, does not interfere with the performance of its duties to the public.⁹⁹ Except when restricted by law or public policy, corporations have an absolute right of disposition, and in its exercise are unlimited as to objects, circumstances or quantity.¹ Therefore a company may sell all its corporate property for a corporate or lawful purpose.² Naturally, following from the larger power, a corporation, which may sell its property or dispose of any interest in the same as it deems expedient.³ The general rule of the absolute alienability of corporate property is clearly applicable to private corporations, established solely for trading or manufacturing purposes in which the public has no direct interest.⁴ But a majority of the shareholders of a prosperous corporation, can not sell out the property and invest in other enterprises, against the wishes of the minority.⁵ Nor may the directors, even with the consent of a majority of the shareholders do so.⁶ But in case of a failing company, the rule is different, and sale of the whole property may be made by

v. Commissioners, 5 Ohio, 205; *De Reuyter v. St. Peter's Church*, 3 N. Y. 238; *Clark v. Titcomb*, 42 Barb. 122; *Central Gold Min. Co. v. Platt*, 3 Daly, 263; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 588, 99 Am. Dec. 300.

⁹⁸ *Judge Christianity in Joy v. Jackson & Michigan Plank Road Co.*, 11 Mich. 164; *Hearst v. Putnam M. Co.* (1904), 77 Pac. 753.

⁹⁹ *Benton v. City of Elizabeth*, 61 N. J. Law, 411, 693.

¹ 2 Kent's Com. 281; *Burton's Appeal*, 57 Pa. St. 213; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439, 451; *Binney's Case*, 2 Bland. 142.

² *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Sargent v. Webster*, 13 Metc. 498; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; *Hodges v. New England Screw Co.*, 1 R. I. 347; *State v. College of California*, 38 Cal. 166, 171;

Webster v. Turner, 12 Hun, 264; *Ardesco Oil Co. v. N. A. Min. Co.*, 66 Pa. St. 375, 382.

³ *Barry v. Merchants' Ex. Co.*, 1 Sand. Ch. 280; *White Water, etc. Co. v. Vallette*, 21 How. 424; *Clark v. Titcomb*, 42 Barb. 122.

⁴ *Webster v. Turner*, 12 Hun, 264; *Hancock v. Holbrook*, 4 Woods, 52; *Sheldon, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 607; *Dupee v. Boston, etc. Co.*, 114 Mass. 37.

⁵ *Kean v. Johnson*, 9 N. J. Eq. 401; *McCurdy v. Myers*, 44 Pa. St. 535; *Boston, etc. R. Co. v. New York, etc. R. Co.*, 13 R. I. 260; *Clinch v. Financial Co.*, L. R. 4 Ch. 117.

⁶ *Abbott v. American, etc. Co.*, 21 How. Pr. 193; *Barclay v. Quick-silver Min. Co.*, 9 Abb. Rr. (N. S.) 284; *Middlesex R. Co. v. Boston, etc. R. Co.*, 115 Mass. 347; *Balliet v. Brown*, 103 Pa. St. 546.

the directors.⁷ Such a sale, however, and the assignment of all a corporation's property, will not in itself accomplish its dissolution or operate as a surrender of its franchises.⁸

Dedication.—A corporation owning real property, may dedicate part of its land to public use, as, for public highway.⁹

§ 831. **Quasi-public corporations require express authority.**—The rule that a private corporation may sell or lease or encumber its property, does not apply to a *quasi*-public corporation, such as a railroad company which owes special duties to the public, and is allowed to exercise the right of eminent domain, and to enjoy other special privileges, not granted to strictly private corporations. Unless expressly authorized by its charter, or by statute, a *quasi*-public corporation can not sell, lease¹⁰ or mortgage, or otherwise alienate its property,¹¹ which is necessary to its use in the performance of its public duties, or which it acquired under exercise of the power of eminent domain. Its conveyance of such property, is held contrary to public policy, and void.¹² "Corporations possessing and exercising the right of eminent domain, owe duties to the public, from the performance of which they are not allowed to escape by a sale or lease of their franchises, without first obtaining the consent of the legislature. The franchise of a corporation, having a right to receive tolls, may be levied on to satisfy an execution against the corporation, and in this way it may be deprived of its corporate powers and privileges. And they may be lost by the foreclosure of a legally ex-

⁷ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 579, 99 Am. Dec. 300; *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 61 Am. St. Rep. 57; *Lauman v. Lebanon, etc. R. Co.*, 30 Pa. St. 42; *Hancock v. Holbrook*, 4 Wood, 52, 9 Fed. Rep. 353; *Sheldon, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 607; *Hutchinson v. Green*, 91 Mo. 367; *Chew v. Ellingwood*, 86 Mo. 273; *De Camp v. Alward*, 52 Ind. 473; *Dana v. Bank of United States*, 5 Watts & S. 223.

⁸ *Hill v. Fogg*, 41 Mo. 563; *Kansas, etc. Co. v. Sauer*, 65 Mo. 279; *Bruffett v. Railroad Co.*, 25 Ill. 353; *Reichwald v. Commercial, etc. Co.*, 106 Ill. 439; *De Camp v. Alward*, 52 Ind. 468; *State v.*

Bank of Maryland, 6 Gill & J. 205, 230.

⁹ *Los Angeles, etc. Assn. v. City of Los Angeles*, 95 Cal. 420.

¹⁰ *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24; *Thomas v. West Jersey Ry. Co.*, 101 U. S. 71; *Brunswick, etc. Co. v. United Gas, etc. Co.*, 85 Me. 532, 35 Am. St. Rep. 385.

¹¹ *Pacific, etc. Cable Co. v. Western Union Tel. Co.*, 50 Fed. 493; *Commonwealth v. Smith*, 10 Allen (Mass.), 448, 87 Am. Dec. 672.

¹² *Chicago Gas, etc. Co. v. People's Gas, etc. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124; *Richardson v. Sibley*, 11 Allen (Mass.), 165, 87 Am. Dec. 700.

ecuted mortgage, or by laches in reclaiming them, when they have been illegally sold, leased or assigned. But, subject to these well-defined exceptions, it is now settled by an overwhelming weight of authority, that public or *quasi*-public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public, as well as to their stockholders; and, that they can not sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority."¹³ This rule is applied to railroad,¹⁴ street-railroad,¹⁵ water,¹⁶ gas, and electric light,¹⁷ canal,¹⁸ cemetery,¹⁹ sleeping-car,²⁰ and other companies incorporated, and owing special duties to the public; but applies only when they have power of eminent domain, or other exclusive or special privileges.²¹ The rule is not applied to permits allowed by such a corporation for the joint use of its property by another, if thereby it is not prevented, in any way, from the performance of its duties to the public.²² But such *quasi* corporation may transfer or encumber its property, not acquired under the power of public domain, and not necessary to the performance of its duties to the public.²³

§ 832. **Sale of the entire property and franchises.**—Only the State can object to the disposition of all its property by a solvent corporation, where no stockholder or creditor objects.²⁴ A corporation, through a majority of its directors, may make a transfer of all its property in payment of one creditor, if it be done *bona fide*.²⁵ Such a debtor corporation may prefer one cred-

¹³ Brunswick Gas Light Co. v. United Gas, etc. Co., 85 Me. 532, 35 Am. St. Rep. 385.

¹⁴ St. Louis, etc. Ry. Co. v. Terre Haute, etc. Co., 145 U. S. 393; Richardson v. Sibley, 11 Allen (Mass.), 65, 87 Am. Dec. 700.

¹⁵ Abbott v. Johnstown, etc. Co., 80 N. Y. 27, 36 Am. Rep. 572.

¹⁶ Foster v. Fowler, 60 Pa. St. 27.

¹⁷ Chicago, etc. Coke Co. v. People's Gas, etc. Co., 121 Ill. 530, 2 Am. St. Rep. 124; Gibbs v. Consolidated, etc. Co., 130 U. S. 296.

¹⁸ Susquehanna Canal Co. v. Bonham, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315.

¹⁹ Wolford v. Crystal Lake Cem. Assn., 54 Minn. 440.

²⁰ Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24.

²¹ Girard Point, etc. v. Southwork Foundry Co., 105 Pa. St. 248.

²² Union Pac. Ry. Co. v. Chicago, etc. Ry. Co., 10 U. S. App. 98, 51 Fed. 309.

²³ Plymouth Ry. Co. v. Colwell, 39 Pa. St. 337, 80 Am. Dec. 526.

²⁴ Read v. Citizens, etc. Co., 75 S. W. 1056 (Tenn. 1903).

²⁵ Buell v. Buckingham (1864), 16 Iowa, 284, citing Town v. Bank of River Raisin, 2 Doug. (Mich.) 530; Revere v. Boston Copper Co., 15 Pick. 351; Boston Glass Mfg. v. Langdon, 24 Pick. 49; State v. Bank of Maryland, 6 Gill & J. 205; Union Bank v. Morris, 6 Gill & J.

itor to another.²⁶ And, generally, a corporation may sell and transfer its property, and may prefer its creditors, although it is insolvent, unless such power is prohibited by law;²⁷ even when all the property of the corporation is conveyed absolutely in payment of a single debt, leaving others unpaid.²⁸ A deed of trust, given by a corporation to secure certain of its creditors, is valid though it conveys nearly all of its property. Its validity is not affected by the fact that it was the result of a compromise among the directors, who were not harmonious, and favored securing different creditors.²⁹ So, a corporation may make an assignment for the benefit of creditors.³⁰ The majority of the stockholders of a co-operative association may sell the property and business; and, even if the sale is voidable by the remainder of the stockholders, after being ratified by them, it can not be avoided by one of those participating in it.³¹ The deed of a mining corporation, however, does not pass the title to its mining land, unless it is shown to have been ratified by two-thirds of its stockholders, as is provided by law.³² The authority in the charter of a prospecting and mining company, to purchase, own, lease, and sell mineral lands, gave it power to sell all its property, notwithstanding the dissent of a stockholder.³³

§ 832a. **Sale of entire property may be enjoined.**—Any dissenting stockholder may enjoin the attempted sale of the entire property of the corporation, so long as it is solvent.³⁴ A lease of

363; *Catlin v. Eagle Bank*, 6 Conn. 233, 242; *Sargent v. Webster*, 13 Metc. 497; *Russell v. McLellan*, 14 Pick. 63.

²⁶ *Sommerville v. Horton*, 4 Yerg. 541; *Niolon v. Douglas*, 2 Hill. Ch. 433; *Milburn v. Beach*, 14 Mo. 104; *Kuykendall v. McDonald*, 15 Mo. 416.

²⁷ *Bergen v. Porpoise Fishing Co.* (1887), 42 N. J. 397.

²⁸ *Lampson v. Arnold*, 19 Iowa, 487.

²⁹ *Rollins v. Shaver, etc. Co.*, 80 Iowa, 380 (1890), 45 N. W. Rep. 1037.

³⁰ And such assignment is not invalid, when made by a quorum of the directors. *Chase v. Tuttle* (1887), 55 Conn. 455, 3 Am. St. Rep. 64.

³¹ *Berry v. Broach* (1888), 65 Miss. 450.

³² *McShane v. Carter* (1889), 80 Cal. 310; *Pekin, etc. Co. v. Kennedy* (1889), 81 Cal. 356; Cal. Laws 1880, p. 131.

³³ *Traer, etc. v. Lucas P. Co.*, 99 N. W. 290 (Iowa, 1904).

³⁴ *Abbott v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *People v. Ballard* (1892), 134 N. Y. 269; *Consolidated, etc. Co. v. Nash* (Wis. 1901), 85 N. W. 485; *Harding v. American, etc. Co.*, 182 Ill. 551 (1899), 74 Am. St. Rep. 189; *Treadwell v. United, etc. Co.* (1900), 47 N. Y. App. Div. 613; *Ellogen v. Gerbreaux, etc. Co.*, 30 N. Y. Misc. 264 (1900); *De La Vergne, etc. Co. v. German, etc. Inst.* (1899), 175 U. S. 40; *Davies*

entire property may be enjoined by a dissenting stockholder.³⁵ Where the business of the corporation is unprofitable, and the company insolvent, it may sell its entire property for purpose of dissolution.³⁶ Where the purpose of the dissolution is not abandonment of the corporate business, but continuance of the business by another corporation, a dissenting shareholder may enjoin the sale.³⁷ A corporation, which has sold to another corporation which had no authority to buy, can not recover back the purchase price, where it was paid out of the assets of the purchasing corporation.³⁸ By unanimous consent of the stockholders of a strictly private corporation, all the corporate assets may be sold, if the creditors are protected.³⁹ Where one of the stockholders, who have, by agreement, sold their stock, secretly, receives a *bonus* from the purchaser, he may be compelled to share it *pro rata* with the other stockholders who joined in the sale.⁴⁰ The by-laws may properly provide for sale of all the corporate property.⁴¹ The court will not enjoin, on account of inadequacy of price, an authorized sale of all the property by authority of a majority of the shareholders.⁴² Statutory power to lease all the property, may be exercised by a majority of the stockholders, where the statute does not designate the mode of lease.⁴³ Power given by statute, to sell the entire property and business of a corporation, is not authority to transfer subscriptions unpaid.⁴⁴ A stockholder, by his delay, ratification or acquiescence in a sale of the entire property, may lose his right to dissent.⁴⁵ Although the corporation has authority to sell its entire property, it can not do so in ex-

v. Monroe, etc. Co. (1901), 107 La. 145, 31 So. 694; Eldred v. American Palace Car Co. (1899), 96 Fed. 59; Eldred v. American, etc. Co. (1900), 105 Fed. 55.

³⁵ Small v. Minneapolis, etc. Co. (1891), 45 Minn. 264; Parsons v. Tacoma, etc. Co. (1901), 25 Wash. 492, 67 Pac. 765.

³⁶ Plant v. Macon (1898), 103 Ga. 606, 30 So. 567. *Vide infra*, DISSOLUTION, § 1313.

³⁷ Kean v. Johnson (1853), 9 N. J. Eq. 401; Ervin v. Oregon, etc. Nav. Co. (1886), 27 Fed. 625.

³⁸ McClure v. Trask (1899), 161 N. Y. 82; Savings T. Co. v. Bear Valley, etc. Co. (1902), 112 Fed. 693.

³⁹ Morrisette v. Howard (Kan. 1901), 63 Pac. 756; Arkansas, etc. Co. v. Manning, 63 S. W. 627 (Tex. 1901).

⁴⁰ Synnot v. Cummings (1902), 116 Fed. 40.

⁴¹ Republican Mines v. Brown (1893), 58 Fed. 644.

⁴² Peabody v. Westerly Waterworks (1897), 20 R. I. 176.

⁴³ Dickerson v. Consolidated, etc. Co. (1902), 114 Fed. 232.

⁴⁴ Bank of China v. Morse, 168 N. Y. 458 (1901).

⁴⁵ Feld v. Roanoke Inv. Co., 123 Mo. 609 (1894); Bear Valley, etc. Co. v. Savings, etc. Co. (1902), 117 Fed. 94; Glymont, etc. Co. v. Toller (1894), 80 Md. 292.

change for the stock or bonds of another corporation, even under statute, and compel a dissenting shareholder to accept them in exchange for his own stock, upon distribution of the corporate assets.⁴⁶ On the contrary, the federal court held, in a like case, that he is obliged to accept such payment in stock.⁴⁷ Where a corporation sells its property and business, for stock in another corporation, it may distribute the stock among its shareholders, but any one dissenting, may demand the cash value of his share of stock.⁴⁸ And to ascertain the cash value of the stock, where the sale is to a new corporation, in which the shareholders of the old corporation are interested, the dissenting stockholder is entitled to a public sale of the stock.⁴⁹

§ 832b. Rights of creditors when the corporation sells its entire property.—Where a corporation makes a sale of all its property for the stock of another corporation, it may be subjected to the payment of debts of creditors, or the conveyance may be set aside in equity, as in fraud of creditors, and the corporation dissolved and wound up as insolvent, or each shareholder may be held individually liable for the amount received by him.⁵⁰ A judgment creditor may levy execution upon the property conveyed, on the ground that it was transferred in fraud of creditors.⁵¹ In case of sale of all its property by a solvent corporation, a general creditor can not maintain a bill in equity against the purchaser.⁵² The officers of a corporation, making an invalid sale of all the corporate property to another corporation, may be held liable for damages for conspiracy to defraud.⁵³ Although a corporation has sold all its assets to another corpora-

⁴⁶ *Morris v. Elyton, etc. Co.*, 125 Ala. 263 (1900), 28 So. 513; *Carter v. Produce, etc. Co.* (1894), 164 Pa. St. 463; *Goler v. Tacoma Ry., etc. Co.* (N. J. 1903), 54 Atl. 413.

⁴⁷ *Farmers', etc. Co. v. Toledo, etc. R. R. Co.* (1893), 54 Fed. 769.

⁴⁸ *Feld v. Roanoke Inv. Co.*, 123 Mo. 603 (1894); *Forrester v. Boston, etc. Co.* (1898), 21 Mont. 544, 55 Pac. 229.

⁴⁹ *Mason v. Pewabic Min. Co.* (1890), 133 U. S. 50, 66 Fed. 391.

⁵⁰ *Baltimore, etc. T. Co. v. Interstate, etc. T. Co.* (1893), 54 Fed. 50; *Vance v. McNab, etc. Co.* (1892), 92 Tenn. 47; *Fort Payne Bank v. Alabama Sanitarium*, 103

Ala. 358 (1894), 15 So. 618; *Chattanooga, etc. R. R. Co. v. Evans* (1895), 66 Fed. 809; *Grant v. Southern Contract Co., etc.* (1898), 47 S. W. 1091.

⁵¹ *Couse v. Columbia, etc. Co.* (N. J. 1895), 33 Atl. 297; *Moffat v. Smith* (1900), 101 Fed. 771; *Buckwatter v. Whipple*, 41 S. E. 1010 (Ga. 1902); *Swan, etc. Co. v. Frank* (1893), 148 U. S. 603; *Vicksburg, etc. Co. v. Citizens' Tel. Co.* (1901), 79 Miss. 341, 30 So. 725, 89 Am. St. Rep. 696.

⁵² *Ames & Harris v. Sabin*, 107 Fed. 582 (1901).

⁵³ *Russell v. Post* (1891), 138 U. S. 425.

tion a creditor may garnishee a stockholder upon his unpaid subscription for stock.⁵⁴

§ 833. **Sale by one corporation to another.**—A corporation may sell its property to another corporation.⁵⁵ Thus, a duly incorporated irrigating company, having power, under its charter, to construct and operate a canal for irrigation, waterworks, and manufacturing purposes, may, with the assent of the stockholders, lawfully sell and convey to another irrigating company, its right of way, canal, personal and real property, provided it is done in good faith, and not to delay or defraud creditors.⁵⁶ And it is the same, where a corporation could not be carried on with profit, and was approaching serious financial embarrassment. A sale, without fraud and in good faith, of all its property, to a rival corporation engaged in the same business, whose paid-up stock was given in payment, affords no ground of complaint by a stockholder.⁵⁷ But generally, when the property of one corporation is sold to another, no shareholder of the former can be required, without his own consent, to accept the stock of the latter as his share of the proceeds of the sale.⁵⁸ The reason is that such a transaction would, in effect, amount to a consolidation of the two companies.⁵⁹ A company may, however, sell its assets for the

⁵⁴ *Prentice v. United States, etc. Co.* (1897), 78 Fed. 106.

⁵⁵ *Warfield v. Marshall, etc. Co.* (1887), 72 Iowa, 666, 2 Am. St. Rep. 263. Here where the first corporation was insolvent, and had executed a mortgage to its shareholders to secure them as creditors, thus preferring them to other creditors, and the second corporation was organized by the shareholders of the first and other persons, all paying value for their stock therein, and the first corporation sold its property to the second corporation so organized, in consideration that the second corporation would pay the mortgage to the shareholders in the first corporation, which was the full value of the property conveyed, and all this was done in good faith, though with knowledge by all the parties that the other creditors of the first corporation would

never be able to realize anything on their claims; it was held that the transaction was a valid one, and could not be set aside at the suit of the unsecured creditors of the first corporation.

⁵⁶ *State v. Western Irrigating Canal Co.* (1888), 40 Kan. 96, 10 Am. St. Rep. 166.

⁵⁷ Even though he was not notified of, nor present at, the meeting at which the transfer was decided upon. *Sawyer v. Dubuque Printing Co.* (1889), 77 Iowa, 242.

⁵⁸ *Taylor v. Earle*, 8 Hun, 1; *Frothingham v. Barney*, 6 Hun, 366; *McCurdy v. Meyers*, 44 Pa. St. 535; *In re Empire Assn.*, L. R. 4 Eq. 341; *Clinch v. Financial Co.*, L. R. 4 Ch. 117; *Bird v. Bird's, etc. Co.*, L. R. 9 Ch. 358; *Morawetz on Corporations*, 212.

⁵⁹ *Morawetz on Corporations*, 212. See, however, *St. Louis, etc. R. Co. v. Fiernan*, 37 Kan. 606.

stock of another company, having a fixed money value and capable of being converted into money at any time, and of being distributed as money, among shareholders not consenting to the arrangement.⁶⁰ Statutory authority to transfer "the work done, together with all rights, privileges and easements," of a railroad company, unable to complete the construction of its line, to another company, not competing, does not empower the assigning of the railroad company's contracts of subscription, payable upon completion of the road.⁶¹ A contract in restraint of trade, running to a corporation, "its successors and assigns," is assignable to, and enforceable by, a corporation which succeeds to the business and property of such obligee.⁶² Where an old-established corporation sells out to a newly-organized one, and turns over all its property, the new company becomes liable upon the debts and contracts of the old.⁶³ Therefore, when a corporation, after con-

⁶⁰ Treadwell v. Salisbury Mfg. Co., 73 Mass. 393, 66 Am. Dec. 480; Morawetz on Corporations, 212.

⁶¹ Toledo, etc. R. Co. v. Hinsdale (1888), 45 Ohio St. 556.

⁶² Diamond Match Co. v. Roeber (1887), 13 N. E. Rep. 419.

⁶³ Slattery v. St. Louis, etc. Co. (1886), 91 Mo. 217; Hibernia Ins. Co. v. St. Louis, etc. Co., 10 Fed. Rep. 596, 13 Fed. Rep. 516; Fogg v. Receiver, 17 Fed. Rep. 516; Brum v. Insurance Co., 16 Fed. Rep. 140; Railroad v. Boring, 51 Ga. 582; Dean v. La Motte Lead Co., 59 Mo. 523; Town of Reading v. Wedder, 66 Ill. 80; Charitable Soc. v. Episcopal Church, 1 Pick. 371; Railroad v. Bee, 48 Cal. 398; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; City of St. Louis v. Gas Co., 70 Mo. 98; Hastings v. Drew, 50 How. Pr. 254; Railroad v. Evans, 6 Heisk. 607; Thompson v. Abbott, 61 Mo. 176. B. recovered a judgment in 1868, against a railroad company shortly after it had assigned all its property to trustees as one of the means of transferring it to a new company which was contemplated. One of the considerations of the assignment was the payment of the old company's debt. In 1874 the new

company was organized and received a transfer of all of the property. In 1880 the holder of the judgment brought suit upon it against the trustees, who defaulted, and the new company, pleaded that the debts due the creditors of the old company of the same class as plaintiffs' claim exceeded its assets, and that plaintiff was only entitled to a *pro rata* of such assets upon distribution among all the creditors; and it was held that it should be presumed the claims of the other creditors had been paid, or that the assets were ample for the full satisfaction of the remaining ones, so that the suit might be maintained without making the other creditors parties. Galveston, Harrisburg, etc. Ry. Co. v. Butler, 56 Tex. 506. By deed from one railroad company to another, the title was reserved in the vendor till the vendee had discharged the vendor's floating debt by certain methods of payment. The vendee made partial payment in that way by cash and bonds to A., one of the vendor's creditors and directors, with the approval of the vendor's president, and his consent that A. might appropriate

tracting debts, transfers, without consideration, all of its property to another corporation having notice of the indebtedness, equity has jurisdiction of a suit to enforce the indebtedness against the latter corporation, although no judgment has been obtained against the former one.⁶⁴ And, where a corporation, organized by the members of a partnership, passes a resolution to purchase the assets of the partnership, and assumes its indebtedness, it can not, by a secret understanding between the directors that certain claims are not included, prevent the creditor from following the firm's assets into the hands of the corporation.⁶⁵ While consolidation is frequently effected by the sale of the property and franchises of one corporation to another, every case of sale is not necessarily a consolidation, properly so called; it may be a mere succession, as it has been felicitously termed by a learned writer, Mr. Taylor, who says that a succession differs from a consolidation, in this respect among others, that the purchaser acquiring the property and franchises of a corporation, does not thereby become responsible for its liabilities already accrued.⁶⁶ It will have been seen, however, that the later cases show a disposition to follow the assets of the former corporations, even after a sale, for the purpose of insuring that the full amount of the same shall be rendered to the creditors of the original corporation.

§ 833a. Liability of a corporation purchasing all the property of another corporation.—A company which *bona fide* buys all the assets of another corporation, is not liable for its debts, unless upon its express contract to pay them.⁶⁷ Even upon a plan to reorganize, where the new company, purchasing at foreclosure sale, is to assume floating debts of the foreclosed com-

the sum to his own use, the directors of the company taking no action; and it was held that this was not a compliance with all the conditions so as to estop the vendor from asserting his title. *Tennessee & Coosa R. Co. v. East Alabama Ry. Co.*, 73 Ala. 426.

⁶⁴ But that the president of the former corporation is not properly a party to such suit. *Hibernia Ins. Co. v. St. Louis, etc. Co.*, 3 McCrary, 368.

⁶⁵ *Williams v. Colby* (1889), 53 Hun, 637.

⁶⁶ Taylor on Corporations, § 415; *Hammond v. Port Royal, etc.*

R. Co., 15 S. C. 10; and 16 S. C. 567; *Cook v. Detroit, etc. Ry. Co.*, 43 Mich. 349; *City of Menasha v. Milwaukee, etc. R. Co.*, 52 Wis. 414; *Gilman v. Sheboygan, etc. R. Co.*, 37 Wis. 317.

⁶⁷ *Holyoke, etc. Co. v. United States, etc. Co.* (Mass. 1902), 65 N. E. 54; *Fernschild v. Yuengling, etc. Co.* (1897), 15 N. Y. App. Div. 29; *Advance, etc. v. Penn, etc. Co.* (1900), 195 Pa. St. 602; *Tilley v. Coykendall* (1902), 69 N. Y. App. Div. 92; *Wallace v. Ann Arbor, etc. Ry. Co.* (1899), 121 Mich. 588; *Campbell v. Farmers, etc. Bank* (1896), 49 Neb. 143, 68 N. W. 344.

pany, the holders of such debts have no claim, legal or equitable, upon the new company.⁶⁸ But where one corporation purchases all the property of another, paying for it in its own stock, issued to shareholders of the vendor corporation, it must pay the latter's obligation, or the property will be sold and its proceeds applied to their payment.⁶⁹ The case is different in consolidation of corporations; the consolidated corporation, in taking over all the assets of the constituent companies, assumes also all their burden of debts.⁷⁰ A scheme by officers and stockholders of one corporation to form another, and sell all the corporate property to it, in fraud of creditors, will make the new corporation a mere continuance of the old corporation and liable to its general creditors, as well as to those secured.⁷¹ The court will set aside a foreclosure sale of the corporate property promoted by the stockholders, to buy in the property, in reorganization, so as to cut off the claims of unsecured creditors.⁷² A corporation is not a *bona fide* purchaser of property which it pays for in its own stock.⁷³ A corporation can not be a partner in a partnership; to enter into a partnership, may forfeit its charter;⁷⁴ an exception is where one individual owns all of the stock of the corporation.⁷⁵

§ 834. **Power of directors and other officers to sell.**—In the absence of express restrictions, the directors of a corporation have the power to convey its property in payment of its debts;⁷⁶ but they have no power to sell all its property, without the consent of the stockholders, unless necessary to do so for the payment of its debts.⁷⁷ "They can not so dispose of its property as to virtually end its existence, and prevent it from carrying on the business for which it was incorporated."⁷⁸ As the managers of

⁶⁸ Columbus, etc. R. R. Appeals (1901), 109 Fed. 177.

⁶⁹ Grenell v. Detroit, etc. Co. (1897), 112 Mich. 70.

⁷⁰ Morrison v. American Snuff Co. (1901), 79 Miss. 330, 30 So. 923, 89 Am. St. Rep. 598; Shaadford v. Detroit, etc. Ry. (1902), 89 N. W. 960.

⁷¹ Blanc v. Paymaster Min. Co. (1893), 95 Cal. 524, 29 Am. St. Rep. 149; Angle v. Chicago, etc. Ry. (1894), 151 U. S. 1.

⁷² Louisville, etc. Ry. v. Louisville T. Co. (1899), 174 U. S. 674.

⁷³ Fogg v. Blain (1890), 133 U. S. 534.

⁷⁴ People v. North River, etc. Co. (1890), 121 N. Y. 582.

⁷⁵ Allen v. Woonsocket Co., 11 R. I. 288 (1876); Wilson v. Carter, etc. Co. (1899), 46 W. Va. 469, 33 S. E. 249.

⁷⁶ Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516.

⁷⁷ Elyton Land Co. v. Dowdell, 113 Ala. 177, 59 Am. St. Rep. 105.

⁷⁸ People v. Ballard, 134 N. Y. 269, 1 Keener's Cas. 630.

the corporation, they have power to sell all its property, if necessary, to pay its debts.⁷⁹ The general manager has no authority, without express power, to sell and convey or lease the real estate⁸⁰ or other corporate property. The president has no power, merely by virtue of his office, to sell and convey, or contract to sell and convey, the real estate or personal property;⁸¹ nor has the vice-president;⁸² the treasurer;⁸³ the secretary;⁸⁴ or a bank cashier,⁸⁵ by virtue of his office, any implied power to sell the property of the corporation.

Sale or transfer to pay debts.—A corporation unrestricted by its charter or statute, has the same power as a natural person, to transfer all or any part of its property for the purpose of paying its lawful debts.⁸⁶ And for such purpose it may make an assignment for the benefit of its creditors.⁸⁷

§ 835. **Power to sell the franchise to be a corporation.**—The cases are agreed that a railroad corporation can not, independent of legislative authority, alienate or mortgage its franchise to be a corporation.⁸⁸ Under the general incorporation law of Texas, one railroad company has no power to purchase another railroad; or to sell its road to another company or to another person.⁸⁹

⁷⁹ *McElroy v. Minnesota, etc. Co.*, 96 Wis. 317.

⁸⁰ *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Hartford Iron Mining Co. v. Cambria Mining Co.*, 80 Mich. 491.

⁸¹ *Pittsburg Melting Co. v. Reese*, 118 Pa. St. 355; *Crump v. United States Mining Co.*, 7 Grat. (Va.) 352, 56 Am. Dec. 116; *Titus v. Cairo, etc. Co.*, 37 N. J. Law, 98.

⁸² *Morris v. Griffith & Wedge Co.*, 69 Fed. 131.

⁸³ *Winsted Hosiery Co. v. New Britain Knitting Co.*, 69 Conn. 565.

⁸⁴ *Nashua Iron, etc. Co. v. Chandler, etc. Co.*, 166 Mass. 419.

⁸⁵ *Steinke v. Yetzer*, 108 Iowa, 512.

⁸⁶ *Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75.

⁸⁷ *Crump v. United States Mining Co.*, 7 Grat. (Va.) 352, 56 Am. Dec. 116.

⁸⁸ *Coe v. Columbus, etc. Ry. Co.* (1859), 10 Ohio St. 372; *Common-*

wealth v. Smith, 10 Allen, 448; *East Boston, etc. R. Co. v. Hubbard*, 10 Allen, 459; *Richardson v. Sibley*, 11 Allen, 65; *Hall v. Sullivan R. Co.*, 21 Law Rep. 138; 1 Brun. Col. Cas. 613; *Pierce v. Emery*, 32 N. H. 484; *Richards v. Merimack, etc. Co.*, 44 N. H. 127, 136; *Bardstown, etc. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199; *Arthur v. Commercial, etc. Bank*, 9 Smed. & M. 394; *Kennebec, etc. R. Co. v. Portland, etc. R. Co.*, 59 Me. 9, 23; *Shepley v. Atlantic, etc. R. Co.*, 55 Me. 395, 407; *Stewart's Appeal*, 56 Pa. St. 413, 422; *Pittsburg, etc. R. Co. v. Allegheny Co.*, 63 Pa. St. 126, 135; *Clarke v. Omaha, etc. R. Co.*, 4 Neb. 458, 465; *State v. Consolidation Coal Co.*, 46 Md. 1, 9; *Hays v. Ottawa, etc. R. Co.*, 61 Ill. 422; *Wood v. Bedford, etc. R. Co.*, 8 Phila. 94; *Pearce v. Madison, etc. R. Co.*, 21 How. 441.

⁸⁹ *Gulf, etc. R. Co. v. Morris*, 67 Tex. 692 (1887).

Statutory authority.—The legislature, subject only to constitutional restriction, may expressly authorize a *quasi* or other corporation to transfer, lease or encumber its property, and franchises and special privileges, as has been done in some States, although such alienation may prevent the corporation from performing its duties to the public; but, without express authority⁹⁰ any contract made by a *quasi*-public corporation, such as a railway, canal or turnpike, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burdens which it imposes, is held to be a violation of the contract with the State, and void as against public policy.⁹¹ The purchaser does not become a corporation merely by virtue of the purchase and conveyance, made under legislative authority to a corporation to sell its property and franchises, but must organize under the general corporation law, unless in such authority the legislature expressly provided that the purchaser should be a corporation.⁹² Or, it may be said that such a corporation, in the absence of statutory authority, has no right to sell its franchise to be a corporation, or any property essential to its exercise, acquired under law of eminent domain.⁹³ So also, transfers of powers of one such corporation to another, are against public policy, and the courts will not promote transfer,⁹⁴ for the further reason, if corporations were allowed to sell their franchises to others, a single corporation might acquire and monopolize the powers and privileges of all its rivals, destroy competition and control the markets. To prevent the possibility of such disasters to the public, public policy demands that corporations be kept under legislative supervision and restraint.⁹⁵ A corporation can not evade liability by delegating to another the

⁹⁰ *Snell v. City of Chicago*, 133 Ill. 413, 8 L. R. A. 858; *Lauman v. Lebanon, etc. Co.*, 30 Pa. St. 46, 72 Am. Dec. 685; *Rafferty v. Central Packing Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763.

⁹¹ *Thomas v. Railroad Co.*, 101 U. S. 71, 83; *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 290; *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 107; *Fanning v. Osborne*, 102 N. Y. 441; *Stewart's Appeal*, 56 Pa. St. 413; *Commonwealth v. Smith*, 114 Mass. 448, 456; *Middlesex R. Co. v. Bos-*

ton, etc. R. Co., 115 Mass. 347; *Branch v. Jesup*, 106 U. S. 468, 484.

⁹² *Snell v. City of Chicago*, 133 Ill. 413, 8 L. R. A. 858; *Memphis, etc. Ry. Co. v. Railroad Comm'rs*, 112 U. S. 610.

⁹³ *Fietsam v. Hay* (1887), 122 Ill. 293, 3 Am. St. Rep. 492.

⁹⁴ *Chicago Gas Light Co. v. People's Gas Light Co.* (1887), 121 Ill. 530, 2 Am. St. Rep. 124.

⁹⁵ *Brunswick, etc. Co. v. United Gas, etc. Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 1 Keener's Cas. 641.

performance of its public duties.⁹⁶ And, negatively, a corporation owing a public duty, can not contract not to perform that duty.⁹⁷ The general rule holds good that a bank, incorporated under a special act of the legislature, can not, in the absence of statutory enactment, sell, transfer or assign its franchise; that is, the corporate rights and privileges conferred upon it by the legislative grant.⁹⁸ So, also, where some of the stockholders of one railway company bought up all the stock and bonds of another and destroyed them, without, however, buying the road itself, yet, taking themselves to be owners of the road from the purchase of the stock and bonds, sold it to a third company, it was held that a creditor of the second company, having obtained judgment against it, had the right to levy execution on the road and franchise,—the purchase and destruction of the stock and bonds, and subsequent sale to the third company, not constituting a dissolution of the second so as to relieve it, as a corporation, from all its debts and obligations.⁹⁹ As to what is included under the term franchise, it has been decided that a railroad with all its rights, franchises and property, is not an entirety.¹ And the line has been clearly drawn between it and alienable property. It is, that a railroad company cannot alienate real property, acquired and held for the exclusive purpose of the exercise of a franchise which can not be alienated, but it may alienate things unnecessary for its use after the road is constructed and prepared for use, which are to be regarded as personal property.² The distinction is made that the franchises to build or manage a railroad, and take tolls thereon, are not necessarily corporate rights, and may be assigned and enjoyed by an individual, but the right to be or form a corporation, is not the subject of sale or transfer, in the absence of statute, and does not

⁹⁶Lancaster, etc. Co. v. Rhoads (1887), 116 Pa. St. 377, 2 Am. St. Rep. 608.

⁹⁷ So a contract, by a corporation authorized to make and sell gas, to discontinue such manufacture and sale, is *ultra vires* and void. Chicago Gas Light Co. v. People's Gas Light Co. (1887), 121 Ill. 530, 2 Am. St. Rep. 124.

⁹⁸ Fietsam v. Hay (1887), 122 Ill. 293.

⁹⁹ Gulf, etc. R. Co. v. Morris, 67 Tex. 692 (1887).

¹Dinsmore v. Racine, etc. R. Co., 12 Wis. 659, 663; Hill v. La Crosse, etc. R. Co., 11 Wis. 226.

²Coe v. Columbus, etc. R. Co. (1859), 10 Ohio St. 372; Shaw v. Norfolk Co. R. Co., 5 Gray, 162, 180; Arthur v. Commercial Bank, 9 Smed. & M. 394; Miller v. Rutland, etc. R. Co., 36 Vt. 452, 473; Kelly v. Trustees, 58 Ala. 489; Wood v. Bedford, etc. R. Co., 8 Phila. 94; Richards v. Merrimack, etc. Co., 44 N. H. 127, 136.

go with the property and franchises when sold.³ The power to sell, mortgage or lease the franchises or property, even the franchise to be a corporation, may, of course, be expressly authorized by the legislature.⁴ So, the legislature may ratify and confirm such acts when done without authority.⁵ Of course, general laws may authorize any corporation to sell to another company all its property, rights, privileges, and franchises, when each company has been incorporated under the law of the same State.⁶ Where the act, under the authority of which a certain company purchased the property and franchises of another, provides that all existing contracts for water privileges "shall be respected and maintained at rates not exceeding the present rates," it is held that this provision does not make perpetual, at the option of the lessee, such contracts, but merely binds the purchaser to respect them during the remainder of the unexpired term which they have to run.⁷

E.

POWER TO LEASE THE CORPORATE PROPERTY.

§ 836. **General power to lease.**—Subject to the qualifications above stated in the case of sale, private corporations may lease their property with the same freedom as individuals, where there is no public interest involved.⁸ A corporation may lease its property for a hundred years, although that is beyond the term of

³ Ragan v. Aiken (1882), 9 Lea, 609; Hall v. Sullivan R. Co., 21 Law Rep. 138; Meyer v. Johnson, 53 Ala. 237; State v. Sherman, 22 Ohio St. 428; Smith v. Gower, 2 Duer, 17; Wilson v. Gaines, 3 Tenn. Ch. 602. In the principal case the bill alleged that a particular railroad, with all its property, effects and franchises, was sold under the proceeding by the state against delinquent railroads, and subsequently resold by the purchaser to an individual named, and by him to the defendant, who had continued to operate the road under the charter of the original corporation, and had charged and received from the complainants excessive freight, and it was held, upon demurrer, that the defendant was not the

corporation, and that the bill was properly filed against him as an individual.

⁴ 1 Rorer on Railroads, 257; State v. Sherman, 22 Ohio St. 411, 428; State v. Richmond, etc. R. Co., 72 N. C. 634; Mahaska, etc. R. Co. v. Des Moines Valley R. Co., 28 Iowa, 437; East Boston, etc. R. Co. v. Eastern R. Co., 13 Allen, 422.

⁵ Shaw v. Norfolk Co. R. Co., 5 Gray, 162, 179; Richards v. Merrimack, etc. Co., 44 N. H. 127, 136.

⁶ Hatch v. American Union Telegraph Co., 9 Abb. N. Cas. 223; New York Laws 1870, ch. 568.

⁷ Hurt v. Terrill (1887), 83 Va. 167; Va. Acts 1878-9, p. 118, § 6.

⁸ Vide cases cited, *infra*, in this section; Vide *infra*, POWERS OF RAILROADS TO LEASE, §§ 1042-1051.

the charter.⁹ A city may legally contract with a private corporation, for its use of the streets, for a period longer than that of the latter's corporate existence.¹⁰ Under laws providing that an association may erect and maintain docks along the shore of its lands, and have the exclusive control of them, the association may lease the exclusive control of such docks to another.¹¹ Under clauses in a company's charter, giving any act or contract done by two-thirds of the stockholders the same validity as if the consent of every shareholder were obtained thereto,—after nine years' unsuccessful working by a porcelain company, the lease of all its works and buildings for twenty-one years, was valid.¹² It has been decided, however, that a corporation, authorized by its charter to sell the real estate necessary for the transaction of its business when not required for the uses of the corporation, can not lease such real estate, nor can it maintain an action for rent, under a lease, such lease not being necessary to the exercise of the purposes for which it was chartered.¹³ And it is a reason given for disallowing leases of all the property of a company, that the company was thereby deprived of its power to carry out the purposes of its creation.¹⁴ In a New Jersey case, in holding void a lease of its franchise to a corporation, for construction of a railroad and canal, Chancellor Zabriskie said: "This rule is founded on reason and principle. The franchises granted by the State, are often parts of the sovereign power delegated to a subject, and

⁹ *Brown v. Schleier* (1902), 118 Fed. Rep. 981; *Sioux, etc. Co. v. Trust Co.* (1897), 82 Fed. Rep. 124.

¹⁰ *Detroit, etc. Ry. v. Detroit*, 64 Fed. Rep. 628 (1894).

¹¹ *Smith v. Berndt* (1888), 1 N. Y. Supp. 108.

¹² *Featherstonhaugh v. Lee Moor, etc. Co.* (1865), L. R. 1 Eq. 318.

¹³ *Metropolitan Concert Co. v. Abbey*, 52 N. Y. Super. Ct. Rep. 97.

¹⁴ *Cass v. Manchester* (1881), 9 Fed. Rep. 640; McKennan, J., said in this case: "The change proposed is not organic, it is true, but it is thorough and fundamental, as it affects the administration of the company's affairs. It involves a withdrawal from the control and management of the stockholders of the entire prop-

erty of the corporation for a period of at least five years; it will preclude for a like period the exercise annually by the stockholders of their judgment as to the particular character and method of conducting the business affairs of the corporation; and it denies to the stockholders any right of suggestion or disapproval of the conditions upon which a relinquishment of important corporate faculties may be conceded. Surely a power which will be attended with such consequences does not relate 'to the ordinary business transactions,' nor 'to the orderly and proper administration of the affairs of the company,' and hence cannot be exercised by the directors without express authority to them."

always privileges to which other citizens are not entitled. In these grants, the State is supposed to regard the character of the grantee, or the guards and restrictions placed upon the corporation, when the grant is by a charter to persons continually changing by transfer of stock. In this case the franchises of maintaining a canal and railroad across public highways and navigable rivers, and of taking tolls and rates of fare fixed by themselves without control, are, with others, a material part of the property leased; these can not be leased or aliened without consent of the State.¹⁵ It has been said that a railway company may lease its property and road, when not prohibited by statute or some principle of public policy.¹⁶ And it would seem that a railroad company, possessing rolling-stock acquired or manufactured for the purposes of the company, would be entitled to let such rolling-stock, when it is not wanted for the working of its own line.¹⁷ Upon the same principle, where the lines of two companies are continuous, and the traffic of the one can be profitably worked only in connection with the other, that the latter may agree to supply the former with such rolling-stock as it may require, though this may involve the manufacture of rolling-stock in excess of its own wants.¹⁸ Two telegraph companies entered into an agreement, by which either company was given the right to string its wires on any of the poles owned by the other, and to operate such wires for its own benefit. On non-payment of the rent provided for, the company whose poles were thus used, might direct the other to remove its wires, and if they were not removed within six months after such notice, they were to become the property of the company upon whose poles they were placed. Afterwards the defendant, acting under an arrangement with the receiver of one of the companies, entered on the premises in possession of the other company, and cut the wires which the latter had strung on the poles of the first company, no previous demand having been made for their removal. There was some irregularity in the proceedings of an executive committee of the first company, authorizing the agreement as to the use of its poles. The action of the

¹⁵ *Black v. Delaware & Raritan Canal Co.*, 22 N. J. Eq. 399.

¹⁶ *Pittsburg, etc. R. Co. v. Columbus, etc. R. Co.*, 8 Biss. 456.

¹⁷ *Browne & Theobald's Railway Law*, 96, citing *Attorney-General v. Great Eastern Ry. Co.*, 11 Ch.

Div. 449, 48 Law J. Ch. 428, 5 App. C. 473.

¹⁸ *Attorney-General v. Great Eastern Ry. Co.*, 11 Ch. Div. 449, 48 Law J. Ch. 428, 5 App. Cas. 473; *Browne & Theobald's Railway Law*, 97.

committee in the premises was afterwards ratified by a resolution of the directors, which resolution was itself irregular and of doubtful validity, but no member of the corporation ever attempted to disaffirm the agreement. It was held, however, that the defendant could not question its validity as a corporate act; that the objection, that the agreement was not sanctioned by three-fifths in interest of the stockholders of one of the companies, had no force, inasmuch as that agreement involved no lease, sale or conveyance of the property of the company, or of any of its rights, privileges or franchises, or any interest therein, within the meaning of the statute; and that even if the agreement required such sanction, the omission to obtain it was not available to defendant.¹⁹ Where a contract of leasing is complete and executed, a plea of *ultra vires* by a defendant corporation is inadmissible in an action to enforce it.²⁰ Laches and the intervention of other equities, may prevent stockholders from obtaining any relief from an *ultra vires* leasing of the property of the company, as in the case of other *ultra vires* acts.²¹ Receipt of rent by the corporation, from a tenant, under lease made by its principal officer in his own name, is ratification of the lease.²² A foreign corporation, when allowed to do business in the State, has the power, and by comity the same

¹⁹ *Farnsworth v. Western Union Tel. Co.* (1889), 53 Hun, 636.

²⁰ So held where a railroad company built a branch railroad, upon the promise of another company to lease it for 999 years at a certain yearly rental, and where, after using the completed road for years without objection, payment of the stipulated rental was refused upon the ground that the acceptance of the lease was *ultra vires*. *Camden, etc. R. Co. v. May's Landing, etc. R. Co.*, 48 N. J. L. 530 (1887).

²¹ *The Hartford, Providence & Fishkill R. Co.*, a Rhode Island corporation, in 1863, executed an agreement transferring all its property, *in perpetuum*, to the Boston, Hartford & Erie R. Co., the stockholders of the former company to be remunerated by stock in the latter, or by payment of a fixed price per share. The latter company afterwards mort-

gaged its road, became bankrupt, and was dissolved by a Connecticut decree. The mortgagees afterwards foreclosed in Rhode Island and formed the New York & New England E. R. Co. The road and property passed into the possession of this latter company by deeds from the mortgage trustees, and from the assignees of the bankrupt company. In 1875 certain stockholders of the H. P. & F. R. Co. brought a suit in equity in Rhode Island to set aside the agreement and lease; and it was held that the agreement and lease were *ultra vires*, but that plaintiffs, by laches and by the intervention of other equities, were precluded from relief. *Boston & Providence R. Co. v. New York & N. E. R. Co.*, 13 R. I. 260. Potter, J., dissenting.

²² *Anderson v. Connor* (1904), 87 N. Y. S. 449.

right as a domestic corporation, to take a lease of property, such as may be requisite for its business in the State;²³ but subject to its laws and public policy.²⁴

F.

POWER TO MORTGAGE THE CORPORATE PROPERTY OR FRANCHISES.

§ 845. **General power to mortgage corporate property.**—The power to alienate property, includes the power to encumber it. The power to borrow, carries with it by implication, unless restrained by charter, the power to secure the loan by mortgage.²⁵ A strictly private corporation has the equal power with a natural person to alienate its property, real or personal, by way of mortgage, or pledge, or otherwise,²⁶ in order to raise money to carry on its business. And, though there be no express power given to a corporation in its charter to borrow money on mortgage, but power is conferred upon its directors to make all necessary contracts, and to sell or otherwise dispose of any portion of its property whenever, in their judgment, it shall be found to be to the interest of the company,—the exercise of the power to borrow, and to secure the loan by mortgage from the company, is valid.²⁷ So, further, the power of a corporation to pledge securities owned by it, for the payment of its debts, is included in the power to sell such securities for that purpose.²⁸ And moreover, a deed by a manufacturing corporation to secure the individual indebtedness of its president, is held not to be *ultra vires*, where it is itself indebted to him in like amount.²⁹ The mortgage must be made by the proper authorities, however, if it is to be valid.³⁰ A mortgage,

²³ Northern, etc. Co. v. City of Chicago, 7 Biss. 45.

²⁴ Van Stuben v. Central R. Co., etc., 178 Pa. St. 167.

²⁵ Union Trust Co. v. Mercantile, etc. Co. 189 Pa. St. 263; New Briton, etc. Bank v. Cleveland Co., 158 N. Y. 722; Jones v. Guaranty, etc. Co., 101 U. S. 622; Bardstown, etc. v. Metcalfe, 4 Metc. (Ky.) 206, 81 Am. Dec. 541; Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454; Wright v. Hughes (1889), 119 Ind. 328, 12 Am. St. Rep. 412; Commissioners v. Atlantic, etc. R. Co., 77 N. C. 289.

²⁶ Lehigh Valley Coal Co. v. West Depere Agricultural Works

(1886), 63 Wis. 45; Aurora, etc. Soc. v. Paddock, 80 Ill. 264.

²⁷ Booth v. Robinson (1886), 55 Md. 419.

²⁸ Leo v. Union Pacific Ry. Co., 17 Fed. Rep. 273.

²⁹ Merchants' Bank v. Pomeroy Flour Co., 41 Ohio St. 552.

³⁰ Under the Civil Code of California, declaring that the powers of a corporation must be exercised, and its property controlled, by its board of directors, and providing that the decision of a majority of the directors, "made when duly assembled," is valid as a corporate act, a mortgage executed by the president and secre-

when given by a corporation for more than one-half the stock actually paid in, is not *ultra vires*, and invalid, although the giving of such mortgage is forbidden by the articles of incorporation.³¹ In a case, however, where a mortgage loan did not increase the indebtedness of the company, it was not within the purview of the constitution of Pennsylvania, which declares that the stock and indebtedness of corporations shall not be increased, without the consent of the majority of the stockholders.³² A mortgage made and recorded, before a proposition to a contractor is accepted, and before any work is done, does not come within the prohibition of an act providing that improvement companies shall not make an assignment, conveyance, mortgage, or other transfer of their estate, while debts or liabilities to contractors remain unpaid,—without their written consent.³³ And under such a provision, a written assent by the corporators, that the real and personal property of the company “may be mortgaged,” is broad enough to warrant the cancellation of a mortgage on some of its chattels, and the substitution of another mortgage on other chattels of the company.³⁴ But a provision in articles of incorporation, that “no instrument affecting the title to real estate, shall be binding, unless ordered at a meeting of the official board,” does not apply to a release of a mortgage.³⁵ As to the formalities of execution, it is held that a mortgage, executed in behalf of a corporation, is not vitiated, as between the parties, because, in the certificate of acknowledgment, the treasurer acknowledged the instrument to be his own free act and deed.³⁶ So, a mortgage by a corporation, by its attorney-in-fact is sufficient, if executed in the name of the corporation, under the attorney’s own hand and

tary, without a resolution of the board of directors, is void, though ratified by the holders of two-thirds of the stock. Action by the board is not dispensed with, in the case of a mining corporation, by the act providing that it is unlawful for the directors of such corporation to sell, mortgage, etc., unless the act be ratified by the holders of at least two-thirds of the stock. *Alta Silver Min. Co. v. Alta Placer Min. Co.* (1889), 78 Cal. 629; Cal. Civil Code, §§ 305, 308. In this case the levy of an assessment by the directors, to pay a debt secured by the invalid

mortgage, did not render the mortgage valid.

³¹ *Warfield v. Marshall, etc. Co.* (1887), 66 Iowa, 72.

³² *Appeal of Powell* (Pa. 1890), 19 Atl. Rep. 559; Pa. Const., art. xvi, § 7.

³³ *Appeal of Reed* (Pa. 1889), 130 Pa. St. 333; Pa. Act 1843, January 21.

³⁴ *Star Printing Co. v. Andrews* (1890), 9 N. Y. Supp. 731.

³⁵ *Stevenson v. Polk* (1887), 71 Iowa, 278.

³⁶ *Fitch v. Lewiston Steam-Mill Co.* (1888), 80 Me. 34.

seal; and it is no objection that the seal of the corporation was not affixed thereto, when it appears that the power of attorney was under seal.³⁷ In an action for the conversion of personal property, to which the plaintiffs claim title under a mortgage from a corporation, the introduction of the mortgage upon which the signature and seal appear to be regular and proper, is sufficient to allow the jury to find that the mortgage is valid, that the corporation is duly established, and that the person signing the name of the corporation, had authority so to do; and these facts are sufficient, *prima facie* to establish the claim of the plaintiffs as to title, unless attacked.³⁸ Mortgages which have been executed, the money borrowed having been received and expended, are not affected by the invalid purpose for which they were made.³⁹

Power to give a mortgage to secure future advances.—A mortgage for future advances, was valid at common law, and is held valid throughout the United States, where not forbidden by local law.⁴⁰

§ 847. Power to mortgage or sell franchise denied.—A corporation created for a public purpose, such as constructing, owning and managing a railroad for the accommodation and benefit of the public, can not, without distinct legislative authority, make any alienation, absolute or conditional, either of the primary franchises to be a corporation, or of the subordinate franchise to manage and carry on its corporate business, without which its franchise to be a corporation, can have little more than a nominal value.⁴¹ And authority to a railroad company to mort-

³⁷ First Nat. Bank v. Salem Capital Flour-Mills Co. (1889), 39 Fed. Rep. 89.

³⁸ Hamilton v. McLaughlin, 145 Mass. 20 (1887).

³⁹ Wright v. Hughes (1889), 119 Ind. 324. Where a turnpike company issued bonds, secured by a mortgage on its road, for money borrowed to extend and complete its road, stockholders who have acquiesced therein until the money was expended cannot be heard to complain for the first time, upon suit to foreclose the mortgage, that the bonds were unauthorized and *ultra vires*. Browning v. Mullins (Ky. 1890), 13 S. W. Rep. 427.

⁴⁰ Jones v. Guarantee Co., 101 U. S. 622 (1879); Commonwealth v. Smith (1865), 10 Allen, 448.

⁴¹ Richardson v. Sibley (1865), 11 Allen, 66, 87 Am. Dec. 700, citing Shrewsbury, etc. R. Co. v. London, etc. R. Co., 6 H. L. Cas. 136; York, etc. R. Co. v. Winans, 17 How. 39; Pierce v. Emery, 32 N. H. 504; Hall v. Sullivan R. Co., 21 Law Reporter, 140; Worcester v. Western R. Co., 4 Metc. 566; Commonwealth v. Smith (1865), 10 Allen, 455, 87 Am. Dec. 672. In the last case cited the court said: "But in the case of a railroad company created for the express and sole purpose of constructing, owning and managing a railroad;

gage its road, income and other property, does not authorize a mortgage of its franchises.⁴² So, in the case of a gold-mining company, it has been held that, as a corporation could not mortgage its franchises, a mortgage, purporting to do so, was so far inoperative.⁴³ Where the charter expressly empowers a corporation to mortgage or otherwise transfer its franchises and tangible property, the "transfer," as to franchises, is used figuratively. The franchises, being mere privileges conferred by law, are not transferable, like a piece of property, and in the nature of things, are not subject to levy and sale under execution.⁴⁴

§ 848. Effect of transfer of all the property and franchises.

—"The real transaction in all such cases of transfer, sale, or conveyance, in legal effect is nothing more or less, and nothing other, than a surrender or abandonment of the old charter, by the mis-called transferees or purchasers. To look upon it in any other

authorized to take the land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the legislature; there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body without authority other than that decreed from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body, of its own will. Such a franchise is not in its own nature transmissible. The power to mortgage can only be co-extensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure, and although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs es-

entially from mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company cannot make a new railroad at its pleasure." *Stewart's Appeal* (1867), 56 Pa. St. 413; *Atkinson v. Marietta, etc. R. Co.* (1864), 15 Ohio St. 21; *Coe v. Columbus, etc. R. Co.* (1859), 10 Ohio St. 372. The case of *Kenebec, etc. R. Co. v. Portland, etc. R. Co.* (1871), 59 Me. 9, is directly to the contrary.

⁴² *Bullan v. Cincinnati, etc. R. Co.*, 4 Biss. 35. But a general law may authorize the purchasers of the property of a railroad to acquire its franchise also by deed. *State v. Sherman* (1872), 22 Ohio St. 411.

⁴³ *Carpenter v. Black Hawk, etc. Co.* (1875), 65 N. Y. 50.

⁴⁴ *Gue v. Tide Water Canal Co.*, 24 How. 257.

light, and to regard the transaction as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure of speech. The vital part of the transaction, and that without which it would be a nullity, is the law under which the transfer is made. The statute, authorizing the transfer and declaring its effect, is the grant of a new charter, couched in few words, and to take effect upon condition of the surrender or abandonment of the old charter; and the deed of the transfer is to be regarded as mere evidence of the surrender or abandonment."⁴⁵ Authority to sell or mortgage the "property and franchises" of a corporation, does not imply the power to sell or mortgage the primary franchise of being a corporation.⁴⁶ In order to acquire the corporate property and secondary franchises, it is not necessary that the purchaser should be a corporation. "The franchise, of being a corporation, need not be implied as necessary to secure the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such, and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad, could as well be exercised by natural persons."⁴⁷

G.

POWER TO BORROW OR LEND MONEY.

§ 849. **Power to borrow money.**—The power to purchase property, and thereby, or in other ways, to incur a debt, implies the power in the corporation to borrow money. "Having the power to acquire and hold personal and real estate, by purchase, it has as an incident, the power to borrow money to make the purchase. The exercise of such power may be advantageous and useful, enabling the corporation the sooner to put its powers into active exercise, and to acquire the necessary property, on terms more profitable to its stockholders. It would scarcely be affirmed that the power to acquire and hold real and personal estate, must be so narrowed that the corporation could not contract a debt for

⁴⁵ By Chief Justice Welch, in *State v. Sherman*, 22 Ohio St. 411.

⁴⁶ *Cook v. Detroit, etc. R. Co.*, 43 Mich. 349; *Eldridge v. Smith*, 34

Vt. 484; *Coe v. Col. etc. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

⁴⁷ Mr. Justice Matthews, in *Memphis, etc. R. Co. v. Railroad Co.*, 112 U. S. 609.

its purchase—that at the very moment of the purchase and conveyance, the purchase money must be counted out, or the purchase and conveyance is void. If the necessities and interests of the corporation require it, which must be determined by those having charge of its affairs, and intrusted with the power and duty,—that a debt be contracted in the acquisition of the necessary property, the power to contract it can not be denied. If more advantageous to borrow the money, and make immediate payment, than to contract the debt for the purchase money with the vendor, the contract is equally within the scope of corporate power, and valid. The authorities, we think, support the proposition that every private corporation, unless prohibited, may borrow money to carry out the purposes of its creation.”⁴⁸ The idea of borrowing is not filled out, unless there is in the agreement therefor a promise or understanding, that what is borrowed will be re-paid or returned, the thing itself, or something like it of equal value, with or without compensation, for the use of it in the meantime. To borrow is the reciprocal action with to lend or to loan.⁴⁹ The weight of modern authority supports the conclusion that private corporations, organized for pecuniary profit, may, like individuals, borrow money whenever the nature of their business renders it proper or expedient that they should do so. And where there are no special restraints in their charters, they take the power as natural persons enjoy it, with all its incidents and accessories; they may borrow money to attain their legitimate objects, precisely as an individual, and bind themselves by any form of obligation not forbidden.⁵⁰ A railroad company has the right, by virtue of

⁴⁸ Alabama, etc. Co. v. Central, etc. Co., 54 Ala. 73.

⁴⁹ Kent v. Quicksilver M. Co. (1879), 78 N. Y. 159.

⁵⁰ Wright v. Hughes (1889), 119 Ind. 528, citing New England, etc. Ins. Co. v. Robinson, 25 Ind. 536; Jones v. Guaranty, etc. Co., 101 U. S. 622; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Booth v. Robinson, 55 Md. 419; Hays v. Galion Gas Light Co., 29 Ohio St. 330; Memphis, etc. R. Co. v. Dow, 19 Fed. Rep. 388; Green's Brice's Ultra Vires, 223; 1 Morawetz, Corp., §§ 342, 343. In the principle case the money was borrowed

in furtherance of a plan to wind up the affairs of a life insurance company by buying up the outstanding policies, and after all the borrowed money had been used many policies were left outstanding with almost no assets to take them up. This plan of buying up the policies was inaugurated for the purpose of changing the business of the company to that of accident insurance, and it was held that the legality of that scheme did not help the outstanding policy holders in their attack upon the securities for the loan.

its powers, and without direct authority being given it in its charter, to borrow money and issue obligations therefor.⁵¹ Where, however, a corporation is authorized to incur indebtedness to a specified amount, borrowing in excess of that amount, is unauthorized.⁵² And it is so, in the case of a corporation borrowing a sum of money less than the amount authorized by its charter, but which, added to amounts previously borrowed, makes the total amount of indebtedness greater than that it is authorized to contract.⁵³ Under an act incorporating a railway company, and providing that the company "shall have the power and authority to borrow money in any sum or sums not exceeding in amount one-half of the par value of the capital stock," the par value of the capital stock is the amount of paid-up capital only, and not the

⁵¹ Philadelphia, etc. R. Co. v. Stichter (1882), 21 Am. L. Reg. 713. In this case where a railroad company, without any direct authority by the terms of its charter to borrow money, proposed to raise funds by issuing irredeemable bonds at a large discount which were not entitled to interest until after the common stock had received a dividend of six per cent., were then to take all revenues up to six per cent., and were then to rank *pari passu* with the common shares for further dividends, it was held that the right to issue such bonds was within the implied powers of the corporation. Adelbert Hamilton in his note to this case, 21 Am. L. Reg. 720, to the power generally to borrow money, cites the following cases: Beers v. Phoenix Glass Co., 14 Barb. 358; Partridge v. Badger, 25 Barb. 358; Clark v. Titcomb, 42 Barb. 122; Commissioners v. Atlantic & N. C. R. Co., 77 N. C. 289; Tucker v. City of Raleigh, 75 N. C. 267; Barry v. Merchants' Exchange Bank, 1 Sandf. Ch. 294; Barnes v. Ontario Bank, 19 N. Y. 152; Smith v. Law, 21 N. Y. 296; Nelson v. Eaton, 26 N. Y. 410; Bradley v. Ballard, 55 Ill. 413; Lucas v. Pitney, 27 N. J. L. 221;

Mobile, etc. R. Co. v. Talman, 15 Ala. 474; Moss v. Harpeth Acad., 7 Heisk. 283; Oxford Iron Co. v. Spradley, 46 Ala. 98; Ala. etc. Co. v. Cent. etc. Assn., 54 Ala. 73; Bank of Chillicothe v. Chillicothe, 70 Ohio, 415; Ridgway v. Farmers' Bank, 12 S. & R. 256; Magee v. Mokelumme, etc. Co., 5 Cal. 258; Union M. Co. v. Rocky Mt. Bank, 2 Colo. 256; Hamilton v. New Castle, etc. R. Co., 9 Ind. 359; Rockwell v. Elkhorn Bank, 13 Wis. 653; Fay v. Noble, 12 Cush. 1; Commercial Bank v. Newport Manuf. Co., 1 B. Mon. 19; Holbrook v. Basset, 5 Bosw. 147; Furness v. Gilchrist, 1 Sandf. 67; Bank of Australasia, 6 Moo. P. C. 152, 193; Forbes v. Marshall, 24 L. J. Exch. 305; *In re* International, etc. Co., L. R. 10 Eq. Cas. 312; Australia, etc. Co. v. Mounsey, 4 K. & J. 733; *In re* German M. Co., 4 De G., M. & G. 19.

⁵² Pool v. West Point, etc. Assn., 30 Fed. Rep. 513; Warfield v. Marshall County, etc. Co., 72 Iowa, 666; Ossipee Manuf. Co. v. Canney, 52 N. H. 295; Auerbach v. Le Sueur Mill Co., 28 Minn. 291.

⁵³ Ossipee Manuf. Co. v. Canney, 52 N. H. 295; Auerbach v. Le Sueur Mill Co., 28 Minn. 291.

full amount of authorized capital.⁵⁴ Although a corporation has incurred an indebtedness greater than its authorized limit, the contract is binding upon it whenever it has actually received the money borrowed.⁵⁵ And extending the principle still further, where the directors of a corporation, acting in good faith, on the reports and representations of its authorized agents, borrow money for the purposes of the corporation, it is not necessary to show that the money, so borrowed, was actually appropriated to the use of the corporation, in order to establish an indebtedness against it, or a personal liability of its stockholders in favor of the lender of the money, or of the sureties who pay the loan.⁵⁶ Under an authority to borrow money, a railroad company has no right to raise money by the issue of irredeemable bonds, entitling the holder merely to a share of the earnings after payment of a certain dividend to the stockholders.⁵⁷ The issue of preferred stock is analogous to this deferred bond scheme and is likewise not within the borrowing power.⁵⁸

§ 850. **Power to lend money.**—In the absence of any express prohibition by charter or statute, a corporation has power to loan money, in any transaction consistent with any purpose of its creation, or to loan for the purpose of making its idle funds productive.⁵⁹ The principal purpose of moneyed corporations, such as banks, and loan and trust companies, is to loan money, but other corporations have no power to loan money as a business, or to make a loan of money, except when incident to the transaction of its authorized business. If the transaction is foreign to the corporate purpose, the loan is *ultra vires*.⁶⁰ A loan of money by a corporation is not necessarily *ultra vires*. And particularly it has been held not *ultra vires* for a trading corporation to lend money to one dealing with it, so as to enable the borrower to carry on the transactions.⁶¹ And, moreover, any

⁵⁴ Appeal of Lehigh Ave. Ry. Co. (1889), 129 Pa. St. 405, 7 Ry. & Corp. L. J. 42.

⁵⁵ Pool v. West Point, etc. Assn., 30 Fed. Rep. 513; Warfield v. Marshall County, etc. Co., 72 Iowa, 666.

⁵⁶ Borland v. Haven (1889), 37 Fed. Rep. 394.

⁵⁷ Taylor v. Philadelphia, etc. R. Co. (1881), 7 Fed. Rep. 386.

⁵⁸ Kent v. Quicksilver Min. Co., 78 N. Y. 159. But Burt v. Rattle, 31 Ohio St. 116, was different.

⁵⁹ Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Western, etc. Assn. v. Kribben, 48 Mo. 37; City of Baltimore v. Baltimore Ry. Co., 21 Md. 50. *Vide infra*, § 914, PROHIBITION OF LOANS TO OFFICERS.

⁶⁰ Barry v. Yates, 24 Barb. (N. Y.) 199; Bonn v. Terrell, etc. Manuf. Co., 82 Tex. 309.

⁶¹ Holmes v. Willard (1889), 53 Hun, 629. Judge Van Brunt here

corporation, public or private, has capacity, if not prohibited, to take a mortgage as security for a debt contracted in furtherance of the objects of its creation.⁶² But the private corporation, chartered by the name of the "State Grange of the Patrons of Husbandry of Alabama," has no express grant of power to lend money, and no such power can be implied from the declared purposes and objects for which its charter was granted; on the contrary, such power is excluded by the declaration that the corporation is not created for pecuniary profit.⁶³ Neither does a provision in the charter of a corporation, giving it a lien upon a stockholder's shares to secure any indebtedness from him to it, authorize the corporation to lend to the stockholder.⁶⁴ If a corporation has power "to hold, acquire and dispose of real and personal property for the uses and purposes of said corporation," it has power to acquire, by transfer, title to a note taken in the course of its business, and to sue upon the note.⁶⁵ So, under a statute giving a corporation power to discount non-negotiable notes, and to take, hold, and convey any property, real, personal, or mixed, it was held that it might take and hold city warrants.⁶⁶ And a corporation may take a mortgage, although unable to take the oath required by statute.⁶⁷ A corporation chartered to accumulate a fund, to be lent on real estate security or divided among its members, can lend money to its members and take deeds of trust on realty as security, and sell and assign such contracts of loans.⁶⁸ And generally, a mortgage to a life insurance company securing a note given in consideration of a loan of the company's funds, is valid.⁶⁹ A party who has given a mortgage to a corporation from

says: "We have not been referred to any authority or principle under which such a transaction can be held *ultra vires* of a corporation, particularly a trading corporation which has the right to exercise such mercantile powers as may be convenient and necessary for the successful transaction of its business, which clearly gives it the authority to extend mercantile facilities to the persons dealing with it, if in its judgment it thinks it for the benefit of its business so to do."

⁶² State v. Rice (1880), 65 Ala. 83.

⁶³ Chambers v. Falkner, 65 Ala. 448.

⁶⁴ Webster v. Howe Machine Co. (1887), 54 Conn. 394.

⁶⁵ Wayland University v. Boorman, 56 Wis. 657.

⁶⁶ Aull Savings Bank v. Lexington, 74 Mo. 104.

⁶⁷ Lincoln Savings Bank v. Ewing (1883), 12 Lea, 598.

⁶⁸ Detweiler v. Breckenkamp, 83 Mo. 45.

⁶⁹ Washington Bank v. Continental Life Ins. Co., 41 Ohio St. 1. Though the life insurance company's charter provided that its "capital stock and funds shall be

which he has received a loan, is estopped to deny, in a suit to foreclose, that it had authority to make the loan.⁷⁰ So, where the charter of a company provides that its surplus funds shall be invested in mortgages on real estate in New York, or in certain classes of bonds, it is not competent for one, who, in another State, has obtained a loan on personal security, or his surety, to set up in defense the want of power in the company to make the loan.⁷¹ And even where a trust company, under its charter, had authority to invest only in such securities as were authorized thereby, it was held that it might enforce payment of an unauthorized loan.⁷² Where, however, a director, while indebted to his bank for an amount greater than seventy-five per cent. of the stock held by him, obtained a loan for a further amount, giving his note therefor, guarantied by another person, the charter of the bank prohibiting its lending to a director more than seventy-five per cent. of the amount of his stock, it was held that the note was void, and could be enforced neither against the director nor the guarantor.⁷³ But a corporation, by its charter prohibited from lending money at a rate of interest exceeding the legal rate, may lend money in another State at a rate of interest which, although legal there, is higher than the legal rate in the State of its incorporation.⁷⁴

H.

POWER TO ISSUE NEGOTIABLE PAPER.

§ 851. **Power to make and issue promissory notes.**—Corporations created for business purposes, unless restrained by charter or by statute, have, as a necessary incident, the power of incurring debts in the course of their legitimate business, and of making negotiable paper in payment of such debts.⁷⁵ And this is so, also,

invested either in loans upon bonds and mortgages upon real estate. . . . or in loans upon . . . United States stocks and bonds."

⁷⁰ *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172.

⁷¹ *New York Mut. Life Ins. Co. v. Wilcox*, 8 Biss. C. Ct. 203.

⁷² *Davis Sewing Machine Co. v. Best*, 30 Hun (N. Y.), 638.

⁷³ *Workingmen's Banking Co. v. Rautenberg*, 103 Ill. 460, 42 Am.

Rep. 26; *Dickey and Craig, JJ.*, dissenting.

⁷⁴ *United States Mortgage Co. v. Speery*, 24 Fed. Rep. 838. *Cf. Reiff v. Bakken*, 36 Minn. 333, and *Gamble v. Central R. & B. Co. of Georgia* (1888), 80 Ga. 595, 12 Am. St. Rep. 276, 280, as to foreign usury laws.

⁷⁵ *Monument Nat. Bank v. Globe Works*, 101 Mass. 58, 3 Am. Rep. 322; *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192;

in the case of *quasi*-corporation having special duties to perform in behalf of the public, as railroads, gas companies, etc.⁷⁶ But it is held otherwise in England and in Canada, where such implied power is limited to trading corporations, and all others are there held to require express power to issue or indorse negotiable paper.⁷⁷ Authority in a company's charter to "borrow money and issue its bonds therefor" imports power to make negotiable or non-negotiable paper, and give such securities as may be deemed most advantageous.⁷⁸ "No question is better settled upon authority, than that a corporation, not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note payable either at a future day, or upon demand, when such note is given for any of the legitimate purposes for which the company was incorporated."⁷⁹ "When a corporation can lawfully purchase property or procure money on loan, in the course of its business, the seller or the lender may exact, and the purchaser or borrower must have the power to give, any known assurance which does not fall within the prohibition, express or implied, of some statute. The particular restriction must be sought for in the charter of the corporation, or in some other statute binding upon it; but if not found in that examination, we may safely affirm that it has no existence."⁸⁰ So, likewise, an acceptance of a bill by a corporation binds it, although the bill was drawn on an officer of the corporation.⁸¹ An acceptance of an order by the New England Car Trust, to pay money already provided for by a contract with the company, does not come within the article of the articles of association of the car trust, providing that, in order to bind the company, all contracts involving liabilities for the payment of money shall be in writing, and signed by at least three members

Morville v. American Tract Soc., 123 Mass. 136, 25 Am. Rep. 40; Merchants' Nat. Bank, etc. v. Citizens, etc. Co., 159 Mass. 505, 38 Am. St. Rep. 453; Richmond, etc. Co. v. Snead, 19 Grat. (Va.) 354, 100 Am. Dec. 670; Fifth Ward Sav. Bank v. First Nat. Bank (1887), 48 N. J. 513.

⁷⁶ Kneeland v. Braintree, etc. Co., 167 Mass. 161; Merchants', etc. Bank v. Citizens' Gas Light Co. etc., 159 Mass. 505, 38 Am. St. Rep. 453; Ward v. Johnson, 95 Ill. 215;

Sparks v. Despatch, etc. Co., 104 Mo. 531, 24 Am. St. Rep. 351; Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192.

⁷⁷ Bateman v. Mid-wales Ry. Co., L. R. 1 C. P. 512; Gilbert v. McAnnany, 28 Upper Can. Q. B. 384.

⁷⁸ Talladega Ins. Co. v. Peacock, 67 Ala. 253.

⁷⁹ Moss v. Averell, 10 N. Y. 449.
⁸⁰ Judge Comstock in Curtis v. Leavitt, 15 N. Y. 66.

⁸¹ Louisville, Evansville, etc. Co. v. Caldwell, 98 Ind. 245.

of the board of managers.⁸² The form of corporate notes is governed by strict rules more fully set forth in works on commercial paper. In a case in Massachusetts, a promissory note, containing the words "we promise to pay," signed, "John Roach, Treasurer," and stamped with a circular corporate seal, the circumference of which passes through the words "Roach" and "Treasurer," containing the name of the corporation printed in a circle near its outer edge, and the words, "Incorporated, 1884," in the center, the seal being in the usual place of signature, and the name being to the left, and below its center, was held to be the note of the corporation.⁸³ A seal pasted on a corporation's note does not render it non-negotiable, unless authorized by the vote of the corporation and placed thereon by the proper officer, the note purporting to be under seal.⁸⁴ Where a note was signed by one who, the evidence tended to show, was defendant's secretary, and was impressed with a stamp which appeared to have been used as the seal of the company, and there was evidence that plaintiff had advanced to defendant the amount for which the note was given, a finding that defendant had executed the note in consideration of money lent to it, was not disturbed.⁸⁵ If a religious corporation can give a note, it can do so only by authority of those in whom the management of its affairs is vested, *acting as a board*. A majority of them signing separately, do not bind the corporation.⁸⁶ If, however, a corporation has power to make a note for any purpose, it can not, as against a *bona fide* holder, set up that it had no power to make the particular note in question.⁸⁷ Therefore, when a corporation has power, under any circumstances, to issue negotiable paper, a *bona fide* holder has a right to presume that it was issued under circumstances which gave the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.⁸⁸ A private corporation, authorized to issue negotiable paper, is bound by its note in

⁸² French Spiral Spring Co. v. New England Car Trust (1887), 32 Fed. Rep. 44.

⁸³ Miller v. Roach (1889), 150 Mass. 146.

⁸⁴ Mackay v. St. Mary's Church (1885), 15 R. I. 121; 2 Amer. St. Rep. 881.

⁸⁵ Jansen v. Otta Stietz, etc. Co. (1888), 1 N. Y. Supp. 605.

⁸⁶ People's Bank v. St. Anthony's, etc. Church, 39 Hun, 498.

⁸⁷ Lehigh Valley Coal Co. v. West Depere Agricultural Works, 63 Wis. 45.

⁸⁸ National Bank of Republic v. Young (1887), 41 N. J. Eq. 531.

the hands of an innocent holder for value, although in executing it, the corporation exceeded the amount of indebtedness, which it was authorized to incur.⁸⁹ Under the statute providing that the amount for which any one individual or firm shall be indebted to a national bank, shall not exceed a certain sum, when such a bank violates the provision, by lending to one person an amount in excess of the limit, such person can not set up the violation of the statute as a defense to his liability on the note. If a penalty is to be enforced against the bank, it can be done only at the instance of the government. A contract entered into by the bank in violation of this law, is not void.⁹⁰ Where the law provides that the articles of incorporation shall be recorded, the courts will presume that this was done, and will not permit a surety on the note of a corporation to testify that he understood the company to be a partnership, and that the manager was liable as a member of it.⁹¹ Persons dealing in the commercial paper of a corporation, are bound to take notice of the extent of its powers.⁹² The power is implied only when it is necessary, in furtherance of the objects and purposes of the corporation.⁹³ It has no power to endorse negotiable paper, for any purpose foreign to the authorized objects of the corporate creation.⁹⁴

§ 852. Power to make accommodation paper.—The general rule is that the accommodation and indorsement, or guarantee of the corporation, is *ultra vires* and non-enforceable;⁹⁵ but the theory, that a corporation has only such powers as are expressly granted, or necessarily implied, is no longer applied to a strictly private corporation. Where its business is private, and it is solvent, a private corporation, with the assent of all the shareholders, may become accommodation indorser of negotiable paper.⁹⁶ A

⁸⁹ Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285.

⁹⁰ Wyman v. Citizens' Nat. Bank (1887), 29 Fed. Rep. 734; U. S. Rev. Stat., § 5200.

⁹¹ Bank of Monroe v. Gifford (1887), 72 Iowa, 750.

⁹² Credit Co. Limited v. Howe Machine Co. (1887), 54 Conn. 357, 1 Am. St. 123.

⁹³ Police Jury v. Britton, 15 Wall. (U. S.) 566.

⁹⁴ People v. River Raisin, etc. Co., 12 Mich. 389, 86 Am. Dec. 64;

Pearce v. Madison, etc. R. Co., 21 How. (U. S.) 441.

⁹⁵ Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Hall v. Auburn, etc. Co., 27 Cal. 255, 87 Am. Dec. 75; Park Hotel Co. v. Fourth Nat. Bank (1898), 86 Fed. 742; Preston v. Northwestern, etc. Co. (Neb. 1903), 93 N. W. 136; Sturdevant v. Farmers' Bank (1901), 62 Neb. 472, 87 N. W. 156.

⁹⁶ Martin v. Niagara Falls, etc. Co. (1890), 122 N. Y. 165; Murphy v. Arkansas, etc. Co. (1899),

corporation created for the purpose of carrying on a manufacturing business, has implied power to make negotiable paper for use, within the scope of its business, but no power to become a party to bills or notes for the accommodation of others.⁹⁷ So, therefore, a private manufacturing corporation has no power to accept drafts for the accommodation of its stockholders or others. The consent of the stockholders or directors can not confer such power; and a previous course of dealing of the corporation, will not enable the holder of such a draft to recover on it, against the corporation, if he is not a holder for value, as well as in good faith, without notice that the acceptance was an accommodation acceptance.⁹⁸ And, generally, no corporation can, in the absence of any general or special law conferring such power, bind itself by indorsing promissory notes for accommodation of the maker, for a consideration paid.⁹⁹ Accordingly, an insurance company has no power to indorse accommodation paper for a third party.¹ So, likewise, the officers of a transfer company, whose articles of incorporation empower it "to engage in the general freight and transfer business, and such other business as may not be inconsistent therewith," have no implied power to sign its name to a contract of suretyship for the purpose of guarantying the credit of a third party, nor have they power subsequently, to sign a letter purporting to assume the payment of the amount stipulated in such contract. Both instruments are illegal as to such corporation; and, being *ultra vires*, it can not be held liable upon them.² But a corporation having express or implied power to

97 Fed. 723; *Steiner v. Steiner, etc. Co.* (1898), 120 Ala. 128, 26 South. 494.

97 National Bank of Republic v. Young (1887), 41 N. J. Eq. 531.

98 National Park Bank, etc. v. German-American, etc. Co., 116 N. Y. 281; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Webster v. Howe Machine Co.* (1887), 54 Conn. 394.

99 *Holmes, etc. v. Willard*, 125 N. Y. 675.

¹ *National Park Bank v. German-American Mutual Warehousing & Security Co.* (1889), 116 N. Y. 281, 22 N. E. Rep. 567.

² In *assumpsit* by a bank against a life insurance company, on its

indorsement of a note, it appeared that the company was chartered with no unusual powers; that the note, indorsed in its name by W., its president, was that of a railroad company of which he was also president, and to the credit of which the proceeds were put on his procuring the note discounted at the bank; that W. had, with the assent of the directors of the insurance company, been the manager of its finances, and had signed and indorsed its paper to a large amount as its president; but it did not appear that he had made any use of the company's name, with the knowledge of the directors, which they considered

become guarantor for another corporation, may issue or indorse paper for its benefit, for in such case it is not mere accommodation paper.³ Accommodation acceptance by an officer of a manufacturing corporation on behalf of the company, where the consideration is afterward advanced upon the faith of the acceptance, will bind the corporation. If the corporation is authorized to give promissory notes for any purpose, it is responsible to a *bona fide* indorsee of such paper, regardless of the purpose for which it was given; but if the corporation is prohibited by its charter from issuing negotiable paper, it is voidable in the hands of any indorsee, as well as in those of the original holder.⁴ A manager can not, generally, accept bills and bind his company. But where the treasurer of a corporation has, for a number of years, with the knowledge and consent of his principal, signed and indorsed business paper in its name, the corporation is estopped to deny the treasurer's authority to indorse an accommodation note to a purchaser for value, who relied upon these transactions as evidence of his authority.⁵ And in an action on an accommodation note indorsed to plaintiff by defendant's treasurer, evidence that at the time of the indorsement, plaintiff was told that it was the defendant's regular indorsement, is admissible to show plaintiff's

as binding thereon, except where it was understood that the company received the proceeds or the direct benefit, and it was held that the insurance company had no power to indorse an accommodation note for a third party; and even if it had, the facts gave W., as its president, no implied authority to sign its name for such purpose. *Ætna Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *Lucas v. White Line Transf. Co.* (1887), 70 Iowa, 541.

³ *Zabriskie v. Cleveland, etc. R. Co.*, 23 How. (U. S.) 381; *Connecticut, etc. Co. v. Cleveland, etc. Co.*, 41 Barb. (N. Y.) 10; *Gans v. Carter*, 77 Md. 213; *Holmes v. Willard*, 125 N. Y. 75. In *assumpsit* against a corporation, on acceptances by J., as manager of defendant, there was evidence that J. was an employee merely, without express authority to sign or accept

paper; that he was a stockholder in the corporation which drew the acceptances sued on; that a memorandum of the maturity of the drafts was, under J.'s directions, entered on the books of defendant, but that the directors had no knowledge of the memorandum or acceptances; that J. drew notes at a bank to meet expenses of defendant; that the acceptances sued on were for the accommodation of the drawer. It was held that defendant was not bound by such acceptances. *Merchants' Nat. Bank v. Detroit, etc. Works* (1888), 68 Mich. 620.

⁴ *Monument Nat. Bank v. Globe Works* (1869), 101 Mass. 57, 3 Am. Rep. 322; *National Park Bank v. German Am. Co.*, 116 N. Y. 281.

⁵ *Second Nat. Bank v. Pottier, etc. Co.* (1888), 56 N. Y. Super. Ct. Rep. 216.

knowledge of the agent's apparent authority to indorse.⁶ And, where also a note was executed by defendant's president, in his own favor, for the accommodation of the company, by him discounted, and the proceeds used for defendant's benefit, defendant having retained the benefit of the transaction, was estopped to deny, as against the administratrix of the president, who had paid the note, the authority of the president to execute it.⁷ Although from the form of a transaction, it appeared that an individual was a principal debtor, and a corporation only a surety, yet, the fact being otherwise, and the corporation the principal debtor, it was held that the pledge or appropriation of its bonds upon the debt was not *ultra vires*, but within its powers.⁸ Finally, it is stated to be a general doctrine of the law, that, where a corporation has power, under any circumstances, to issue negotiable paper, a *bona fide* holder has a right to presume that it is issued under circumstances which give the requisite authority, and the doctrine is applied to commercial paper made by a corporation, for the accommodation of a third person, when in the hands of a *bona fide* holder who has discounted it before maturity, on the faith of its being business paper.⁹

§ 853. **Power to become surety or guarantor.**—When foreign to the objects for which the corporation was created, a corporation has no power to become surety or guarantor for another corporation, or for a natural person, and thereby risk the corporate funds in a different enterprise from that authorized in its charter;¹⁰ but the power exists expressly in the case of surety and guaranty companies, incorporated for such express purpose.¹¹ The implied power exists without express authority, when it is necessary, in furtherance of the business of the corporation.¹²

§ 854. **Power to make and issue bonds.**—The power to execute and issue bonds in payment or as security for corporate debts,

⁶ Second Nat. Bank v. Pottier, etc. Co. (1888), 56 N. Y. Super. Ct. Rep. 216.

⁷ Tuscaloosa, etc. Co. v. Perry (1888), 85 Ala. 158.

⁸ Baxter v. Washburn, 8 Lea, 1.

⁹ National Bank v. Young, 5 Cent. Rep. 113 (N. J.), citing Bird v. Daggett, 97 Mass. 494; Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Mechanics' Bank Assn. v. Whitehead Co., 35 N. Y. 505.

¹⁰ Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26; Lucas v. White, etc. Co., 70 Iowa, 541, 58 Am. Rep. 449; Humboldt Min. Co. v. American, etc. Co., 62 Fed. 356.

¹¹ Gans v. Carter, 77 Md. 1; Gutzeit v. Pennie, 95 Cal. 598.

¹² Green Bay, etc. Co. v. Union Steamboat Co., 107 U. S. 98; Low v. Cal. Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629.

is incident to the power to purchase property, borrow money, and contract debts. "This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal. But there is nothing immoral or contrary to public policy in making them negotiable, if the necessity of commerce require that they should be so. A mere technical dogma of the courts of common law, cannot prohibit the commercial world from inventing or using any species of security, not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world, is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer, and gives a bond with negotiable qualities, and by this means obtain funds for the accomplishment of the useful enterprises of the day, it can not be allowed to evade the payment, by parading some obsolete judicial decision, that a bond, for some technical reason, can not be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanction of judicial recognition, not only in this court, but of nearly every State in the Union, is well known, and admitted."¹³

I.

POWER TO HOLD THE STOCK OF OTHER CORPORATIONS.

§ 855. **Power to take stock in another corporation.**—As a general rule, a private corporation can not subscribe to the stock of another corporation, the business of which is entirely different from its own.¹⁴ In the United States the weight of judicial authority, State and federal, denies the power of a corporation to subscribe for, or purchase or deal in the stock of another corpora-

¹³ Mr. Justice Grier, in *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *Commonwealth v. Smith*, 10 Allen (Mass.), 448, 87 Am. Dec. 672.

¹⁴ *Talmage v. Pell*, 7 N. Y. 328; *Franklin Co. v. Lewiston Bank*, 68

Me. 43; *Mechanics' Bank v. Meridian Agency*, 24 Conn. 159; *Beach on Railways*, § 80. In Pennsylvania corporations are forbidden by statute to use their funds in the purchase of any stock in other corporations, or to hold the same,

tion, directly, or through an agent or trustee,¹⁵ except where the power is expressly granted by charter or statute, or is necessary as a means to the accomplishment of its authorized purposes.¹⁶ If one corporation were free to subscribe for, or purchase shares in another corporation, as an Ohio court expresses it, "It could take the entire management of the other's business, by buying up a majority of its shares, and however foreign such business might be to that which the corporation, so purchasing said shares, was created to carry on. A banking corporation could become an operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining the control of the stock of the bank."¹⁷ As in that case, the rule is often based upon the ground that such subscription or purchase is foreign to the objects of the creation of the corporation, but the like rule is applied where the character or purposes of the corporations are the same, or similar, as in the purchase of shares in a railroad company by another, or in an insurance company by another, etc.¹⁸ A purchase by a corporation, of stock in another corporation, is not, however, necessarily void.¹⁹ Of course, when the power is expressly granted by charter or statute, a corporation

except as collateral security for a prior indebtedness. 1 Brightley's Pa. Digest, 343, § 30. And similar statutes are to be found in other states. Tenn. Code (1884), § 2496; Ind. Rev. Stat. (1881), § 3858; Colo. Gen. Stat. (1883), p. 183, § 10, and p. 189, § 35.

¹⁵ Central Ry. Co. v. Pennsylvania Ry. Co., 31 N. J. Eq. 475; Nassau Bank v. Jones, 95 N. Y. 115; *Vide infra*, §§ 937-939, TRUSTS AND MONOPOLIES, and *infra*, § 704f, "Holding corporations." One corporation holding and voting the stock of another. *Vide infra*, § 1053, power of railroad corporations to acquire stock in other railroad companies.

¹⁶ California Bank v. Kennedy, 167 U. S. 362; First Nat. Bank, etc. v. National, etc. Bank, 92 U. S. 122; Franklin Co. v. Lewiston, etc., 68 Me. 43, 2 Am. Rep. 9.

¹⁷ Franklin Bank, etc. v. Commercial Bank, etc., 36 Ohio St. —, 38 Am. Rep. 594.

¹⁸ People v. Chicago, etc. Co.,

130 Ill. 268, 17 Am. St. Rep. 319; Franklin Bank, etc. v. Commercial Bank, etc., 36 Ohio St. 350, 38 Am. Rep. 594; Buckeye, etc. Co. v. Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71.

¹⁹ Hill v. Nisbet (1884), 100 Ind. 341. Whether the purchase of stock in one corporation by another is *ultra vires* or not must depend upon the purpose for which the purchase was made, and whether such purchase was, under all the circumstances, a necessary or reasonable means of carrying out the object for which the corporation was created, or one which under the statute it might accomplish. It must be said at once, that where the purchase of stock in one corporation by another amounts to an engaging in a business other than that authorized by its charter, such purchase is *ultra vires*, and this is so, not because the purchase is stock, but because the business is outside the scope of its charter."

may acquire stock in another;²⁰ and it may do so, without express authority, when such acquirement of stock is necessary, as a means to the accomplishment of the purposes of the corporate creation.²¹ There is a presumption that the purchase of the stock of another company was necessary to the purposes of the corporation purchasing.²² And there is no presumption that a corporation is incapable of purchasing and holding shares of the stock of another corporation, it not appearing under what circumstances it was acquired or held.²³ A corporation may invest in the stock of other corporations, as well as in any other funds, provided it be done *bona fide*, and with no sinister or unlawful purpose, and there be nothing in its charter, or in the nature of its business, that forbids it.²⁴ "Whether the purchase of stock in one corporation by another is *ultra vires* or not, must depend upon the purpose for which the purchase was made, and whether such purchase was, under all the circumstances, a necessary or reasonable means of carrying out the object for which the corporation was created, or one which, under the statute, it might accomplish."²⁵ As, where a railroad is authorized to acquire the property and franchises of another, it may do so by purchase of its stock.²⁶ And where the objects for which a corporation was created, requires it to invest funds, it may, in the absence of restriction, invest them in the stock of other corporations;²⁷ but even when it is authorized to hold shares in other corporations, by investment, or in payment of debt, or as security for a loan, it may not, as a business, deal in the shares of other corporations.²⁸ A corporation may sell a

²⁰ Market St. Ry. Co. v. Hellman, 109 Cal. 571; Oelburman v. New York, etc. Ry. Co., 27 Hun (N. Y.), 332; Zabriskie v. Cleveland, etc. Ry. Co., 23 How. (U. S.) 381; California Bank v. Kennedy, 167 U. S. 262; First Nat. Bank, etc. v. National Exch. Bank, etc., 92 U. S. 122.

²¹ Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; Buckeye, etc. Co. v. High, 92 Tenn. 115, 36 Am. St. Rep. 71; People v. Chicago, etc., 130 Ill. 268; Compagnie Francaise v. Western Union Tel. Co., 11 Fed. 862.

²² Ryan v. Leavenworth, 21 Kan. 365; Evans v. Bailey, 66 Cal. 112;

In re Rochester Ry. Co., 110 N. Y. 119.

²³ Evans v. Bailey (1884), 66 Cal. 112.

²⁴ Booth v. Robinson, 55 Md. 419.

²⁵ Hill v. Nesbit, 100 Ind. 341; Dewey v. Toledo, etc. Ry. Co., 91 Mich. 351; Atchison, etc. R. Co. v. Cochran, 43 Kan. 225, 19 Am. St. Rep. 129.

²⁶ Todd v. Kentucky, etc. Co., 57 Fed. 47; Hodges v. New England, etc. Co., 1 R. I. 347, 53 Am. Dec. 624.

²⁷ *In re Asiatic Banking Corp.*, 4 Ch. App. 252.

²⁸ Holmes, etc. Manuf. Co. v. Holmes, etc. Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448.

part of its property for stock in another, with *bona fide* intention to sell it, and convert it into money,²⁹ but it can not sell and transfer all its property to another corporation, for stock therein, with purpose to continue its own corporate life therein.³⁰ In such a case, the court said: "There was to be a corporation within a corporation. Individual activity was to cease, but corporate energy was to be exercised through a living corporation, whose life and functions were to be controlled through the shares held by its corporate creator and master. Forbidden to exercise the very functions for which the breath of corporate life had been breathed into it by the State, there would remain standing only the shell of a corporation, retaining corporate existence only for the purpose of controlling and directing the new corporation, in which was vested its corporate capital, and to receive and distribute its aliquot proportion of those earnings as dividends among its own shareholders. The effect of this action of the appellee, was to divest itself of the power to exercise the essential and vital elements of its franchise, by a renunciation of the right to engage, directly and individually, in the very business which it was organized to carry on, and is a disregard of the conditions upon which corporate existence was conferred. The State is presumed to grant corporate franchises in the public interest, and to intend that they shall be exercised through the proper officers and agencies of the corporation, and does not contemplate that corporate powers will be delegated to others. Any conduct which destroys their functions, or maims, or cripples their separate activity, by taking away the right, freely and independently to exercise the function of their franchise, is contrary to a sound public policy."³¹ The weight of authority holds, that one private corporation may exchange all its property for the stock of another corporation, to be divided among its own stockholders, but only in the event that they all consent thereto.³² "Not only is the purchase of stock in another company beyond the power of a railroad corporation, in the absence of an express stipulation in the charter, but the purchase of such stock in a rival and competing line, is held to be contrary to public policy, and void."³³ Generally, a corporation

²⁹ *People v. Ballard*, 134 N. Y. 269; *McCutcheon v. Merz Capsule Co.*, 37 U. S. App. 586, 71 Fed. 787.

³⁰ *Taylor v. Earle*, 8 Hun (N. Y.), 1; *Frothingham v. Barney*, 6 Hun (N. Y.), 366.

³¹ *McCutcheon v. Merz Capsule Co.*, 37 U. S. App. 586, 71 Fed. 787.

³² *Mason v. Pewabic Min. Co.* (1890), 133 U. S. 50.

³³ *Louisville, etc. R. R. v. Kentucky* (1896), 161 U. S. 677.

has no implied power to purchase capital stock in another corporation, and as to railroad companies, it is settled that one company can not purchase shares in another.³⁴ A corporation may invest its surplus funds in whatever securities it may deem best, but without express authority it may not invest in the stock of another corporation, with purpose of controlling its management,³⁵ or of holding the stock permanently.³⁶ Members of corporations have no such absolute right to transfer their shares, as entitles shareholders of a railway company to sell their stock to another railroad company, in defiance of an injunction granted to prevent the other railroad from obtaining control thereof, contrary to the provisions of a State constitution, forbidding the control of one railway by another, parallel and competing.³⁷ The power of corporations to buy the shares of other companies, depends upon the principles heretofore treated in connection with subscriptions to stock by artificial persons.³⁸ Whether under the circumstances of a case, a company had or did not have power to buy the stock of another, a shareholder in the latter can not, after having been guilty of laches, raise the question, and object to the transaction, as beyond the powers of the former.³⁹ A solvent corporation, in the absence of legislative provision to the contrary, may purchase, hold and re-sell its own shares, and take or give them in pledge or mortgage, provided these transactions be in entire good faith, the exchanges being of equal value, free from all fraud, actual or constructive.⁴⁰ A corporation may acquire

³⁴ *Central R. R. v. Collins* (1869), 40 Ga. 582.

³⁵ *De la Vergne, etc. Co. v. German, etc. Inst.* (1899), 175 U. S. 40.

³⁶ *Byrne v. Schuyler* (1895), 65 Conn. 336, 28 L. R. A. 304.

³⁷ *Pennsylvania R. Co. v. Commonwealth* (1887), 116 Pa. St. 65. *Cf.* Pa. Const., art. xvii, § 4.

³⁸ *Supra*, § 220.

³⁹ *Alexander v. Searcy* (1889), 81 Ga. 536, 12 Am. St. Rep. 337, holding that where notice of purchases of stock of a corporation is given to the directors and stockholders, and the purchaser regularly votes the stock, and expends large sums for the benefit of the corporation under resolution of the stockholders, the minority

stockholders cannot complain, seven to fifteen years after the several purchases were made, that the purchaser, being the majority stockholder, has procured the mismanagement of the corporation, nor that, being a corporation, it had no power under its charter to make the purchases.

⁴⁰ *First National Bank of Salem v. Salem Capital Flour Mills Co.* (1889), 39 Fed. Rep. 89, 6 Ry. & Corp. L. J. 209, 212; *Bank v. Bruce*, 17 N. Y. 510; *Taylor v. Exporting Co.*, 6 Ohio, 176; *In re Insurance Co.*, 3 Biss. 542; *Bank v. Transportation Co.*, 18 Vt. 138; *Clapp v. Peterson*, 104 Ill. 26; *Dupee v. Water Power Co.*, 114 Mass. 37.

stock in another, in collection and payment of a previously contracted debt;⁴¹ and whether previously contracted or not, if the *bona fide* purpose be to sell the stock and not to hold it.⁴² A prohibition against holding or dealing in stock of another corporation, does not prevent such acquirement of stock, in settlement of debt.⁴³ A railroad corporation may take the stock of another railroad corporation, by way of security for a debt, but it has no right to invest its corporate funds in the purchase of such stock. Such an investment is *ultra vires*.⁴⁴ Where one corporation makes advances to another, taking as collateral mortgage, bonds of the latter, which it is unable to redeem, defaulting in the payment of the interest, and thereafter such corporation makes further advances secured by bonds and stock of the latter corporation, the transaction is not within the prohibition of the Code of West Virginia, forbidding one corporation to subscribe for, or purchase stock, bonds, or securities of another corporation, except in payment of a *bona fide* debt.⁴⁵ In this case it was held that a railway company may lawfully make advances of money or supplies to another railway corporation, to enable it to complete its line, when the latter is to operate as a natural feeder to the former, taking the bonds or stock of the latter as collateral security. In New York it is enacted that any railroad company, created under, and by, the laws of that State, or of any adjoining State, may subscribe for, take and hold the stock of union depot companies, created under that act, in such amounts as the directors of the subscribing company may, from time to time, deem best for its interests.⁴⁶ It has even been held that the issue of stock, for the purchase of other telegraph companies, is lawful.⁴⁷ But the greater weight of authority is, that a corporation can not, unless authorized by statute, subscribe to, or hold, the capital stock of another.⁴⁸ Thus, a railway company can not subscribe for stock

⁴¹ *Citizens Bank v. Hawkins*, 34 U. S. App. 423, 71 Fed. 369; *Holmes, etc. Manuf. Co. v. Holmes Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448.

⁴² *Howe v. Boston Carpet Co.*, 16 Gray (Mass.), 495.

⁴³ *First Nat. Bank etc. v. National Exch. etc.*, 92 U. S. 122.

⁴⁴ *Milbank v. New York, Lake Erie, etc. R. Co.*, 64 How. Pr. 20.

⁴⁵ *Taylor County v. Baltimore,*

etc. R. Co. (1888), 35 Fed. Rep. 161.

⁴⁶ N. Y. Laws of 1882, ch. 273, § 21.

⁴⁷ *Williams v. Western Union Telegraph Co.*, 48 N. Y. Super. Ct. Rep. 349, Arnoux, J., dissenting.

⁴⁸ *Valley Ry. Co. v. Lake Erie Iron Co.* (1888), 46 Ohio St. 44. In the first case cited in the last section this was admitted in terms, the court saying, "the proposition

in another railway, without obtaining express legislative authority.⁴⁹ A railway corporation is not authorized in the general railroad law of Michigan, to acquire the stock and franchises of another completed company, with the intention of itself exercising those franchises; and, in the absence of statutory authority, the power does not exist at common law.⁵⁰ Thus, a corporation having the right to mine, in organizing another corporation for mining purposes, or in dealing in the stock of such corporation, acts beyond the scope of its powers.⁵¹ A company filing its certificate under the same law under which gas companies operate, stating its objects to be, to make and supply gas, and to purchase and hold the stock of other gas companies, has no power thereunder, to so hold such stock, the object being, to control such companies and stifle competition throughout a large city.⁵² So, a corporation

is broadly stated in many cases, that one corporation can not, without express statutory authority, become the owner of any portion of the stock of another corporation," and cites: *Pearce v. Madison*, etc. R. Co., 21 How. 441; *Mutual, etc. Assn. v. Meridian, etc. Co.*, 24 Conn. 159; *Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 43; *Central R. Co. v. Collins*, 40 Ga. 582; *Sumner v. Marcy*, 3 Wood. & M. 105. The principal case cites beside, *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475.

⁴⁹ *Central R. Co. v. Collins*, 40 Ga. 582; *Hazelhurst v. Savannah, etc. R. Co.*, 43 Ga. 13, 57; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475, 494; *Elkins v. Camden, etc. R. Co.*, 36 N. J. Eq. 5; *Beach on Railways*, § 81; *Salomons v. Laing*, 12 Beav. 339; *Maunsell v. Midland, etc. Ry. Co.*, 1 Hem. & M. 130; *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 21 L. J. Ch. 837. *Cf.* 8-Vic. ch. 16, *Angell & Ames*, § 392; *Green's Brice's Ultra Vires*, etc. (2d ed.), 91. The General Railroad Act of New York declares with respect to companies formed thereunder that it shall be unlawful for such companies to use any of their funds in the purchase of any stock in their own

or in any other corporation. N. Y. Laws of 1850, ch. 140, § 8. But a railroad that has leased another may exchange its stock for the stock of the lessor road. N. Y. Laws of 1867, ch. 254, as amended by Laws of 1879, ch. 503. Generally, however, such an authority is not to be implied by a grant of power to lease other roads. *Salomons v. Laing*, 12 Beav. 339, 353. In several states, however, there are statutes authorizing railways to subscribe under certain restrictions to the stock of other railway companies. *Ohio Act of March 3, 1851*, § 4; *White v. Syracuse, etc. R. Co.*, 14 Barb. 559; *Md. Laws of 1836*, ch. 276, granting the privilege to the *Baltimore & Ohio R. Co.*; *Mayor v. Baltimore, etc. R. Co.*, 21 Md. 50; *Beach on Railways*, § 81. In *Kansas* a railway company may purchase shares of stock in a connecting line for the purpose of consolidation. *Ryan v. Leavenworth, etc. Ry. Co.*, 21 Kan. 365.

⁵⁰ *McIntosh v. Flint, etc. R. Co.*, 34 Fed. Rep. 582.

⁵¹ *McMillan v. Carson Hill Union Mining Co.*, 12 Phila. (Pa.) 404.

⁵² *People v. Chicago Gas Trust Co.* (1889), 130 Ill. 268, 7 Ry. & Corp. L. J. 23.

formed for the purpose of furnishing a city with electric light, and claiming the exclusive privilege thereof, after its stock has been purchased by the president of the gas and water company of the city, for the purpose of destroying competition, is not entitled to the aid of a court of equity in restraining a rival company from infringing its exclusive privilege.⁵³ And a railroad corporation has no power to guarantee dividends to the subscribers for stock in an elevator corporation.⁵⁴

J.

POWER TO BUY ITS OWN SHARES.

§ 859. **Power to buy and hold its own stock.**—*In England*, at common law, a corporation can not buy its own shares. Such a purchase of its own stock, and payment by debentures, is void, as is also a resale of it, at a discount.⁵⁵ Transfer to a trustee, to hold for the corporation, is alike ineffective, and will not release the seller from his personal liability, in case of insolvency of the corporation, unless he was ignorant that the corporation was beneficiary of the trust; though the transaction may be legal, where its purpose was cancellation of the stock, and where its forfeiture would have been legal. A surrender of stock to the corporation, is similar to a purchase by the corporation of its own stock.⁵⁶

In the United States.—The power of a trading corporation to traffic in its own stock, where no authority to do so is conferred upon it by the terms of its charter, has been much discussed in the courts, and their conclusions have been conflicting, but the decided weight of authority, both in England and in the United States, is against the existence of the power, unless conferred by express grant or clear implication. An exception to the rule is admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt, due to it, and as a necessity arising in order to avoid loss. If a corporation can buy

⁵³ Appeal of Scranton Electric Light & Heat Co. (1888), 122 Pa. St. 154, 9 Am. St. Rep. 79. Such corporation wilfully frustrates the objects of its institution and commits a fraud on the public, and is not entitled to an equitable consideration.

⁵⁴ Elevator Co. v. Memphis & Charleston R. Co. (1887), 85 Tenn.

703, 4 Am. St. Rep. 798. Yet in this case the charter conferred such additional powers as might be convenient for the due and successful execution of the powers granted.

⁵⁵ *In re London Celluloid Co.*, 39 Ch. D. 190.

⁵⁶ *Bellerby v. Rowland, etc. Co.* (1902), 2 Ch. 14.

one share of its stock at pleasure, it may buy every share, and be without any stockholder for the protection of creditors. But a trading corporation can not exist without stock and stockholders, and the law forbids the organization of a corporation without stock. Creditors have a right to assume that stock, once issued and not called back, in the manner provided by law, remains outstanding in the hands of stockholders, liable to respond to creditors to the extent of the prescribed liability. And it matters not, whether the stock becomes extinct by purchase, by the corporation that issued it, or is held subject to be re-issued.⁵⁷ In Illinois, any corporation may buy and sell its stock, if it is solvent, and acts in good faith,⁵⁸ but not to the injury of corporate creditors.⁵⁹ In Iowa, a private corporation may purchase shares of its own stock.⁶⁰ In Massachusetts, unless prohibited by statute, a corporation may purchase its own stock.⁶¹ All the courts agree that for antecedent debts, due the corporation, it may take its own stock, in good faith, as security or in payment, where the rights of creditors are not affected.⁶² A corporation may take its own stock by way of gift,⁶³ or bequest.⁶⁴ By statute in New York, certain corporations are prohibited from purchasing or loaning money on their own stock,⁶⁵ and national banks are, by federal statute, similarly prohibited.⁶⁶ The doctrine that corporations, when not prohibited by their charters, may buy and sell their own stocks, is supported by a respectable line of authorities.⁶⁷ And the

⁵⁷ *Coppin v. Greenlees Co.*, 38 Ohio St. 275 (1882), 43 Am. St. Rep. 425. *Vide supra*, § 196, reduction of capital stock by purchase of its own shares.

⁵⁸ *Bank v. Peoria, etc. Co.*, 191 Ill. 128 (1901).

⁵⁹ *Butler, etc. Co. v. Robbins* (1894), 151 Ill. 588.

⁶⁰ *West v. Averill, etc. Co.*, 109 Iowa, 488 (1899).

⁶¹ *New England Trust Co. v. Abbott* (1894), 162 Mass. 148.

⁶² *City Bank v. Bruce* (1858), 17 N. Y. 507; *Barto v. Nix* (1896), 15 Wash. 563; *Porter v. Plymouth, etc. Co.* (1904), 74 Pac. 938; *Atwater v. Smith* (1898), 73 Minn. 507; *Roach v. Burgess*, 62 S. W. 803 (Tex. 1901).

⁶³ *Lake Superior, etc. Co. v. Drexel* (1882), 90 N. Y. 87.

⁶⁴ *Revanna, etc. Co. v. Dawsons* (1846), 3 Gratt. (Va.) 19.

⁶⁵ *Batley v. Eureka Bank*, 62 Kan. 384 (1901).

⁶⁶ *Burrows v. Niblack* (1898), 84 Fed. 111.

⁶⁷ *Dupee v. Boston, etc. Co.*, 114 Mass. 37; *Chicago, etc. R. Co. v. Marseilles*, 84 Ill. 145, 84 Ill. 643; *Hartridge v. Rockwell, R. M. Charlton*, 260; *Robinson v. Beal*, 26 Ga. 28; *Leland v. Hayden*, 102 Mass. 551; *American, etc. Co. v. Haven*, 101 Mass. 308; *Bank v. Bruce*, 17 N. Y. 507; *Jones v. King*, 86 Ill. 20; *Iowa, etc. Co. v. Foster*, 49 Iowa, 25; *Taylor v. Miami Ex. Co.*, 6 Ohio, 176; *State v. Building Assn.*, 35 Ohio St. 253; *Bank v. Champlain, etc. Co.*, 18 Vt. 131; *Pierce on Railroads*, 505. But see *Holladay v. Elliott*,

rule appears to be well settled in the United States, that a corporation may, unless prohibited by statute, purchase its own stock, or take it in pledge or mortgage; that it may purchase its own stock in exchange for money or other property, and hold, re-issue or retire the same, provided such act is done in entire good faith, is an exchange of equal value, and is free from all fraud, actual or constructive;⁶⁸ provided that the corporation is neither insolvent nor in process of dissolution, and that the rights of creditors are not injuriously affected.⁶⁹ In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment, in the lawful exercise of its corporate powers.⁷⁰ And a very late authority holds also that a corporation, if not prohibited by its charter, which gives it general contractual powers, may receive its own capital stock from a stockholder, and pay him therefor with the bonds of another corporation, with which he had originally purchased the stock.⁷¹ But an Ohio court declares that the decided weight of authority is against the existence of the power, unless conferred by express grant or clear implication.⁷² So, therefore an agreement between a manufacturing corporation and a stockholder, to purchase its stock from the stockholder, was held void.⁷³ The foundation principle, says the Ohio court, upon which these latter cases rest, is that a corporation possesses no powers, except such as are conferred upon it by its charter, either by express grant or necessary implication. It is true, however, that in most jurisdictions, where the right of a corporation to traffic in its own stock, has been denied, an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due it. This exception is supposed to rest on a necessity which arises in

8 Oreg. 84; *Preston v. Grand Colliery, etc. Co.*, 11 Sim. 327.

⁶⁸ *First Nat. Bank v. Salem, etc. Co.* (1889), 39 Fed. Rep. 89, Deady, J., citing *Bank v. Bruce*, 17 N. Y. 510; *Taylor v. Exporting Co.*, 6 Ohio, 176; *In re Insurance Co.*, 3 Biss. 452; *Bank v. Transportation Co.*, 18 Vt. 138; *Clapp v. Peterson*, 104 Ill. 26; *Dupee v. Water Power Co.*, 114 Mass. 37.

⁶⁹ *Clapp v. Peterson*, 114 Ill. 26.

⁷⁰ *Dupee v. Water Power Co.*, 114 Mass. 37.

⁷¹ *Rollins v. Shaver Wagon &*

Carriage Co. (Iowa, 1890), 45 N. W. Rep. 1037.

⁷² *Coppin v. Greenlees, etc. Co.* (1882), 38 Ohio St. 275.

⁷³ *Coppin v. Greenlees, etc. Co.* (1882), 38 Ohio St. 275, 43 Am. Rep. 425; *Bartholomew v. Bently*, 1 Ohio St. 42; *Strauss v. Insurance Co.*, 5 Ohio St. 59; *Bank v. Insurance Co.*, 12 Ohio St. 601; *Hays v. Galion*, 29 Ohio St. 338; *Currier v. Lebanon, etc. Co.*, 56 N. H. 262; *Savings Bank v. Melfkuhler*, 19 Kan. 60.

order to avoid loss. It was early recognized in Ohio,⁷⁴ and has been incidentally referred to as an existing right since.⁷⁵ But, however that may be, the right of a corporation to traffic in its own stock, appears to be inconsistent with the principle of the liability of stockholders to creditors.⁷⁶ Now, it is just as plain that a business or trading corporation can not exist without stock and stockholders, as it is that the creditors of such corporation are entitled to the security, from the liability of stockholders, named in the constitution.⁷⁷ The corporation itself can not be a stockholder of its own stock, within the meaning of this provision of the constitution. Nobody will deny this proposition. And if a corporation can buy one share of its stock at pleasure, why may it not buy every share? If the right of a corporation to purchase its own stock at pleasure exists and is unlimited, where is the provision, intended for the benefit of creditors? This is not the security to which the constitution invites the creditors of corporations. I am aware, that the amount of stock required to be issued, is not fixed by the constitution or by statute, and also, that provision is made by statute for the reduction of the capital stock of corporations; but of these matters creditors are bound to take notice.⁷⁸ They have a right, however, to assume that stock once issued, and not called back, in the manner provided by law, remains outstanding in the hands of stockholders, liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock, purchased by the corporation that issued it, becomes extinct, or is held subject to be re-issued. It is enough to know that the corporation, as purchaser of its own stock, does not afford to creditors the security intended. And surely, if the law forbids the organization of a corporation without stock, because the required security is not furnished, it can not be, that having brought the corporation into

⁷⁴ Taylor v. Miami Exporting Co., 6 Ohio, 176; Coppin v. Greenlees, etc. Co. (1882), 38 Ohio St. 278.

⁷⁵ State v. Building Assn., 35 Ohio St. 258.

⁷⁶ Coppin v. Greenlees, etc. Co. (1882), 38 Ohio St. 278; Ohio Const., art. xiii, § 3, which reads as follows: "Dues from corporations shall be secured by such individual liability of stockholders, and other means, as may be pre-

scribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

⁷⁷ Coppin v. Greenlees, etc. Co. (1882), 38 Ohio St. 278; State v. Sherman, 22 Ohio St. 411.

⁷⁸ Coppin v. Greenlees, etc. Co. (1882), 38 Ohio St. 278.

existence, it invests it with power to assume, at pleasure, the identical character or relation to the public that was an insurmountable objection to the giving of corporate existence in the first place."⁷⁹ A solvent corporation may purchase the stock of its resigning president, with the purpose of re-issuing it to his successor.⁸⁰

K.

POWER WITH RESPECT TO CONTRACTS.

§ 860. **Power to contract.**—The power of a corporation to make and execute contracts, necessary or convenient in its authorized business, is a power incident to corporate existence.⁸¹ But a corporation has no power to enter into any contract which is foreign to the corporate purposes, set out or implied in the charter. "A corporation, and an individual, do not stand upon the same footing in regard to the right of contracting. The latter may make all contracts which, in the eye of the law, are not inconsistent with the interests of society; whereas, the former, being created for a specific purpose, must look to its charter, which is, as it were, the law of its nature, to ascertain the extent of its capacity. It can not only make no contracts, forbidden by its charter, but it can only make those which are necessary to effectuate the purposes of its creation."⁸² For example, an insurance company can not issue policies of insurance against any risks not authorized by its charter,⁸³ and such an *ultra vires* contract, can not be validated by custom of the corporation, or by consent or ratification of all the stockholders.⁸⁴ "The usage of a corporation does not become the law of its existence, or the measure of its powers. The general law of the State, (under which the corporation is organized), of which all persons are presumed to have knowledge, is the source and limit of all its powers and duties; and these can not be varied, either by usage or contract."⁸⁵ The power to take lands for turnpike roads, to build their toll houses, erect toll gates, and collect their tolls, do not imply the power to erect

⁷⁹ Coppin v. Greenlees, etc. Co. (1882), 38 Ohio St. 278.

⁸⁰ Joseph v. Raff (N. Y. 1903), 68 N. E. 118.

⁸¹ Wiggins Ferry Co. v. Chicago, etc. R. Co., 73 Mo. 389, 39 Am. Rep. 212; Spangler v. Butterfield, 6 Colo. 356.

⁸² Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

⁸³ Andrews v. Union, etc. Ins. Co., 37 Me. 257.

⁸⁴ Louisville, etc. R. Co. v. Louisville Trust Co., 174 U. S. 552.

⁸⁵ Coppin v. Greenlees, etc. Co., 38 Ohio St. 275, 43 Am. Rep. 425.

hotels, establish stage and transportation lines, and to purchase carriages and horses for the purpose of carrying on the business.⁸⁶

§ 861. Mode of executing contracts, deeds, etc.—The statute of Michigan, providing that no estate in land, shall be created unless by deed in writing subscribed by the grantor, does not require the officers of a corporation to follow any particular form. The signatures of the president and secretary, respectively, followed by the words, "president," and "secretary," will effect conveyance of the corporate property.⁸⁷ Unless otherwise expressly required by statute or charter, a contract may be executed in any one of the following described ways:— It may be executed in writing, and sealed either with or without the name of the corporation subscribed,⁸⁸ or in writing subscribed in the corporate name without seal,⁸⁹ or by the record in writing, of a resolution by the board of directors,⁹⁰ or by such resolution unwritten,⁹¹ or by the oral agreement of authorized agents of the corporation,⁹² or by acquiescence in agreement of such agents,⁹³ or by acceptance of benefits of such an authorized agreement.⁹⁴ When a corporate deed of conveyance or contract is executed by an instrument of writing, there should appear in the body of the instrument, the name of the corporation, as the grantor, grantee, contractor, or contractee, instead of the name of the director or other officer, who seals or acknowledges the instrument.

§ 862. Mode of signing and sealing. Corporate contracts, etc., under seal.—The name of the corporation as subscribed to the instrument, should be followed by the word "by," next before the signature of the person who executes the instrument on behalf of the corporation; followed by the designation of his office, as, "president," or whatever it may be. The seal, when affixed, or "scroll," should be subscribed by the secretary, with a declaration that it is the seal of the corporation. In New Jersey, proof of the signature of the president, and that the cor-

⁸⁶ *Downing v. Mt. Washington Road Co.* (1860), 40 N. H. 230; *State v. Comm'rs*, 3 *Zabriskie*, 510.

⁸⁷ *Ismon v. Lader* (1903), 97 N. W. 769, 10 Det. Leg. N. 779.

⁸⁸ *Louisville, etc. Ry. v. Louisville T. Co.* (1899), 174 U. S. —; *Globe, etc. Co. v. Reid* (1897), 19 Ind. App. 203.

⁸⁹ *Barney v. Pforr* (1897), 117 Cal. 56.

⁹⁰ *Argus Co. v. Mayor, etc.*, 55 N. Y. 495 (1874).

⁹¹ *Murray v. Beal* (1901), 23 Utah, 548, 65 Pac. 726.

⁹² *Manchester St. Ry. v. Wilham* (N. H. 1902), 52 Atl. 461.

⁹³ *Neosho, etc. Co. v. Hannum* (1901), 10 Kan. App. 499, 63 Pac. 92.

⁹⁴ *Poche v. New Orleans, etc. Co.* (1900), 52 La. Ann. 1287, 27 So. 797.

porate seal was affixed, will suffice as an acknowledgment.⁹⁵ One who is interested in the corporation, as stockholder or officer, is not competent to take the acknowledgement of the person who executed the instrument;⁹⁶ nor is one, who is interested as mortgagee or grantee of the property which is the subject of the instrument.⁹⁷ The seal alone is sufficient signature of the corporation, and proper execution of the instrument, where affixed to its power of attorney, reciting in the beginning and in the *testimonium* clause, that the corporation had no president, and that the execution was by its chairman, and by another director, and by the secretary, though the name of the corporation was not subscribed, apart from the seal. Under the circumstances, it is presumed that the described officers had authority to give the power of attorney; and that the seal was affixed by them.⁹⁸ The seal is unnecessary to the validity of a contract to which the corporation is a party.⁹⁹ The letters, "mfg.," instead of the word manufacturing, is sufficient in the signature of the corporation to a deed.¹

§ 863. **Acknowledgment of deed by corporation.**—It is not necessary that the certificate of acknowledgment appear upon the deed itself, if the proof shows that the corporate officer actually acknowledged the execution.² As between the parties to the deed, a defective acknowledgment does not affect it.³ A corporate deed is acknowledged by the president or other officer who executed it.⁴ In making the acknowledgment, the statutory requirements of the State wherein the land lies, must be followed, as to substance of the certificate, and the officer before whom taken. It may be made either within, or without, the State.⁵ To the certificate of acknowledgment must be added, the affidavit of the person making the acknowledgment for the corporation, that the president and secretary, or persons representing them in the execution and acknowledgment of the instrument, were actually the corporate officers whom they purport to be, and are authorized to execute it. There is no special form, at common law, for

⁹⁵ General, etc. Co. v. Transit, etc. Co. (1898), 57 N. J. Eq. 460.

⁹⁶ Wilson v. Griess (Neb. 1902), 90 N. W. 866.

⁹⁷ Kothe v. Krag, etc. Co., 20 Ind. App. 293 (1898).

⁹⁸ Graham v. Partee (Ala. 1804), 35 So. 1016.

⁹⁹ Suberly v. Miller (1904), 207 Ill. 443. *Vide supra*, § 104.

¹ Seiberling v. Miller (1904), 207 Ill. 443.

² Linderman v. Hastings, etc. Co. (1899), 38 N. Y. App. 488.

³ Marvin v. Anderson (1901), 111 Wis. 387.

⁴ Lovett v. Steam, etc. Assn., 6 Paige, 54 (1836).

⁵ Hodder v. Kentucky, etc. Ry. (1881), 7 Fed. 793.

making the acknowledgment of a deed by a corporation. The secretary may make the acknowledgment.⁶ In the absence of acknowledgment, the execution may be proved, but only by subscribing witnesses.⁷ The several States generally provide by statute for the method and form of acknowledgment of deeds, by corporations within, as well as without, the State.

§ 864. **Validity of contracts executed in name of officer instead of corporation.**—A note, contract, deed or mortgage, etc., may be enforced by, or against, a corporation which is the real party in interest, although it be made in the name of a corporate officer, or agent, instead of in the name of the corporation, if the corporation undertakes to carry out the contract. The cashier of a bank may transfer bank-paper by signing his own name as cashier, without naming the bank.⁸ A note, given and signed by an individual, as "manager and president," may be shown to be the obligation of the corporation.⁹ An instrument signed by an individual as, "general agent," may be proven up to be a contract of the corporation.¹⁰ A deed sealed and regularly acknowledged, but signed by the president only in his own name, may be held good.¹¹

§ 865. **Who may question corporate power to contract.**—A contract, entered into by the corporation, is presumed to be within the charter powers, until the contrary is made to appear, the burden of proof that it is *ultra vires*, being upon him who alleges it.¹²

§ 866. **Contracts prohibited by law or contrary to public policy.**—As in the case of any individual, any contract of a corporation is void, which is prohibited by law, or which is contrary to declared public policy; for example, a usurious contract,¹³

⁶ Pryne v. Adams, etc. Co., 92 Hun, 214 (1895).

⁷ Dodge v. American, etc. Co. (1899), 109 Ga. 394, 34 S. E. 772.

⁸ McIntyre v. Preston (1848), 10 Ill. 48, 48 Am. Dec. 321; Second Nat. Bank v. Martin (1891), 82 Iowa, 442; McCormick v. Stockton, etc. R. R. (1900), 130 Cal. 100.

⁹ Jones v. Woolley (1891), 2 Idaho, 790, 26 Pac. 120; *In re Pendleton Hardware Co.* (1893), 24 Oreg. 330, 33 Pac. 544.

¹⁰ Lewis v. Mutual, etc. Co., 8

Colo. App. 368 (1896), 46 Pac. 621; Jones v. Williams (1897), 139 Mo. 1, 37 L. R. A. 632; Swarts v. Cohen (1894), 11 Ind. App. 20.

¹¹ Consolidated Coal Co., etc. v. Peers (1894), 150 Ill. 344; Chouteau v. Allen (1879), 70 Mo. 290; Turner v. Kinston, etc. Co. (Tenn. 1900), 59 S. W. 410; Unión, etc. Co. v. Robinson (1897), 79 Fed. 420.

¹² Ohio & Miss. Ry. Co. v. McCarthy, 96 U. S. 267.

¹³ Commercial Bank v. Nolan, 8 Miss. 508.

or a contract in restraint of trade, or to create a monopoly, or to prevent competition.¹⁴

§ 867. **Contracts by quasi-public corporations.**—"The principle is that where a corporation, like a railroad company, has granted to it by charter, a franchise, intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract, which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."¹⁵

L.

POWER TO ENTER INTO PARTNERSHIP.

§ 868. **Whether a corporation may enter into a partnership.** It is not competent for a corporation to become a partner with another corporation, or firm, because, the relation of partners is such, that any one partner is bound by the agreement of any of the others, and no corporation has any right to so abdicate its powers, by becoming subject to the caprice of another. That would be contrary to public policy, and void, and contrary to the spirit and policy of the law, governing corporations.¹⁶ It can not

¹⁴ *Distilling, etc. Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200; *Harding v. Am. Glucose Co.*, 182 Ill. 551, 47 Am. St. Rep. 189.

¹⁵ Mr. Justice Miller in *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Chicago Gas Light, etc. Co. v. People's, etc. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124.

¹⁶ *State v. Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541; *Mallory v. Hanauer Oil Works*, 86 Tenn. 598; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Mestier v. Chevalier, etc. Co.* (La. 1901), 32 So. 520; *Wittenden Mills v. Upton*, 10 Gray (Mass.), 582, 71 Am. Dec. 681. *Vide* the following authorities upon the contrary proposition that a corporation may enter into partnership: *In re Hamilton*, 1 Fed.

Rep. 800; *In re Warner*, 7 Bankr. Reg. 47; *Smith v. Wright*, 5 Sandf. 113; *Raymond v. Putnam*, 44 N. H. 160; *Bullock v. Hubbard*, 23 Cal. 495; *Mullins v. Miller*, 1 Lower Can. J. 121; *Mellon v. Craig*, 3 Ont. R. Ch. Div. 546; *Lindley on Partnership*, *78, citing *Gill v. Manchester, S., etc. Ry. Co.*, L. R. 8 Q. B. 186, as to one company being the agent of another, if not its partner. See, generally, as to corporations entering into partnership 3 Central L. Jour. (1876) 668-9; 15 Fed. Rep. Note of Cases (1883), 667-674, 71 Amer. Dec. (1886) 681; 8 So. West. Rep. (1888) 396; *McKinney's Note of Cases*, 20 Amer. & Eng. Corp. Cas. (1888) 485-6; 3 No. of Cases (1888), 58, 59; 4 No. of Cases (1889), 1-3; cited by W.

become a member of a "trust," for that is a board of trustees unrecognized by law. Where a corporation, by so joining a trust, left itself without will, and without power, its charter was held forfeited.¹⁷ A corporation has no power, unless it is expressly conferred, to enter into partnership with individuals, or with another corporation, but it may acquire and hold property, in common with another, and make joint contracts, as in traffic agreements among railroad corporations.¹⁸ Nevertheless, as will be seen,¹⁹ a corporation may be held to partnership liability, upon its contracts, under circumstances, where an individual may be held liable.²⁰ "It may be considered as *prima facie ultra vires*, for an incorporated company to enter into partnership with other persons."²¹ But there are cases in which partnership agreements between corporations, or between a corporation and other persons, have been sustained and enforced. In an early case in Georgia, in holding that a contract respecting the use of machinery, which

H. Winters in "The Bibliography of Commercial Trusts" (1890), 7 Ry. & Corp. L. J. 236. See, also, notes and articles upon the consolidation of corporations: Elliott (C. B.), 17 West. Jur. (1883) 345-359; Elliott (C. B.), 17 Centr. L. Jour. (1883) 382-3; 6 N. J. Law Jour. (1883) 360-3; Freeman (A. C.), 79 Am. Dec. (1886) 422-428; Desty (Robt.), 2 Lawy. Rep. Ann. (1889) 726-8. "Amalgamation of Companies:" 43 London Law Times (1867), 209-210; and 17 Solicitor's Jour. (1873) 362-364.

¹⁷ People v. North River, etc. Co., 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843; Bishop v. American, etc. Co., 157 Ill. 284, 48 Am. St. Rep. 317; Chicago & Alton R. Co. v. Mulford, 162 Ill. 533; Mallory v. Hanaur Oil Works, 86 Tenn. 598, 8 S. W. 396.

¹⁸ Hill Mfg. Co. v. Boston, etc. R. Co., 104 Mass. 122; New York, etc. Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; State v. Concord R. Co., 59 N. H. 85.

¹⁹ *Vide supra*, Partnership Liability, §§ 126-140.

²⁰ Cleveland Paper Co. v. Courier Co., 67 Mich. 152; French v. Donohue, 29 Minn. 111.

²¹ Lindley on Partnership, *79, 80, citing the American cases Sharon Coal Co. v. Fulton Bank, 7 Wend. 412; Catskil Bank v. Gray, 14 Barb. 479; and as to holding out, Holmes v. Old Colony R. Co., 5 Gray, 58. Whittenton Mills v. Upton, 10 Gray, 582. In this case a person bought the machinery, tools and stock of a foundry which he hired. The foundry had previously furnished machinery to a manufacturing corporation. The lessor of the foundry and the corporation then made an agreement by which the corporation was to advance money for the machinery, tools, stock and rent, the lessor was to have a salary, and the profits of the business done by him was to be divided for five years, subsequently extended three years. In the purchase of machinery for the corporation the parties dealt as strangers. It was held that the corporation could not put its business beyond its control, enter into any business foreign to that for which it was created (cotton manufacturing), nor enter into partnership for that purpose.

the parties styled a "lease," was, in fact, a partnership, on the ground that the so-called "rental" was to be paid *only* out of the net profits of the business, and was not to exceed a certain proportion of them, the court below said: "The fact that the plaintiff is a corporation and the Dalton City Company is also a corporation, makes no difference in the legal principles which govern the case, for a corporation may be a machinist in the eye of the law, as well as an individual." And on appeal, this proposition was not denied.²² In a later well-argued case in Connecticut, it appeared that the Stevens Company, a partnership engaged in the manufacture of toys, was a member of a firm known as the American Toy Company, engaged in the wholesale and retail toy business. The Stevens partnership, being technically dissolved by the death of one of its members, the heirs and surviving partners applied to the legislature for a charter of incorporation, on the ground that the business was prosperous, and any break in its management would work injuriously to all concerned. The legislature granted a charter, reciting the substance of the petition in the preamble of the act; and it was decided in an elaborate opinion, that the act authorized the corporation to continue the business, as it was then conducted, and to continue the partnership relation with the toy company.²³ And where nothing, in an act of incorporation, specified the business to be done, nor did anything in the corporate name suggest it, and all the stock was held by a single stockholder, the corporation having entered into partnership with a firm, to be terminated at will by the corporation, the court held that this was not *ultra vires* on its part.²⁴ If a

²² Dalton City Co. v. Dalton Manuf. Co. (1852), 33 Ga. 243.

²³ Butler v. American Toy Co. (1878), 46 Conn. 136.

²⁴ Allen v. Woonsocket Co., 11 R. I. 288 (1876). It was here said: "Where a corporation is created for special purposes, there is no doubt that it must be confined in its operations to those purposes. But in the construction of its powers it may be sometimes very important to consider whether the corporation is bound to show that the act done is within its granted powers, or whether the contestant is bound to show that it is beyond them. . . . And the general

rule may be stated to be that it lies on those who impeach the contract to show that it is avoided. The contrary rule would probably produce a great deal of litigation in this state. It is believed that there are many charters of corporations doing a very large business where in the charter itself no purpose whatever is specified (although in one, the Lonsdale, it is described in the title of the act, and there only as a manufacturing corporation), and a still greater number where the intended business can only be inferred from the name. In such cases the fact that the persons were incorpo-

corporation becomes a co-partner in a partnership, it can not plead its *ultra vires* act against liability for the partnership debts.²⁵ A debtor to a partnership, made up of an individual with a corporation, can not set up, as defense, the illegality of the corporation, by reason of its entry into the partnership.²⁶ Any person, who is party to, or who with notice deals with, a corporation which has entered into a co-partnership, is estopped to plead *ultra vires* in any action by or against the corporation or co-partnership.²⁷ If two corporations are jointly carrying on a business under an assumed name, its property belongs one-half to each corporation.²⁸ A corporation must account to the other partners, where it has entered the partnership, notwithstanding it was *ultra vires*.²⁹

§ 869. Arrangement upheld though the partnership is not. The results of partnership arrangements, between corporation and individuals, have been subjected to the rules governing partnerships, and their contracts enforced even where the agreement has not been upheld.³⁰ Accordingly, where a corporation and an in-

rated, and the fact that the legislature and the corporators have acquiesced in the doing of a particular business, or in a continued course of dealing, might be entitled to weight. If the partnership had been for a definite period, it might well be argued that the respondent had no right to make such a contract. But it was a mere partnership at will, terminable at any moment by either party. The respondent, therefore, did no more part with the control of the business than if it had employed the partners as agents, and its right to do that cannot very well be denied."

²⁵ Cameron v. Ford, etc. Bank (Tex. 1896), 34 S. W. 178; Johnson v. Weed, etc. Co. (1899), 103 Wis. 291.

²⁶ Wilson v. Carter, etc. Co., 46 W. Va. 469 (1899), 33 S. E. 249.

²⁷ *In re Ervin* (1901), 109 Fed. 135; Wallerstein v. Ervin (1901), 112 Fed. 124; Kelly v. Biddle, 120 Mass. 147 (1901).

²⁸ Guernick v. Alcott (1902), 66 Ohio St. 94.

²⁹ Boyd v. American, etc. Co. (1897), 182 Pa. St. 206.

³⁰ Where a corporation entered into regular articles of copartnership with an individual, and goods were sold in good faith relying upon the liability of both the corporation and the individual, it was held not necessary to establish a valid copartnership between the defendants to create the liability claimed against them. A corporation may, in furtherance of the object of its creation, contract with an individual, although the effect of the contract may be to impose upon the company the liability of a partner. And as to third persons the liability of a partner is frequently imposed, although it was not the intention of the party sought to be charged to become one, and even though a partnership could not have been made. *Cleveland, etc. Co. v. Courier, etc. Co.* (1887), 67 Mich. 152, citing *Manhattan, etc. Co. v. Sears*, 45 N. Y. 799; *Leggett v. Hyde*, 58 N. Y. 272; *Raft Co. v. Roach*, 97 N. Y. 378. Where a

dividual have assumed to enter into partnership and jointly transact business together, they may, by reason of their joint interest, recover upon obligations made to them in their partnership name, irrespective of their partnership rights and duties as between themselves, or the capacity of the association to execute the powers incident to a partnership.³¹ While a corporation, and individuals who have gone into partnership to run a ferry, do not constitute a partnership, they may be partners in the profits of the ferry, being tenants in common thereof, and as such entitled to share in its earnings.³² In the case of an agreement between two railroad companies for the interchange of traffic, with through tickets and through rates, where one of the companies took a shipment for a station on the other's road, it was assumed that if the agreement was not a partnership, it was sufficient to constitute one company the agent of the other to make the contract of carriage.³³ The weight of authority, however, is contrary to the existence of any implied power in corporations, to enter into partnership agreements with other companies or individuals;³⁴ the reason frequently assigned being, that it is contrary to public policy that corporations

company leased its iron works to an individual for five years, reserving a part of the profits for rent, as the company had an interest in the profits as such, it was held liable as a partner, and the contract was sustained. *Catskill Bank v. Gray*, 14 Barb. 479. A bank which could only take ten per cent. and an insurance company which could take twelve per cent. on loans, were composed of the same stockholders and officers and used the same room and vault. The profits of the bank on exchange and of the insurance company on loans were divided between the two. On suit against the bank as a partner on account of depreciation of bills deposited with the insurance company, it was said the two corporations could not form a partnership, but could make joint contracts, and a verdict for the plaintiff was affirmed. *Marine Bank v. Ogden*, 29 Ill. 248.

³¹ *French v. Donohue* (1882), 29 Minn. 111.

³² *Hackett v. Multnomah Ry. Co.* (1885), 12 Oreg. 130.

³³ *Gill v. Manchester, etc. R. Co.* (1873), L. R. 8 Q. B. 186. A corporation was organized to acquire, develop and sell lands and water rights, and being a mere agency for more conveniently carrying out the agreements between the parties organizing it, was held to constitute a partnership, and the entire capital stock of the corporation was treated as partnership assets. *Sharb v. Beaudry*, 56 Cal. 446 (1880).

³⁴ *Central R., etc. Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Mallory v. Hanaur Oil Works* (1888), 86 Tenn. 598; *People v. North River Sugar Ref. Co.* (1890), 121 N. Y. 582; *Whittenton Mills v. Upton*, 10 Gray, 582; *New York, etc. Canal Co. v. Fulton Bank*, 7 Wend. 412; *Charlton v. New Castle, etc. Ry. Co.*, 5 Jur. (N. S.) 1097; *Angell & Ames on Corporations*, § 272; 1 *Morawetz on Priv. Corporations*, § 421; *Green's Brice Ultra Vires*, 334 *et seq.*; *Common-*

should be bound, except by the acts of their regularly appointed directors and officers, while as members of partnerships they could be bound by the acts of the other members of the firm.³⁵ Not only, it is said, does the partnership relation interfere with the management of the corporation by its regularly appointed officers, but it is also an impairment of the authority of its shareholders themselves, and involves the company in new responsibilities through agents over whom they have no control.³⁶ And, if two companies contract for a permanent amalgamation, it is equivalent to the creation of a new corporation, without the consent of the sovereign, and therefore *ultra vires*.³⁷

M.

MISCELLANEOUS POWERS.

§ 870. **Power of corporation to dedicate to public use.**—A railroad may dedicate, as a public highway, its real estate conveyed to it for railroad purposes.³⁸ A dedication of land to the public use, vests in the public a right to use the same without the naming of a grantee, or the existence of any specific grantee.³⁹ An essential to the dedication of property to public use, is that it be forever. Any reservation of right to revoke it, defeats the dedica-

wealth v. Smith, 10 Allen, 448; Hanson v. Paige, 3 Gray, 239; Bissell v. Michigan Southern & N. I. R. Co., 22 N. Y. 258; Catskill Bank v. Gray, 14 Barb. 471; Catskill Bank v. Hooper, 5 Gray, 574; Marine Bank v. Ogden, 29 Ill. 248; Conkling v. Washington Univ., 2 Md. Ch. 497; Gunn v. Central R., etc. Co., 74 Ga. 509; Jones v. Parker, 29 N. H. 31; Van Keuren v. Trenton Co., 13 N. J. Eq. 302; French v. Donohue, 29 Minn. 111; Lamoille Val., etc. R. Co. v. Bixby, 55 Vt. 235; Ontario Salt Co. v. Merchants' Salt Co., 18 Ont. Ch. 540. Accordingly, a railroad cannot form a partnership with a private person unless especially authorized by its charter. Ledgister v. Central Line Steamers, 75 Ga. 567; Gunn v. Central R., etc. Co., 74 Ga. 509.

³⁵ Hackett v. Multnomah Ry. Co. (1885), 12 Oregon, 129.

³⁶ Whittenton Mills v. Upton, 10 Gray, 582, 71 Am. Dec. 681; Mallory v. Hanaur Oil-Works (1888), 86 Tenn. 598.

³⁷ Charlton v. New Castle, etc. R. Co., 5 Jur. N. S. 1097. The projectors of a canal lying in two states obtained separate charters for each portion, each corporation having the same officers, and by a by-law the stock was consolidated. The court said in the case that although it was not necessary to decide the point whether corporations might consolidate or form a partnership, general principles were against such powers. New York, etc. Co. v. Fulton Bank, 7 Wend. 412.

³⁸ So. Pac. Co. v. City of Pomona (Cal. 1904), 77 Pac. 929.

³⁹ Coffin v. City of Portland (C. C. 1886), 27 Fed. 412; City of Llano v. Llano Co. (1886), 5 Tex. Civ. App. 132.

tion.⁴⁰ Any corporation owning land, has the same power as an individual to dedicate to public use, a part thereof.⁴¹ A railroad having right-of-way and adjoining lands with public lands, granted in aid of its construction, may dedicate to the public the right to cross its track and right-of-way.⁴²

§ 871. Notice of corporate powers. Who are chargeable with notice.—The doctrine of notice of corporate powers of course, includes notice of the authority and powers of the agents and officers, by whom only the corporation acts.⁴³ Therefore persons dealing with the managers of a corporation, must take notice of the limitations imposed upon their authority by the act of incorporation.⁴⁴ Although a person, dealing with a domestic corporation, is charged with knowledge of the general law regulating corporations, statutory as well as unwritten, and even when dealing with the agents of a foreign corporation, must likewise take notice of every limitation in its charter, yet he is not affected with notice of statutes of a general nature, enacted by the foreign State, though they tend to abridge the corporate powers.⁴⁵ Where certain classes of corporations, for instance, banks, have established, recognized, and well-known usages, all persons dealing with them through their agents, will be affected with notice of those usages, and the contracts of such corporations will be construed with reference to them.⁴⁶ The question whether courts will take judicial notice of the powers of a corporation, is, of course, a totally different subject. It may be said, however, that it depends on whether the corporation is incorporated by special charter

⁴⁰ *City of San Francisco v. Canavan* (42 Cal. 541).

⁴¹ *Blen v. Bear River, etc. Co.*, 20 Cal. 620, 81 Am. Dec. 132; *Hawley v. Gray Bros. Artificial, etc. Co.*, 106 Cal. 337.

⁴² *Northern Pac. R. Co. v. City of Spokane* (1894), 64 Fed. 506.

⁴³ *Beatty v. Marine Ins. Co.*, 2 Johns. 109; *Dabney v. Stévens*, 2 Sweeney, 415, aff'd 46 N. Y. 681; *Silliman v. Fredericksburg, etc. R. Co.*, 27 Gratt. 119; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 29; *Root v. Wallace*, 4 McLean, 8; *Zabriskie v. Cleveland, etc. R. Co.*, 23 How. 398; *In re County Life Assur. Co.*, L. R. 5 Ch. 288, 293; *Royal British Bank v. Turquand*,

6 El. & Bl. 327; *Ernest v. Nicholls*, 6 H. L. C. 401, 419; *Fountaine v. Carmarthen Ry. Co.*, L. R. 5 Eq. 316, 322.

⁴⁴ *Pearce v. Madison, etc. R. Co.*, 21 How. 441.

⁴⁵ *Hoyt v. Thompson*, 19 N. Y. 207; *Bank of Chillicothe v. Dodge*, 8 Barb. 233. *Contra*, *City Fire Ins. Co. v. Carriage*, 41 Ga. 660.

⁴⁶ *Taylor on Corporations*, § 195; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Lincoln, etc. Bank v. Page*, 9 Mass. 155; *Whitwell v. Johnson*, 17 Mass. 245; *City Bank v. Cutter*, 3 Pick. 414; *Haddock v. Citizens' Nat. Bank*, 53 Iowa, 542; *Jackson Ins. Co. v. Cross*, 9 Heisk. 283.

or under a general law. For courts will not take judicial notice of a special charter.⁴⁷

§ 872. Notice of powers of corporate officers.—The constitution of a corporation, and consequently the corporate powers, are presumed to be known as matters of law to all persons interested in the corporate enterprise or dealing with the corporation.⁴⁸ Every person who enters into a contract with a corporation, is bound at his peril to take notice of the legal limits of its capacity.⁴⁹ And all persons dealing with a corporation, are bound to take notice of its charter, constitution, by-laws, and manner of doing business.⁵⁰ But if a contract would, under ordinary circumstances, be within the corporate powers, and the other party, exercising reasonable care, does not discover, that by reason of the particular circumstances of the case, the corporation is, in that instance, exceeding its charter privileges, it can not plead its want of authority as a ground upon which to avoid liability.⁵¹ There is much authority in favor of the general rule, that outsiders are not charged with knowledge of the by-laws of a corporation.⁵² Accordingly, it has been held that it is no defense to

⁴⁷ Kelly v. Alabama, etc. R. Co., 58 Ala. 489.

⁴⁸ Taylor on Corporations, § 264; Davis v. Old Colony R. Co., 131 Mass. 258; Relfe v. Rundle, 103 U. S. 222; Salt Lake City v. Hollister, 118 U. S. 256, 263; Bohmer v. City Bank, 77 Va. 445; Leonard v. American Ins. Co., 97 Ind. 299; Haden v. Farmers', etc. Assn., 80 Va. 683; Spence v. Mobile, etc. Ry. Co., 79 Ala. 576.

⁴⁹ Pearce v. Madison, etc. R. Co., 21 How. 441; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Ashbury Ry. etc. Co. v. Richie, L. R. 7 H. L. 653; East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775.

⁵⁰ Boccock v. Alleghany Coal & Iron Co. (1887), 82 Vo. 913, 3 Am. St. Rep. 128; Elevator Co. v. Memphis, etc. R. Co. (1887), 85 Tenn. 703.

⁵¹ Express Co. v. Railroad Co., 99 U. S. 191, 199; Zabriskie v. Cleveland, etc. R. Co., 22 How. 381, 398; Bissell v. Michigan, etc. R. Co., 22 N. Y. 264; Davis Old

Colony R., 131 Mass. 258, 260, 41 Am. Rep. 221; Charleston, etc. Turnpike Co. v. Willey, 16 Ind. 34; Eastern Counties Ry. Co. v. Hawkes, 5 H. L. Cas. 331, 338. Cf. Fontaine v. Carmathen Ry. Co., 5 Eq. 322. Thus where directors have power to bind the company on certain condition, a person dealing with them may assume that the conditions have been fulfilled. Potterdell v. Fareham Brick Co., L. R. 1 C. P. 674; Royal British Bank v. Turquand, 5 El. & B. 248, 6 El. & B. 327. And an innocent holder of negotiable securities which it is in the power of directors to issue is not bound to see that certain preliminaries on the part of the company which ought to have gone through have been gone through. *In re Land Credit Co.*, *Ex parte* Iverend & Gurney, 4 Ch. 460.

⁵² Fay v. Noble, 12 Cush. 1; Ten Broek v. Boiler, etc. Co., 20 Mo. App. 19; Kingsly v. New England Ins. Co., 8 Cush. 403; Mechanics' Bank v. Smith, 19 Johns. 115;

an action for breach of a contract by a corporation, that, in entering into the contract, it violated its own rules, when that fact was within its knowledge at the time the contract was entered into.⁵³ But where the want of power is apparent, upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him.⁵⁴

§ 872a. A corporation cannot be executor except by express authority of statute. A corporation can act only through its agents, and the duties of executor being personal, are incapable of being delegated to an agent.⁵⁵ A corporation may be a trustee, where it is necessary for it to hold property in trust for a purpose within its corporate power.⁵⁶

Power to confess judgment, or compromise, or arbitrate.—A corporation has the same right as a natural person, to compromise a suit, or to submit any matter in dispute to arbitration, or to confess judgment.⁵⁷

Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359.

⁵³ Samuel v. Fidelity, etc. Co. (1888), 49 Hun, 122. Thus in a recent case it was held that parties contracting with a corporation without actual notice of rules adopted by it, by which it exempts itself from liability on contracts unless they are in writing and signed by its president, will not be bound by such rules. Walker v. Wilmington, etc. R. Co. (1887), 26 S. C. 80.

⁵⁴ Bissell v. Michigan, etc. R. Co., 22 N. Y. 264.

⁵⁵ Georgetown College v. Browne (1871), 34 Md. 450; Farmers', etc. Co. v. Smith (Conn. 1902), 51 Atl. 609; *In re Thompson* (1861), 33 Barb. 334. *Vide* 30 L. R. A. 240.

⁵⁶ White v. Rice (1897), 112 Mich. 403. *Vide supra*, § 829b.

⁵⁷ Northern Liberty, etc. Co. v. Kelly, 113 U. S. 199; Solomon v. Schneider & Co., 56 Neb. 680, 77 N. W. 65; Norville v. Tract. Soc., 123 Mass. 129, 25 Am. Rep. 40.

CHAPTER XXXIV.

EMINENT DOMAIN.

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875. Extent of the power. Restrictions.
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References:

Legislative control over corporations. Sections 923-924.

Police power of the state. Sections 928-932.

Railroad right of way, power of eminent domain. Section 1040.
1040.

Street railways' right to use of streets. Section 1069.

Telegraph and telephone companies' right of way. Section 1082.

§ 873. **The power defined.**—The right of Eminent Domain is the right to take private property for public uses. It is inherent in every independent government, and without limitations, except those self-imposed. It is an attribute of sovereignty. The expediency of appropriating any particular property, is a question for its own determination, beyond judicial interference.¹ "Eminent domain, or the right or power of eminent domain, is the rightful authority which exists in every sovereignty, to regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control, individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand."² Although the charter of a corporation is a contract

¹ *Boom Co. v. Patterson*, 98 U. S. 406.

² *Cooley on Const. Limitations*, 524; *People v. Humphrey*, 23 Mich. 471.

between the State and the corporation, yet it, like other contracts, is made subject to the sovereign power of eminent domain; and the property of a corporation and its franchises may, therefore, be taken for public uses, like the property of individuals, without violating the obligation of the contract.³ Even the franchises of one corporation may be condemned, for the benefit of another, under the power of eminent domain, upon due compensation being made therefor.⁴ It is an incident of sovereignty requiring no constitutional recognition. Provision in the federal, and in certain State, constitutions, for just compensation to be made for the property taken, is no part of the power, but only a limitation upon the exercise of the power itself.⁵

§ 874. Distinguished from the power to tax.—Private property may be taken for public use, in two ways: by taxation, and by eminent domain. The right, in either case, rests upon the people's rights which they collectively retain over the property of individuals, to resume such portions of it, as may be necessary for public use. Taxation exacts money or services from the individual as his contributory share to the public burdens. The right of eminent domain exacts, beyond his share, property for which it makes special compensation.⁶

³ West River Bridge Co. v. Dix, 6 How. 507; Miller v. New York, etc. R. Co., 21 Barb. 513; Alabama, etc. R. Co. v. Kenny, 39 Ala. 307; State v. Noyes (1859), 47 Me. 189; Pierce v. Somersworth (1858), 10 N. H. 369; Crosley v. Hanover, 36 N. H. 404; Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176; Armington v. Barnett, 15 Vt. 745; White River Turnpike Co. v. Vermont, etc. Co., 21 Vt. 590; James River, etc. Co. v. Thompson, 3 Gratt. 270; Wood's Railway Law, 661.

⁴ West River Bridge Co. v. Dix, 6 How. 507; Richmond, etc. R. Co. v. Louisa R. Co., 13 How. 71, 83; Greenwood v. Freight Co. (1881), 105 U. S. 22; New Orleans Gas Light Co. v. Louisiana Light Co. (1885), 115 U. S. 650, 673, where Harlan, J., said: "The rights and franchises which have become vested upon the faith of such contracts, can be taken, by the pub-

lic, upon just compensation to the company, under the state's power of eminent domain." Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176; Central Bridge v. Lowell, 4 Gray, 474; Barber v. Andover, 8 N. H. 398; Armington v. Barnett, 15 Vt. 745; James River Co. v. Thompson, 8 Gratt. 170; Salem Turnpike Co. v. Lyme, 18 Conn. 451; *In re Providence*, etc. R. Co., 17 R. I. 324, 21 Atl. 965; Amador, etc. Co. v. DeWitt, 73 Cal. 483; New Orleans, etc. Co. v. Louisiana, etc. Co., 115 U. S. 650; Eastern R. Co. v. Boston & Me. R., 111 Mass. 125, 15 Am. Rep. 13; Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466. See note to 9 Am. St. Rep. 137 to 147.

⁵ United States v. Jones, 109 U. S. 513.

⁶ Atchison, etc. Ry. v. Kansas City Ry. (1802), 70 Pac. 939; Mr. Justice Ruggles in *People v. The Mayor*, etc., 4 N. Y. 421.

§ 875. **Extent of the power. Restrictions.**—The power of eminent domain is essential to every sovereign government, and is paramount to all private rights vested under it. They are held in subordination to this power, and must yield to its proper exercise. The constitution of the United States can not be brought into conflict with this inherent power in the State, of self-government and self-preservation.⁷ The power belongs to the federal government, within its constitutional sphere of action, as well as to the several States.⁸

§ 876. **Exercise of the power must be for a public use only.** The legislature cannot authorize the taking of private property for private use, even on just compensation.⁹ Thus, a State can not compel a railroad corporation to give up a part of its property to private persons for a grain-elevator.¹⁰ Whether the purpose for which the legislature authorizes private property to be taken, is a public purpose, is a question for the courts to determine, but the decision of the legislature is conclusive of the question whether the public exigency requires the taking of the property.¹¹ If the legislature has not declared, as necessary for the corporation, the property it seeks to take, the courts must determine the question of necessity.¹² The right extends only to property, reasonably necessary for the purpose of the corporation.¹³ The corporation may take the fee, or whatever interest in the land is necessary for the corporate purposes.¹⁴ Property already devoted to a public use may, when necessary, be taken for another public use,¹⁵ as, the taking by one railroad of the property of another company, already in its use for railroad purposes.¹⁶ Corporations may take private property under the power of eminent domain only when the use they wish to make of it is a public use. The fact that the property taken is bestowed on a private person or corporation, and that private emolument results from the use, does not prevent the exercise of the power, if the use is public, and if the public benefit is the object had in view in authorizing

⁷ *West River Bridge Co. v. Dix*, 6 How. 531.

⁸ *Kohl v. United States*, 91 U. S. 367.

⁹ *Missouri Pac. Ry. Co. v. Nebraska*, 164 U. S. 403.

¹⁰ *Missouri Pac. Ry. Co. v. Nebraska*, 164 U. S. 403.

¹¹ *Chicago, etc. R. Co. v. Lake*, 71 Ill. 333.

¹² *St. Mary's Gas Co. v. Elk*, 191 Pa. St. 458.

¹³ *Chicago, etc. Co. v. Dunbar*, 100 Ill. 110.

¹⁴ *Long Island R. R. Co. v. Garvey*, 159 N. Y. 334.

¹⁵ *New York, etc. R. Co. v. Boston, etc. R. Co.*, 36 Conn. 196.

¹⁶ *Lake Shore, etc. Co. v. Chicago, etc. Co.*, 97 Ill. 506.

the taking.¹⁷ A grant of the power for any other than a public use, is void.¹⁸ A railroad built for private business only, can not exercise the power.¹⁹ A railroad to carry limestone, may condemn a right-of-way.²⁰ The use, to be a public one, need benefit only a particular community. It is not necessary that it shall affect the whole State.²¹ A corporation, condemning land for a special purpose, set out in its charter, is limited to that use of the land.²² The corporation can not take lands before instituting proceedings for their condemnation, without committing trespass.²³ The legislature is the sole judge as to the expediency of allowing corporations to take land and property for a public use, and may fix the location.²⁴ Courts decide whether the use is a public one.²⁵ So far as the State is concerned, the private emolument of the person or corporation conducting the enterprise, is to be regarded merely as compensation for the benefit conferred on the public.²⁶ Although a railway company is, in a certain sense, a private corporation, yet the purpose for which it is created is a public one, as much so as if the road were constructed by the State. Upon this ground, and upon this alone, can the exercise of the power of eminent domain, in favor of such corporations, be supported.²⁷ The true criterion by which to judge of the character of the use, is whether the public may enjoy it by right, or only by permission, and not to whom the tax or toll for supporting it, is paid.²⁸ In determining whether a particular use is public or not, it is an immaterial consideration that the control of the property is vested in private persons, who are actuated

¹⁷ *Mills on Em. Dom.*, § 13; *Anderson v. Turbeville*, 6 Cold. 150; *Swan v. Williams*, 2 Mich. 427; *Harris v. Thompson*, 9 Barb. 350; *Matter of Townsend*, 39 N. Y. 171; *Concord R. Co. v. Greely*, 17 N. H. 47; *Whiteman v. Wilmington*, etc. R. Co., 2 Harr. 514; *Stockton*, etc. R. Co. v. *City of Stockton*, 41 Cal. 147; *Bonaparte v. Camden*, etc. R. Co., *Bald*, 223; *Willson v. Blackbird*, etc. Co., 2 Pet. 245.

¹⁸ *Oregon Cascade R. R. v. Bailey* (1869), 3 Oregon, 164.

¹⁹ *Weidenfeld v. Sugar*, etc. Co. R. R. (1892), 48 Fed. Rep. 615.

²⁰ *Farnsworth v. Lime Rock*, etc. R. (1891), 83 Me. 440.

²¹ *Bloomfield*, etc. Co. v. *Richardson* (1872), 63 Barb. 437.

²² *Binney's Case* (1829), 2 Bland (Md.), 99.

²³ *People v. Smith* (1860), 21 N. Y. 595.

²⁴ *In re New York*, etc. R. R., 63 N. Y. 326.

²⁵ *Talbott v. Hudson* (1860), 82 Mass. 417; *Oregon Cascade R. R. v. Bailey* (1869), 3 Oregon, 164.

²⁶ *Concord*, etc. R. Co. v. *Greely*, 17 N. H. 47.

²⁷ *Of. Mills on Eminent Domain*, § 14; *Pine Grove v. Talcott*, 19 Wall. 666; *Secombe v. Milwaukee R.*, 23 Wall. 108; *Weir v. St. Paul R. Co.*, 18 Minn. 155; *Brown v. Beatty*, 34 Miss. 227; *Swain v. Williams*, 2 Mich. 427; *Stewart v. Polk County*, 30 Iowa, 9.

²⁸ *Mills, Em. Dom.*, § 14.

solely by motives of private gain. The inquiry must necessarily be, what are the objects to be accomplished, not who are the instruments for attaining them. The public use required, need not be the use or benefit of the whole public, or State, or any large portion of it. It may be for the inhabitants of a small, or restricted locality, but the use and benefit must be in common, not to particular individuals or estates.²⁹ Or, as otherwise expressed, the question is whether it is of so much benefit or advantage to the community, either directly or indirectly, that it can not be said to be wholly private in its effect and operation.³⁰ A railroad company, incorporated under a statute, making it a common carrier, is not rendered a private enterprise, so as to deprive it of the right of eminent domain,—by the fact that it is poorly constructed, and terminates at a coal mine, belonging to the corporation, when it appears that it carries the mails, passengers and freight, runs regular trains, and has expended about a quarter of a million dollars in building its road, and acquiring its right of way.³¹ Certainly, it is within both the letter and the spirit of the

²⁹ Lewis, Em. Dom., §§ 160, 161.

³⁰ Wood, Ry. Law, § 226.

³¹ Colorado Eastern Ry. Co. v. Union Pac. Ry. Co. (1890), 7 Ry. & Corp. L. J. 373. In this case the court says: "It does seem to me that the right of eminent domain should not necessarily be denied to a railroad corporation because of the fact that the primary and chief inducement moving its promoters was to develop private coal mines and bring their products to market." And continues: In *Railroad Co. v. Moss*, 23 Cal. 324, the court say: "It is urged that the plaintiffs are constructing a railroad from a coal mine in the mountains, through a desolate region, to navigable waters, to enable it to get coal ready to market, and that this is a mere private use, and that therefore they have no right to appropriate the property of others to its purposes without their consent. . . . The plaintiffs, in common with other railroad companies organized under this act, are bound by these provisions which make it

obligatory upon them to act as common carriers. . . . The fact that their road does not connect points of present commercial importance can not affect the rights of the plaintiffs. Railroads often make commercial points by their construction, and a large and cheap supply of coal . . . is one of the great necessities of the state, and a matter in which the whole state is interested." In the progress of civilization, municipal existence, as well as the maintenance of rural populations without timber supply, may be so dependent upon a large supply of coal for fuel as to render railroads for its transportation alone of imperative public necessity. It would in fact be difficult to conceive of an object of greater public use. It is as much so as the freighting of breadstuffs, meats, and other necessary supplies for human sustenance in our large cities, or compact communities, dependent upon exterior sources for their production. It would be no answer to their claim to be

law applicable to public railroad corporations, where such an object, as above indicated, is coupled with the obligation, inseparably affixed by the statute to the franchise itself, to become also a common carrier of passengers and freight, and the corporation actually performs such duty to the public, especially where the evidence shows that for the greater period, and in the latter years, of the existence and operation of the road, its business has been confined principally to the carrying of passengers and general freight, however small it may have been.³² It has been aptly said, that if the right to exercise the power of eminent domain should have been denied in the early history of railroads in this country,

public corporations to say, for instance, that a community like Denver was not wholly dependent upon this road for its supply of fuel, as there are other railroads which may bring such supply. Competition is not only the life of trade (or at least is yet supposed to be by the common people), but the multiplication of products, and the facilities for getting them to market, tend to cheapen the necessities of life to the masses; and in the most beneficent and legitimate sense they should retain their character as public necessities. Government itself is maintained to promote the general welfare, and the right of eminent domain has its root in this soil. What is said by Depue, J., in *De Camp v. Railroad Co.*, 47 N. J. Law, 44, respecting a like proceeding where a railroad began in a mine, is quite pertinent: "This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send materials, implements, or machinery for mining purposes into, or to obtain ores from, the several mining tracts adjacent to the location of this road, may use this railroad for that purpose, and of right may require the company

to serve him in that respect; and that is the test which determines whether the use is public. Nor will any motive of personal gain which may have influenced the projectors in undertaking the work take from it its public character. . . . A particular improvement, palpably for private advantage only, will not become a public use because of the theoretical right of the public to use it. But where the franchise is in its nature a public franchise, as the transportation of freight is, and the object promoted is one that concerns the public interests, as the development of the mining resources of a state does, the improvement is essentially a public benefit and advantage; and if there be no restriction on the right of the public to use it, and no inability to use it, except such as arises from the circumstances, the court, in determining whether the improvement is such a public use as that the right of condemnation shall extend to it, will not scan closely the number of individuals immediately profited by it. Indeed, it would not be possible to indicate the number of persons, or define the area of the limits, to which the benefit of such an improvement may extend."

³² *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.* (1890), 7 Ry. & Corp. L. J. 373.

because of their small beginning, some of the greatest railroad enterprises, which have developed and strengthened the commerce and wealth of the country, would have perished in their infancy.³³ The question of public use is not affected by the lease of a road. Accordingly, a railroad company is not precluded from acquiring lands by proceedings *in invitum*, by the mere fact of its having leased its road for the entire term of its corporate existence.³⁴ And the mere act of leasing its tracks, does not forfeit the right of a railway company to condemn land under the law of eminent domain.³⁵ Statutes authorizing an exercise of the right of eminent domain, are to be strictly construed.³⁶ But where the provisions of a statute, relative to several roads changing their locations in order to meet in a union depot, can only be effectuated by one of the companies taking land, the authority to do so must be regarded as conferred by the statute.³⁷ Although the power of eminent domain may not have been expressly delegated to a corporation, yet if the enterprise, which it is organized to conduct, appears, from its charter and the circumstances of the case, to be of a public nature, the power is deemed to have been granted by implication, and *quo warranto* proceedings will not lie against it, for the exercise thereof.³⁸ Thus, where a railway company is organized under a valid charter, and is shown to have done corporate acts under it, this is sufficient to establish a *prima facie* right to take property by eminent domain, and this *prima facie* right can not be successfully assailed in a mere collateral proceeding.³⁹ Proof that the petitioner is a corporation *de facto*, is all the law requires in this class of cases. Evidence, although it may be slight, of corporate acts done by petitioner, is accepted as sufficient. Thus, where it appears that an engineer has been ap-

³³ Colorado Eastern Ry. Co. v. Union Pac. Ry. Co. (1890), 7 Ry. & Corp. L. J. 373.

³⁴ *In re* New York, etc. Ry. Co., 35 Hun, 220, 99 N. Y. 12.

³⁵ Chicago & W. I. R. Co. v. Illinois Central R. Co., 113 Ill. 156.

³⁶ Nichols v. City of Bridgeport, 23 Conn. 189, 60 Am. Dec. 636; Bird v. Wilmington, etc. R. Co., 8 Rich. Eq. 46, 64 Am. Dec. 739; Bensley v. Mountain Lake Water Co., 13 Colo. 306, 73 Am. Dec. 575, and notes; Lance's Appeal, 55 Pa. St. 16, 93 Am. Dec. 722, and note;

Prather v. Jeffersonville, etc. R. R., 62 Ind. 37; Darlington v. United States, 82 Pa. St. 389; and see Kier v. Boyd, 60 Pa. St. 34.

³⁷ Mass. St. 1871, ch. 343; Providence & W. R. Co. v. Norwich & W. R. Co., 138 Mass. 277.

³⁸ Colorado Eastern Ry. Co. v. Union Pac. Ry. Co. (1890), 7 Ry. & Corp. L. J. 373; Chicago, etc. R. Co. v. Chicago, etc. R. Co., 112 Ill. 601.

³⁹ Chicago, etc. R. Co. v. Chicago, etc. R. Co., 112 Ill. 601.

pointed, the line of the proposed road has been located, and other steps taken towards the building of the road, these are corporate acts sufficient to show that the petitioner is a corporation *de facto*.⁴⁰ The prevailing opinion is that its *de facto* existence, as against any person except the State, is sufficient to be shown by a corporation in proceedings to take land in exercise of the right of eminent domain.⁴¹ But some courts, on the contrary, hold that corporate existence *de jure* must be shown.⁴² The State may condemn the property and privileges of a corporation, although grantee of exclusive privilege, and exemption from taxation by the State.⁴³ Property, not in necessary use of one railroad, may be condemned by another for its own necessary uses.⁴⁴ The State may condemn an irrevocable franchise.⁴⁵ Through its legislature it may delegate to private corporations its power to exercise the right of eminent domain.⁴⁶ A change in the constitution, which at the time of creation of the corporation authorized property to be taken, and compensation to be made afterwards, does not affect the right of the corporation granted under the first constitution.⁴⁷ Statutes delegating the power to corporations, are in derogation of the right of the owners of the private property which may be taken, and are to be strictly construed.⁴⁸ Among the uses which have been held to be for public purposes, and for which the legislature may delegate to a *quasi* private corporation the power to take private property, are, to construct gas-works, water-works, telegraph and telephone lines and bridges, when

⁴⁰ Ward v. Railroad Co., 119 Ill. 287.

⁴¹ Thomas v. St. Louis, etc. Ry. Co., 164 Ill. 634; Morrison v. Forman, 177 Ill. 427.

⁴² Powers v. Hazleton, etc. Co., 33 Ohio St. 429; *In re Brooklyn, etc. Co.*, 72 N. Y. 245.

⁴³ Lock Haven Bridge Co. v. Clinton County (1893), 157 Pa. St. 379.

⁴⁴ Chicago, etc. R. R. Co. v. Metropolitan, etc. R. R. Co. (1894), 152 Ill. 519; St. Louis v. Bellville, etc. (1895), 158 Ill. 390; Orleans, etc. Ry. Co. v. Jefferson, etc. R. R. Co. (1899), 51 La. Ann. 1605; Youghhiogheny Bridge Co. v. Pittsburgh, etc. R. R. Co. (1902), 201 Pa. St. 457; Denver, etc. Co. v.

Denver, etc. R. R. Co. (Colo. 1902), 69 Pac. Rep. 568.

⁴⁵ Lockhaven Bridge v. Clinton County, 157 Pa. St. 379.

⁴⁶ Beckman v. Saratoga, etc. R. R. Co. (1831), 3 Paige, 45; New York, etc. R. R. Co. v. Kip (1871), 46 N. Y. 546; Kramer v. Cleveland, etc. R. R. Co. (1855), 5 Ohio St. 146.

⁴⁷ Lehigh Valley R. R. Co. v. McFarlin (1879), 31 N. J. Eq. 706.

⁴⁸ New York, etc. R. R. Co. v. Kip (1871), 46 N. Y. 546; Cleveland, etc. R. R. Co. v. Speer, 56 Pa. St. 325 (1867); State v. Jersey City (1855), 25 N. J. L. 309; Commonwealth v. Erie, etc. R. R. Co. (1856), 27 Pa. St. 339.

severally constructed for use of the general public.⁴⁹ Also, to construct and operate a railroad, or street railway, as a common carrier.⁵⁰ And under such legislative authority, property, already in public use, may be condemned for another public use.⁵¹ For example, a telegraph company, for its use may condemn that part of the right-of-way of a railroad, not in its actual use.⁵²

§ 877. **What are held to be public uses.**—Only those corporations intending to devote their works to public use, can obtain or exercise this power.⁵³ The principles involved in

⁴⁹ *Riche v. Bar Harbor, etc. Co.*, 75 Me. 91; *Arnold v. Covington Bridge Co.*, 1 Duv. (Ky.) 372; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Irrigation District v. Bradley*, 164 U. S. 112.

⁵⁰ *New Orleans, etc. Co. v. Southern T. Co.*, 53 Ala. 211.

⁵¹ *Boston, etc. Co. v. Boston, etc. Co.*, 23 Pick. (Mass.) 360; *Chicago, etc. Co. v. Lake*, 71 Ill. 333; *N. Y., etc. Co. v. Boston, etc. Co.*, 36 Conn. 196; *In re Prospect, etc. R. R. Co.*, 67 N. Y. 371.

⁵² *Mobile & O. R. Co. v. Postal T. Co.*, 120 Ala. 21.

⁵³ *Beekman v. Saratoga, etc. R. Co.* (1831), 3 Paige Ch. 72. Walworth, Chancellor, summed up the matter clearly and fully: "The constitution of the United States does not come in question in such cases. It is admitted that the complainant held the land in fee; and probably under a title derived from the crown, to the rights of which the people have now succeeded. A law declaring the grant from the crown void, and divesting his title on that ground, would impair the obligation of the contract. But it was no part of the contract between the crown and its grantees or their assigns, that the property should not be taken for public use, upon paying a fair compensation therefor, whenever the public interests or necessities required that it should be so taken. All separate interests of individuals in property are held of the government under this tacit

agreement or implied reservation. Notwithstanding the grant to individuals, the *eminent domain*, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property, in the manner directed by the constitution and laws of the state, whenever the public interest requires it. This right of resumption may be exercised not only when the safety, but also where the interest or even the expediency of the state is concerned; as where the land of the individual is wanted for a road, canal or other public improvement. The only restriction upon this power, in cases where the public or the inhabitants of any particular section of the state have an interest in the contemplated improvement as citizens merely, is that the property shall not be taken for the public use without just compensation to the owner, and in the mode prescribed by law. The right of eminent domain does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. And if the legislature should attempt thus to transfer the property of one individual to another, where there would be no pretence of benefit to the public by such

determining what companies are entitled to exercise the power, are ably expounded in the case cited in the foregoing note. The following are among uses which have been held to be public pur-

exchange, it would probably be a violation of the contract by which the land was granted by the government to the individual or those under whom he claims title, and repugnant to the constitution of the United States. But if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain and to authorize an interference with the private rights of individuals for that purpose (2 Kent's Com. 340). It is upon this principle that the legislatures of several of the states have authorized the condemnation of the lands of individuals for mill sites, where, from the nature of the country, such mill sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power, is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprise. And according to the opinion of

Chief Justice Marshall, in the case of *Wilson v. The Blackbird Creek Marsh Company*, 2 Pet. 251, measures calculated to produce such benefits to the public, though effected through the medium of a private incorporation, are undoubtedly within the powers reserved to the states, provided they do not come in collision with those of the general government. It is objected, however, that a railroad differs from the other public improvements, and particularly from turnpikes and canals, because travelers can not use it with their own carriages and farmers can not transport their produce in their own vehicles; that the company, in this case, are under no obligation to accommodate the public with transportation; and that they are unlimited in the amount of tolls which they are authorized to take. If the making of a railroad will enable the traveler to go from one place to another without the expense of a carriage and horses, he derives a greater benefit from the improvement than if he was compelled to travel with his own conveyance over a turnpike road at the same expense. And if a mode of conveyance has been discovered by which the farmer can procure his produce to be transported to market at half the expense which it would cost him to carry it there in his own wagon and horses, there is no reason why the public should not enjoy the benefit of the discovery. And if any individual is so unreasonable as to refuse to have a railroad made through his land, for a fair compensation, the legislature may lawfully appropriate a portion of his property for the public benefit, or may authorize an individual or

poses, for which property may be taken, under power to take when delegated by the legislature to a private corporation:—to construct and operate a railroad, as a common carrier;⁵⁴ to establish a public telegraph line;⁵⁵ for the irrigation of extensive areas of arid lands;⁵⁶ for construction of a bridge to be a part of a public highway;⁵⁷ to develop the mineral resources of the State;⁵⁸ and to furnish water for the uses of the people of a village.⁵⁹ A corporation organized for the purpose of supplying the inhabitants of a city with water, may exercise the power of eminent domain, for the acquisition of land needed as a reservoir.⁶⁰ And a law which authorizes the water company therein named, to take, detain, and use the water of a certain pond, and all streams tributary thereto, does not restrict the company to such a taking as will not interfere with the natural flow of the stream below the pond, nor to a detention of the waters in reservoirs outside of the pond, but authorizes it to detain such waters in the pond itself.⁶¹ So again, under a law which gave to a city the right to take the waters of a certain pond (the waters flowing into it, and ponds and streams within four miles, and any water rights connected therewith),—it has been held that under a condemnation in terms as broad as the language of the statute, all the waters of any stream running

a corporation thus to appropriate it, upon paying a just compensation to the owner of the land for the damage sustained. The objection that the corporation is under no legal obligation to transport produce or passengers upon this road at a reasonable expense, is unfounded in fact. The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf and taking tolls for the use of the same. The public had an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare. The legislature may also, from time to time, regulate the use of the franchise and limit the amount of toll which it shall be lawful to take, in the same man-

ner as they may regulate the amount of tolls to be taken at a ferry, or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road."

⁵⁴ *Bloodgood v. Mohawk, etc. Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313.

⁵⁵ *New Orleans, etc. R. Co. v. Southern, etc. Co.*, 53 Ala. 211.

⁵⁶ *Irrigation Dist. v. Bradley*, 164 U. S. 112.

⁵⁷ *Arnold v. Covington Bridge Co.*, 1 Duv. (Ky.) 372.

⁵⁸ *Hand Gold Min. Co. v. Parker*, 59 Ga. 419.

⁵⁹ *Riche v. Bar Harbor, etc. Co.*, 75 Me. 91.

⁶⁰ *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659.

⁶¹ *Ingraham v. Camden, etc. Water Co.* (1890), 19 Atl. Rep. 861.

into it could be taken, and an existing right to pollute the waters of such a stream.⁶² In California it has been held that the right of eminent domain can not be exercised in favor of the owners of mining claims, to enable them to obtain water for their own use in working such claims, though the intention may also be to supply water to others for mining and irrigating purposes.⁶³ The best examples of public use, and the most frequent exercise of the power of eminent domain, occur in securing means of transportation and intercommunication between different portions of the State.⁶⁴ Thus railroad companies, being common carriers, their use of property is a public one.⁶⁵ For mining and manufacturing, the right of eminent domain may be exercised in overflowing lands with water.⁶⁶ The power can not be exercised by a railroad corporation, after expiration of the time limited for completion of its road.⁶⁷ A railroad can not take more land than is necessary for its own particular authorized purpose, and necessary at the time, or in the immediate future.⁶⁸ A railroad may condemn land for its shops,⁶⁹ and for its terminal facilities,⁷⁰ and for its stations.⁷¹ It may be authorized to take possession of land, pending condemnation proceedings.⁷² One railroad may condemn right-of-way through a narrow pass occupied by another railroad's right-of-way, broad enough for two tracks, and use it when the other railroad is not using it.⁷³ One railroad may condemn the right-of-way to cross another.⁷⁴ The measure of damages, in

⁶² *Martin v. Gleason*, 139 Mass. 183.

⁶³ *Lorenz v. Jacob*, 63 Cal. 73.

⁶⁴ *Mills on Em. Dom.*, § 14; *Buffalo, etc. R. Co. v. Ferris*, 26 Tex. 588; *O'Hara v. Lexington, etc. R. Co.*, 1 Dana, 232.

⁶⁵ *Buffalo, etc. R. Co. v. Brainerd*, 9 N. Y. 100; *Beekman v. Saratoga, etc. R. Co.*, 3 Paige, 45; *Raleigh, etc. R. Co. v. Davis*, 2 Dev. & B. 451; *Swan v. Williams*, 2 Mich. 427; *Tracy v. Elizabethtown, etc. R. Co.*, 80 Ky. 259; *Olcott v. Supervisors*, 16 Wall. 678 (1872); *Concord R. R. Co. v. Greeley* (1845), 17 N. H. 47.

⁶⁶ *Great Falls Mfg. Co. v. Fernald* (1867), 47 N. H. 444.

⁶⁷ *Atlantic, etc. R. R. Co. v. St. Louis* (1877), 66 Mo. 228; *Kinston, etc. R. R. Co. v. Stroud* (N. C.

1903), 43 S. E. Rep. 913; *Bradley v. Northern Pac. R. R. Co.* (1888), 38 Minn. 234.

⁶⁸ *Hill v. Western Vt., etc. R. R. Co.* (1859), 32 Vt. 68; *Oregon Cascade R. R. Co. v. Bailey* (1869), 3 Oreg. 164.

⁶⁹ *Chicago, etc. R. R. Co. v. Wilson* (1855), 17 Ill. 123.

⁷⁰ *In re New York, etc. R. R. Co.* (1871), 46 N. Y. 546; *In re New York, etc. R. R. Co.* (1891), 59 Hun, 7.

⁷¹ *Cherokee Nation v. Kansas Ry. Co.* (1890), 135 U. S. 641.

⁷² *In re Lawrence, etc. R. R. Co.* (1892), 133 N. Y. 270.

⁷³ *Anniston, etc. R. R. Co. v. Jacksonville, etc. R. R. Co.*, 82 Ala. 297 (1887), 2 So. 710.

⁷⁴ *National Docks, etc. Ry. Co. v. State* (1891), 53 N. J. L. 217.

case of a condemnation of right-of-way for a street, across a railroad right-of-way, is the expense occasioned to the railroad, and not the value of the land.⁷⁵ Where two street railroads cross each other's tracks, neither has right of priority of passage.⁷⁶ While its right-of-way exists, a railroad is entitled to use of the land, to the exclusion of the owner of the fee.⁷⁷ A street railroad can not condemn land, under the general law, for condemnation of property for use of railroads.⁷⁸ One street railroad has no right to run its cars over another street railway, without its consent, or authority of statute to condemn right-of-way upon payment of adequate compensation.⁷⁹ Pipe-lines also have been given the same rights, as railroads.⁸⁰ The power of the State to condemn land for the use of canal, ferry, turnpike and bridge companies, has never been denied.⁸¹ An act, in relation to telegraph companies, authorizing the condemnation of the right-of-way, is constitutional. The use contemplated is a public, not a private one.⁸² Companies, in accepting the benefits of this law, lay themselves under obligation to the public to permit the use of their lines to all persons, under reasonable regulations, and this obligation may rest upon implication.⁸³ The right of telegraph companies to lay lines, etc., is the same in streets of the District of Columbia as over post-roads generally, under the law. And when the district commissioners have authorized the construction of an overhead line along a business street; with poles at certain intervals, the construction will not be enjoined at the instance of a few store-keepers who consider it a nuisance.⁸⁴ Where a telegraph company condemns a strip of land on which to place its line, it acquires no fee in the soil; there is no obligation to maintain a fence; the owner of the fee can not be excluded from the strip; and a strip

⁷⁵ *Chicago, etc. R. R. Co. v. Chicago* (1897), 166 U. S. 226.

⁷⁶ *Metropolitan St. R. R. Co. v. Kennedy* (1897), 82 Fed. Rep. 158.

⁷⁷ *Roby v. New York, etc. R. R. Co.* (1894), 142 N. Y. 176.

⁷⁸ *Thomson-Houston Elec. Co. v. Simon* (1890), 20 Oreg. 60.

⁷⁹ *Fidelity, etc. Co. v. Mobile St. Ry. Co.* (1892), 53 Fed. Rep. 687; *Crescent City R. R. Co. v. New Orleans, etc. R. R. Co.*, 48 La. Ann. 856 (1896), 19 So. 868.

⁸⁰ *West Virginia, etc. Co. v. Oil Co.*, 5 W. Vt. 382.

⁸¹ *Mills on Em. Dom.*, § 14, and authorities there cited.

⁸² *State v. American & European Commercial News Co.*, 43 N. J. L. 381; *Pierce v. Drew*, 136 Mass. 75; *New Orleans Tel. Co. v. Southern Tel. Co.*, 53 Ala. 211.

⁸³ *State v. American & European Commercial News Co.*, 43 N. J. L. 381.

⁸⁴ *Hewett v. Western Union Tel. Co.*, 4 Mackey (D. C.), 424, 54 Am. Rep. 284; U. S. Act of July 24, 1886; U. S. Resolution, March 3, 1863.

half a rod in width is not an unreasonable quantity of land to condemn for the purpose.⁸⁵ Telephone lines are entitled to the same privileges upon the same principle.⁸⁶ In Virginia, it is held that the legislature can not delegate the power of eminent domain to an electric power company.⁸⁷ The power can not be exercised for construction of a railroad, to be operated only four months each year, for the use of sight seers.⁸⁸ Where one *quasi*-public corporation holds property which it has condemned, and which is necessary to its uses for the public, no other corporation can condemn the same, in the absence of express authority therefor.⁸⁹ Formerly mills, especially grist mills, were considered of public use, so as to justify the exercise of the power of eminent domain in their behalf. But mill corporations can now expect such privileges, only in jurisdictions where precedent is too strong to be departed from. In most cases, they will not be granted. The reasons for encouraging mills in early times, when capital was small, and steam, as a motive power, had not been discovered, have largely ceased to exist, and there is now no reason for indulging owners of mills over owners of public groceries, hotels, or theaters.⁹⁰ Public drainage companies may have the right of eminent domain;⁹¹ more especially, as a swamp may in itself be a nuisance, and its reclamation a public benefit.⁹² But a private undertaking will not be favored with this power, though the work is done by a corporation formed for purposes of drainage.⁹³ Dam and boom companies have been accorded this privilege.⁹⁴ Where

⁸⁵ *Lockie v. Mutual Union Tel. Co.*, 113 Ill. 401.

⁸⁶ *Irwin v. Telephone Co.*, 37 La. Ann. 63; *Telephone, etc. Co. v. Forke*, 2 Tex. App. 367.

⁸⁷ *Fallsburg, etc. Co. v. Alexander* (Va. 1902), 43 S. E. Rep. 194.

⁸⁸ *In re Niagara Falls, etc. R. R. Co.* (1888), 108 N. Y. 375; *In re Providence, etc. R. R. Co.* (1891), 17 R. I. 324.

⁸⁹ *Scranton, etc. Co. v. Northern, etc. Co.* (1899), 192 Pa. St. 80.

⁹⁰ *Mills on Em. Dom.*, § 14, and cases cited; *Jordan v. Woodward*, 40 Me. 317.

⁹¹ *Willson v. Blackbird, etc. Co.*, 2 Pet. 245; *Henry v. Thomas*, 119 Mass. 583; *Dingley v. Boston*, 100 Mass. 544; *Hartwell v. Armstrong*,

19 Barb. 166; *Tidewater Co. v. Coster*, 18 N. J. Eq. 518; *Norfleet v. Cromwell*, 70 N. C. 634; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *Anderson v. Baker*, 98 Ind. 587; *McQuillan v. Hatton*, 42 Ohio St. 202; *Cheesbrough v. Commissioners*, 37 Ohio St. 508.

⁹² *Dingley v. Boston*, 100 Mass. 544.

⁹³ *Anderson v. Kerns Draining Co.*, 14 Ind. 199.

⁹⁴ *Weaver v. Mississippi Boom Co.*, 28 Minn. 534; *Patterson v. Boom Co.*, 3 Dill. 465; *Lancaster v. Kennebeck Co.*, 62 Me. 272; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Cotton v. Boom Co.*, 22 Minn. 372; *Schoff v. Improvement Co.*, 57 N. H. 110.

the federal government condemned a canal company's dam and locks, it was held to pay not only their cost, but also to pay for taking the company's franchise to demand tolls.⁹⁵ A gas company may be authorized to condemn the use of the streets for laying its pipes and mains.⁹⁶ A natural-gas company, furnishing gas to the public, may condemn the use of land for laying of its pipes.⁹⁷ A turnpike company may be authorized to take, and use as its turnpike, a country road, without payment of damages to abutting property owners.⁹⁸ A waterworks company may be authorized to exercise the right of eminent domain, for construction of its waterworks, for supplying the public with water.⁹⁹

§ 878. **What property may be taken.**—The State may take the property of corporations for public purposes, on making due compensation, just as the State may take the property and franchises of any individual. *What is a taking* is not narrowly construed. It is enough that some private right is materially impaired; as, the backing of water, so as to overflow the lands of individuals, is such a taking.¹ The State may *delegate the right* to exercise the power to a private citizen, or to a corporation.² Land already devoted to a public use, may be condemned, and taken for a more important use. Thus, a company, authorized to construct a railroad between two points, may occupy any lands of the State on the general route laid down, and it makes no difference that the location crosses land, purchased for the use of a State institution, which will thereby be materially interfered with.³ But under other circumstances, it has been held, that land already devoted to the public use for a blind asylum, could not be so taken.⁴ When State land is taken, it must be paid for, as in the case of an individual proprietor.⁵ Land within a State,

⁹⁵ Monongahela, etc. Co. v. United States (1893), 148 U. S. 312.

⁹⁶ Bloomfield, etc. Co. v. Richardson (1872), 63 Barb. 437.

⁹⁷ Great Western, etc. Co. v. Hawkins (Ind. 1903), 66 N. E. Rep. 765.

⁹⁸ Chagrin Falls, etc. Co. v. Cane (1853), 2 Ohio St. 419.

⁹⁹ Pocantico, etc. Co. v. Bird, 130 N. Y. 249 (1891).

¹ Pumpelly v. Green Bay Co., 13 Wall. 166.

² Brayton v. Fall River, 124 Mass. 95.

³ Indiana Central R. Co. v. State (1852), 3 Ind. 421.

⁴ St. Louis, etc. R. Co. v. Blind Inst., 43 Ill. 303.

⁵ Commonwealth v. Boston R. Co., 3 Cush. 25. But in some states a gift of the land by the state is presumed from the authority to enter thereon. Pennsylvania R. Co. v. New York, etc. R. Co., 23 N. J. Eq. 157; Davis v. East Tennessee, etc. R. Co., 1 Sneed, 94.

and held by the United States, is liable to condemnation, for streets, roads and railroads, like the lands of a private person.⁶ But here again, if the land is already occupied, and used for a public use, as for a fort, light-house, or armory, it can not be taken for an ordinary local, though public, use.⁷ A State legislature can authorize the use of the public streets of a municipality, by a telephone company, as a location for its poles.⁸ So, a street railway may be given right of way along public streets. In several of the American States, however, the constitutions prohibit the passage of any law, authorizing the construction of street railways in towns or cities, without the consent of the local authorities.⁹ The property, franchises and contracts of corporations, equally with those of individuals, are subject to be taken under the power of eminent domain, and even the franchise of being a corporation, may be taken for the benefit of another corporation, when the public use demands it.¹⁰ Shares of stock may be taken, as well as franchises, for public use, upon just compensation. The title to shares of stock and franchises, is no more sacred or secure against invasion, when the public uses require it, than is the ownership of real estate.¹¹ In case of consolidation, as of railroads, and other *quasi* corporations, the legislature may authorize the "taking" of the shares of a dissenting stockholder, upon just compensation to him.¹² A bridge owned by a corporation, may be condemned, and taken as part of a public highway.¹³ The United States, directly, or through a railroad chartered by

⁶ Mills on Em. Dom., § 350; United States v. Railroad Bridge, 6 McLean, 517.

⁷ United States v. Chicago, 7 How. 185; United States v. Railroad Bridge, 6 McLean, 517; United States v. Ames, 1 Woodb. & M. 76; Union Pac. R. Co. v. Burlington, etc. R. Co., 3 Fed. Rep. 106; Grintner v. Kansas, etc. R. Co., 23 Kan. 642.

⁸ Irwin v. Great Southern Tel. Co., 37 La. Ann. 63, Manning, J., dissenting.

⁹ Stimson's Am. Stat. Law (1886), § 476, citing the constitutions of West Virginia, Missouri, Texas, Georgia, Alabama, Pennsylvania, Illinois and Colorado. Or of the electors. Neb. Const. (1875, art. 13, § 2.

¹⁰ New Orleans, etc. Co. v. Louisiana, etc. Co., 115 U. S. 650; West River Bridge Co. v. Dix, 6 How. 507.

¹¹ Black v. Delaware, etc. Canal Co. (1873), 24 N. J. Eq. 468; Trask v. Peekskill, etc. Co., 6 Hun, 236 (1875); Philadelphia, etc. R. R. Co. v. Catawissa R. R. Co., 53 Pa. St. 20. See Lauman v. Lebanon Valley R. R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

¹² Black v. Delaware, etc. Co., 24 N. J. 455.

¹³ West River Bridge Co. v. Dix, 6 How. (U. S.) 507; Metropolitan R. Co. v. Chicago, etc. Co., 87 Ill. 317; Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Pennsylvania R. R. Co.'s Appeal, 93 Pa. St. 150.

it, may take lands by eminent domain, in the Territories, (even lands held by 'Indians), or in a State.¹⁴ The power is inherent in the State legislature, and its exercise is limited only by constitutional restrictions,¹⁵ namely, those of federal and State constitutions; first, that no person shall be deprived of his property without due process of law, and second, that no private property shall be taken for public use without just compensation.¹⁶ The power is not granted, but is one of the powers reserved to the State. It overrides all private rights, and the power can not be granted away, or abridged by one legislature, so as to bind its successor, or even itself.¹⁷

§ 879. Construction of the grant of power.—A grant of eminent domain is strictly construed against the grantee, more especially so when it is claimed that it interferes with the enjoyment of a prior grant for like use.¹⁸ The record of proceedings, in condemning land, must show strict compliance with the statute authorizing them.¹⁹ The right of eminent domain must be exercised by a railroad, within the time limited for completion of its road.²⁰ The State may compel one railroad to allow connection with it by another.²¹ Where the chartered line for construction of a railway, is crossed by the tracks of other railways already constructed, the right to cross them is granted, by necessary implication.²² The property of a corporation may be condemned to the use of another, under the same power.²³ The taking of the property of a corporation, is not an alteration, modification, or repeal of its charter. It is the enforced purchase of its

¹⁴ *Cherokee Nation v. Kansas R. Co.*, 135 U. S. 641; *Darlington v. United States*, 82 Pa. St. 282.

¹⁵ *Central Branch, etc. Co. v. Atchison, etc. Co.*, 28 Kan. 453.

¹⁶ *Chicago, etc. Co. v. Chicago*, 166 U. S. 226; *Matter of Tuthill*, 36 App. Div. N. Y. 492, affirmed 163 N. Y. 163.

¹⁷ *In re Twenty-Second St.*, 102 Pa. 108; *Phila. Passenger Co.'s Appeal*, 102 Pa. St. 123; *Chicago, etc. R. Co. v. Nebraska*, 170 U. S. 57; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78.

¹⁸ *Pa. R. R. Co.'s Appeal*, 93 Pa. St. 150.

¹⁹ *Nichols v. Bridgeport*, 22 Conn. 189; *Hyslop v. Finch*, 99 Ill. 171; *Hercules Iron Works v.*

Elgin, etc. Co., 141 Ill. 491; *San Fran. R. Co. v. Gould*, 127 Cal. 601.

²⁰ *Peavy v. Calais R. R. Co.*, 30 Me. 498; *N. Y., etc. Co. v. Boston, etc. Co.*, 36 Conn. 196; *Atlantic, etc. Co. v. St. Louis*, 66 Mo. 228.

²¹ *Louisville, etc. Co. v. State*, 9 Baxt. (Tenn.) 521.

²² *Morris, etc. R. Co. v. Central R. Co.*, 31 N. J. Law. 205; *State v. Eastern, etc. Co.*, 36 N. J. Law, 181.

²³ *Mills on Em. Dom.*, § 41; *Trustees v. Salmond*, 11 Me. 109; *Jeffersonville, etc. R. Co. v. Dougherty*, 40 Ind. 33; *Illinois Canal v. Chicago, etc. R. Co.*, 14 Ill. 314; *East, etc. R. Co. v. East Tennessee, etc. R. Co.*, 75 Ala. 275.

property.²⁴ And, of course, land which is owned by a railroad company, and which it expects, at some future time, to use for railroad purposes, but which it has held for several years, without using in any way, is subject to condemnation for the right-of-way of another company.²⁵ Mere priority of acquisition, or even of

²⁴ Mills on Em. Dom., § 41; Grand Junction R. Co. v. Middlesex, 14 Gray, 553; Boston, etc. R. Co. v. Salem, etc. R. Co., 2 Gray, 1; State v. Hudson Tunnel Co., 38 N. J. 548.

²⁵ Colorado Eastern Ry. Co. v. Union Pac. Ry. Co. (1890), 7 Ry. & Corp. L. J. 373. The court instructively sums the matter up thus: It is next insisted by defendant that the land sought to be condemned has already been appropriated by it to its use as a public railroad corporation or at least that it acquired it by purchase, with a view to such use, and that it is highly probable it will in the near future become a necessity to its increasing business. The evidence shows that this land is a part of a body of twelve acres which was purchased by one McCullah, in 1881, for defendant. This witness stated "I received my orders to purchase it from Mr. Egbert (representative of defendant road). He told me to go and buy it; buy it quick, before the Burlington parties could get it." The Burlington was the Burlington & Missouri Valley Railroad, about to build into Denver, and seeking terminal facilities. Mr. Choate, superintendent of defendant road, testified, substantially, that this piece of land was acquired for the reason that the Burlington Railroad was trying to get an entrance into the city, and to injure defendant's property, and it was necessary to buy this to keep that road from getting into their yards. He further stated that in his opinion this land would in the near future become necessary for

the use of defendant, for additional turn-outs and switch yards, and that they would have so improved it but for the lack of funds, and it was yet their purpose to so use it. It appears, however, from the evidence, that the only work done upon this piece of land was the construction of some embankments along or across it prior to 1885, and before Mr. Choate took charge as superintendent. These embankments have washed away somewhat, and were on grades below that of defendant's railroad track, and not at an elevation at all suitable for switches or turn-outs from the main track. No buildings of any sort have ever been constructed upon it, and no other use made of it. Without imputing to the defendant company the selfish and indefensible motive of being actuated in the acquisition of this land by a desire to obstruct the Burlington road's access to the Union depot, the very utmost that can be conceded to the defendant is that it entertained the belief that this piece of ground might become necessary to the full accommodation of its business in the future, and that it expects to so apply it. This is but a prospective dedication, which may or may not ever be made. If the defendant were seeking to condemn this property upon a prospective increase of its business, "it should be established beyond reasonable doubt that such increase will occur." (Railroad Co. v. Davis, 43 N. Y. 145.) While not holding defendant to the same rigorous rule as if it were seeking to condemn

occupation, gives no exclusive right, except, in so far as the condemnation trenches upon the greater necessities of the other franchise.²⁶ One company can not, however, condemn part of the property of another, for the construction of its road, without compensation. The fact that property has been taken for a particular public use, does not make it public property for all purposes. And the property rights of a railroad company, in its right of way, are protected by the same restrictions against appropriation by any other company for railroad purposes or other public use, as if afforded by the constitution and laws in the case of the private property of an individual.²⁷ The corporate franchise and the property, when inseparable, can be taken together, compensation being made for both.²⁸ Franchises are held in subordination to the exercise of eminent domain, and must yield to its proper exercise. The investiture of the franchise is not absolute. Conditions enter into all contracts, superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community. No distinction is made between corporeal and incorporeal property, and a franchise is as subject to the power of eminent domain, as any other property.²⁹

this property, yet "no one can blink so hard as not to see," from the evidence as a whole, that the defendant has not for five years done any other act looking to the subjection of this piece of ground to its use; and if it is held exempt from the exercise of the right of eminent domain, it rests for its foundation upon conjecture, or a contingency that no court can say with assurance will ever arise. The evidence shows that this defendant has a large amount of other land, some two hundred and seventy-five acres, in Denver, appurtenant to its line of railroad, a part of which, at least, can be made quite available for any use similar to that for which it claims to hold this. In view of its greater necessity to the petitioner, as already demonstrated, I feel constrained to hold, both on reason and authority, that this mere prospective use by defendant should yield to the more im-

mediate necessities of the petitioner. *Springfield v. Railroad Co.*, 4 Cush. 63; *Illinois & M. Canal Co. v. Chicago & R. I. R. Co.*, 14 Ill. 314; *Prospect Park v. Williamson*, 91 N. Y. 552; *Eastern R. Co. v. Boston & M. R. Co.*, 111 Mass. 125; *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 35 Mich. 265, 24 Am. Rep. 545, and note.

²⁶ *East St. L. C. Ry. Co. v. East St. L. U. Ry. Co.*, 108 Ill. 265; *Lake S. & M. S. Ry. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506.

²⁷ *Grand Rapids, etc. R. Co. v. Grand Rapids, etc. R. Co.* (1877), 35 Mich. 265.

²⁸ *West River, etc. Co. v. Dix*, 6 How. 507; *Crosby v. Hanover*, 36 N. H. 404.

²⁹ *Mills on Em. Dom.*, § 42; *West River Bridge v. Dix*, 6 How. 507; *Enfield Toll Bridge Co. v. Hartford, etc. R. Co.*, 17 Conn. 40; *Backus v. Lebanon*, 11 N. H. 19; *Central Bridge v. Lowell*, 15 Gray, 106; *New York, etc. R. Co. v. Bos-*

§ 880. **In case of consolidation.**—In case of consolidation of corporations, the power of eminent domain, of the constituent companies, passes to the consolidated company.³⁰ The consolidated corporation acquires the other's right enjoyed, to exercise the power of eminent domain;³¹ and it may continue condemnation proceedings for acquirement of the right of way, begun by the original corporation.³²

§ 881. **The power not transferable.**—The right of eminent domain is not transferable, either by sale, or mortgage, or lease. Express legislative authority to a corporation, to transfer its franchises, is, in effect, a grant *de novo*, to the transferee, and surrender and abandonment of the old charter. The statute authorizing the transfer, is the grant of such new charter (to take effect upon condition of such surrender or abandonment), of which the deed of transfer is the evidence.³³ The person to whom the State has delegated the power of eminent domain, can not delegate it; thus, a lease, for a hundred years, of a railroad, does not vest in the lessee the lessor's power of eminent domain, although the power was possessed by the lessor, and is necessary, in order to complete the railway line.³⁴

*The legislature can not surrender the power; or bargain it away to a corporation, beyond the legislative power of revocation, at any time.*³⁵

§ 882. **When foreign corporations may exercise the power.** A *quasi* corporation, as, a railroad, or a telegraph company, etc., may not exercise the right of eminent domain, beyond the State of its incorporation. Such power is not accorded within the rules of comity;³⁶ nor may a domestic corporation exercise the right, in behalf of a foreign corporation, to whom, as, in case of a railroad, it has leased its road. Such foreign corporation is some-

ton, etc. R. Co., 36 Conn. 196; Salem Turnpike v. Syme, 18 Conn. 451; James River Co. v. Thompson, 3 Gratt. 270; Tuckahoe Canal Co. v. Tuckahoe R. Co., 11 Leigh, 42; Lafayette Plank Rd. v. New Albany, etc. R. Co., 13 Ind. 90; Newcastle, etc. R. Co. v. Peru, etc. R. Co., 3 Ind. 464; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Lake Shore Ry. v. Chicago, etc. R. Co., 97 Ill. 506; Dunlap v. Toledo, etc. Ry. Co., 50 Mich. 470.

³⁰ Traster v. Missouri Pac. Ry. Co., 23 Neb. 171.

³¹ South Carolina Ry. Co. v. Blake, 9 Rich. 228.

³² Kip v. New York, etc. Co., 67 N. Y. 227; Toledo, etc. Co. v. Dunlap, 47 Mich. 456.

³³ Mahoney v. Spring Valley Water Co., 52 Cal. 159; State v. Sherman, 22 Ohio St. 411.

³⁴ Mayor v. Norwich Ry. Co., 109 Mass. 103.

³⁵ *In re* Twenty-Second Street, 102 Pa. St. 108.

³⁶ Abbott v. New York, etc. Ry. Co., 145 Mass. 450; Holbert v. St. Louis, etc. Co., 45 Iowa, 23.

times expressly given the right to the same extent, as in the case of a domestic corporation.³⁷ A foreign corporation can not exercise the power, unless expressly granted to it, by the State in which it is doing business.³⁸ The legislature may authorize a foreign corporation to exercise the power of eminent domain.³⁹ Unless expressly authorized, a foreign telegraph company has no power to condemn a right of way on a railroad.⁴⁰ Where a foreign corporation is prohibited, by the constitution, from condemning land, it can not be condemned by a domestic "dummy corporation."⁴¹ Though a foreign corporation is prohibited from exercising the right of eminent domain, it may purchase a right of way.⁴²

§ 883. The property condemned. Acquirement and loss of title. Reversion of condemned property to the stockholder, upon dissolution.—After long delay it is too late to recover by ejectment, land occupied by a railroad, without right. The owner's remedy is an action for damages.⁴³ A railroad may acquire right of way by adverse possession.⁴⁴ The grantor of right-of-way to a railroad, may retake possession, upon breach of condition subsequent.⁴⁵ Where right-of-way of a railroad, when acquired, is subject to mortgage, the purchaser, at foreclosure sale, does not acquire title to the rails and ties.⁴⁶ Under its reserved right to repeal, the State may repeal power of a railroad to condemn, any time before condemnation.⁴⁷ Abandonment is not presumed, from mere non-user for a long time, of its right-of-way by a railroad. It continues, nevertheless, to be its property.⁴⁸ On

³⁷ New York, etc. Co. v. Young, 33 Pa. St. 175; Southwestern Ry. Co. v. Southern, etc. Co., 46 Ga. 43, 12 Am. Rep. 385; Dodge v. City of Council Bluffs, 57 Iowa, 560.

³⁸ Holbert v. St. Louis, etc. Co., 45 Iowa, 23; Saunders v. Bluefield, etc. Co. (1893), 58 Fed. Rep. 133.

³⁹ Columbus, etc. Co. v. Long (1899), 121 Ala. 245, 25 So. 702; Gulf, etc. Ry. Co. v. Southwestern T. Co. (Tex. 1900), 61 S. W. Rep. 406.

⁴⁰ Postal, etc. Co. v. Cleveland, etc. Co. (1899), 94 Fed. Rep. 234.

⁴¹ Koenig v. Chicago, etc. R. R. Co. (1889), 27 Neb. 699. *Vide supra*, § 140.

⁴² St. Louis, etc. R. R. Co. v. Foltz (1892), 52 Fed. Rep. 627.

⁴³ Saunders v. Memphis, etc. Co. (1898), 101 Tenn. 206, 47 S. W. 153.

⁴⁴ Boyce v. Missouri, etc. R. R. Co. (1902), 168 Mo. 583, 58 L. R. A. 442.

⁴⁵ Schlesinger v. Kansas City, etc. Ry. Co. (1894), 152 U. S. 444.

⁴⁶ Skinner v. Ft. Wayne, etc. R. Co. (1900), 99 Fed. Rep. 465.

⁴⁷ Adirondack Ry. Co. v. New York State (1900), 176 U. S. 335.

⁴⁸ Scarritt v. Kansas City, etc. Ry. (1899), 148 Mo. 676; Townsend v. Michigan, etc. R. R. Co. (1900), 101 Fed. Rep. 757; Pittsburgh v. Pittsburgh, etc. R. R. Co. (1893), 159 Pa. St. 331.

termination of the period of existence of a railroad corporation, its right-of-way, where it was granted in fee, does not revert to the owner of the fee, but is held to be perpetual.⁴⁹ Upon dissolution of the corporation, its right-of-way does not revert to the State, or municipality, which granted the corporate franchise, but survives to the stockholders of the corporation, subject to the claims of creditors, to the payment of corporate debts.⁵⁰

§ 884. **Compensation for property taken.**—An arbitrary schedule of damages to be paid, can not be established, but there must be a fair appraisalment by an independent tribunal.⁵¹ Where land is taken by a water company, its fair market value measures the damage, not its value for a storage basin.⁵² The difference in value of land, before taking any part of it for a public improvement, and the value of the part left after the completion of the improvement, as effected by it, is the fair measure of damage to the owner resulting from the appropriation. And this same rule is applied in case of buildings, machinery, and other property.⁵³ In an action for damage, caused by the construction of a

⁴⁹ *Miner v. New York, etc. R. R. Co.* (1890), 123 N. Y. 242.

⁵⁰ *In re Higginson and Dean* (1899), 181 Q. B. 325; *People v. O'Brien* (1888), 111 N. Y. 1; *People v. De Grauw* (1892), 133 N. Y. 254; *Union, etc. Ry. Co. v. Chicago, etc. Ry. Co.* (1896), 163 U. S. 564.

⁵¹ *Mills on Em. Dom.*, § 85; *Cunningham v. Campbell*, 33 Ga. 625; *Cox v. Cummings*, 33 Ga. 549; *Kramer v. Cleveland, etc. R. Co.*, 5 Ohio St. 140.

⁵² *Moulton v. Newburyport Water Co.*, 137 Mass. 163.

⁵³ *Hot Springs R. Co. v. Tyler*, 36 Ark. 205; *Little Rock, etc. Ry. Co. v. Allen*, 41 Ark. 431; *Texas, etc. Ry. Co. v. Kirby*, 44 Ark. 103; *San Francisco, etc. R. Co. v. Caldwell*, 31 Cal. 367; *Eberhart v. Chicago, etc. Ry. Co.*, 70 Ill. 347; *Chicago, etc. R. Co. v. Stein*, 76 Ill. 41; *City of Bloomington v. Miller*, 34 Ill. 621, where a certain amount was awarded for the value of the land taken and half as much more for the depreciation of the part of the lot that

was left; *Dupins v. Chicago, etc. Ry. Co.*, 115 Ill. 97; *Sidener v. Essex*, 22 Ind. 201; *Sater v. Burlington, etc. Co.*, 1 Iowa, 386; *Henry v. Dubuque, etc. R. Co.*, 2 Iowa, 288; *Fleming v. Chicago, etc. R. Co.*, 34 Iowa, 353; *Harrison v. Iowa, etc. R. Co.*, 36 Iowa, 323; *Renwick v. Dubuque, etc. R. Co.*, 49 Iowa, 664; *Ham v. Wisconsin, etc. Ry. Co.*, 61 Iowa, 716; *Missouri River, etc. R. Co. v. Owen*, 8 Kan. 409, in which case the measure of recovery was said to be the amount of damages, and interest from the time of the appropriation of the land, and that the damages were properly shown by evidence of the value of the land immediately before and after the location of the road; *Atchison, etc. R. Co. v. Blackshire*, 10 Kan. 477; *Dwight v. County Comm'rs of Hampden*, 11 Cush. 201; *Virginia, etc. R. Co. v. Henry*, 8 Nev. 165; *New York, etc. Ry. Co. v. Chrystie*, 29 Hun. 646; *Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. 411; *East Brandywine, etc. R. Co. v. Ranck*, 78 Pa.

railroad through an eight-acre tract of land, it appeared that, separated from it by a public road, was another tract of sixteen acres, also owned by plaintiffs, but which was untouched and unaffected by the railroad. Both parties introduced evidence as to the value of the sixteen acres, to which no exception was taken; and neither party moved to strike out the evidence, or asked for instructions thereon; and it was held that a charge was not erroneous which allowed the jury to add the sixteen acres to the eight acres, and, from the value thus ascertained, deduct the value of the tract taken.⁵⁴ In determining the value of the right-of-way taken for a railroad, evidence of beds of coal in the land is admissible, to show the true character of the land, but is to be considered only so far as it affects the market value of the land.⁵⁵ An instruction, that the jury were not to regard the injury caused by frost and insects, after the date of the writ, as a distinct ground of damage (but that the true measure was the diminution in value of the land for cranberry culture), was proper.⁵⁶ It is not necessary to instruct the jury that the land-owner retains the fee, notwithstanding the condemnation of a right-of-way in the land.⁵⁷ No railway company can be forced to allow another railway to use its tracks, or to cross, without just compensation.⁵⁸ The taking of private property, contrary to the owner's will, for

St. 454; *Shemango, etc. R. Co. v. Braham*, 79 Pa. St. 447; *Cummings v. City of Williamsport*, 84 Pa. St. 473; *Pittsburg, etc. Ry. Co. v. Bently*, 88 Pa. St. 178, where it was said the true rule for valuing damages as a whole is the difference between the value of the property before the making of the road and its value after the road is made, as affected by it. *Philadelphia, etc. R. Co. v. Getz*, 113 Pa. St. 214. In this last case it was held that if the location of a railroad so affects the property as to compel the removal of the business conducted by tenants from year to year to another place, and the machinery used in the business is in consequence depreciated as it stands, the difference in the value of the machinery in connection with the business conducted on the property and its value when removed

and applied to the same or other use, is a proper element of damage to be considered by the jury; and also that in ascertaining the value of the machinery as it stood after the injury, evidence as to the expense of removing it from the property to a new place of business is admissible.

⁵⁴ *Baltimore & P. R. Co. v. Sloan* (1890), 7 Ry. & Corp. L. J. 217.

⁵⁵ *Doud v. Mason City & F. D. R. Co.* (1889), 76 Iowa, 438.

⁵⁶ *Howes v. Grush*, 131 Mass. 207.

⁵⁷ *Clayton v. Chicago, etc. Ry. Co.*, 67 Iowa, 238; *Cummins v. Des Moines, etc. S. L. Ry. Co.*, 63 Iowa, 397.

⁵⁸ *Penn. etc. Co. v. Balto, etc. Co.*, 60 Md. 263; *Southwestern R. Co. v. Southern, etc. Co.*, 46 Ga. 43, 12 Am. Rep. 585.

private use, although upon just compensation, is not that due process of law, provided by the Federal Constitution,⁵⁹ and such taking is therefore beyond the power of the legislature to authorize.⁶⁰

§ 885. **Measure of compensation.**—It is not competent for the legislature to fix the compensation. That must be fixed as provided in the proceedings for condemnation.⁶¹ The inquiry should be, what is the worth of the land in the market, with reference to the uses to which it is adapted?⁶² And the measure of compensation should be the difference between the market value of the property injured or taken, before and after the injury or taking.⁶³ When a part of a tract of one owner is taken, the measure of compensation should equal the market value, of that taken, and the damage to the rest of the tract, by the operation of the railroad or other structure,—the difference between the market value of this whole tract, before and after the railroad is built upon the strip taken.⁶⁴

§ 886. **Set-off benefits, as part compensation.**—When one's property is taken or injured, and the question is as to the amount of compensation, certain benefits concurring with the injury, and lessening the actual depreciation of his property, are considered; as, when a portion only of a tract of land is taken, the benefits accruing to the rest of the tract, may be set off, as against the damage done to it, but not as against the value of the portion taken.⁶⁵

⁵⁹ *Mo. Pac. R. Co. v. Nebraska*, 164 U. S. 403.

⁶⁰ *Penn. etc. Co. v. Balto. etc. Co.*, 60 Md. 263.

⁶¹ *Pennsylvania, etc. Ry. Co. v. Baltimore, etc. Ry. Co.* 60 Md. 263.

⁶² *Boom Company v. Patterson*, 98 U. S. 403.

⁶³ *Pittsburgh, etc. Ry. Co. v. Robinson*, 95 Pa. St. 426.

⁶⁴ *Tucker v. Mass. Central Ry. Co.*, 118 Mass. 546; *Taylor Pr. Corp.* 178.

⁶⁵ *Todd v. Kankakee, etc. Ry. Co.*, 78 Ill. 530; *Childs v. New Haven & N. Co.*, 133 Mass. 253.

CHAPTER XXXV.

ULTRA VIRES ACTS AND CONTRACTS.

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References:

Powers. Sections 819-871.

Trusts and monopolies. Sections 933-957.

Defective and incomplete incorporation. *De facto* corporation.
Sections 118-125.

Torts. Section 974.

Partnership liability. Sections 126-140.

Forfeiture of charter and franchise. Sections 1292-1303.

Liabilities of officers and agents. Sections 146-767a.

Liabilities of the corporation. Sections 768-791.

§ 887. Definition. Different senses in use of the term.—

An *ultra vires* act, or contract of a corporation, is one unauthorized by, or violative of, its charter, or other statute, or which is beyond the scope of the purposes for which the corporation was organized. Such a contract is void, for total want of power to make it, and can not be made good by ratification.¹ *Ultra vires* is a term used to express the action of a corporation which is beyond the powers conferred upon it, by its charter, or the statutes under which it is instituted; and the strict doctrine, relating to it, is, that all acts of the corporation, not within the powers conferred upon it, or reasonably implied from its charter, are null and void.² An *ultra vires* act is simply an unauthorized act, one in excess of the corporate powers conferred by charter, as distinguished from *intra vires* acts, or those authorized by the charter. All corporate acts are either *intra vires*, or *ultra vires*. To be *ultra vires*, it is not necessary that the act be one prohibited. However praiseworthy the act may be, it is *ultra vires*, if it is not expressly stated, or fairly implied, in the charter, as within the scope of the powers conferred.³

§ 888. Rule of the federal courts.—In the United States, two propositions, embracing the whole doctrine of *ultra vires*, are settled by the United States Supreme Court. First, that a contract by a corporation, which prevents the performance of its functions and duties, is *ultra vires*. Second, that the corporate powers are such only as the charter confers. Any act beyond those powers expressly stated, or fairly implied, is void; the contract is *ultra vires*.⁴ This doctrine has been sustained by the

¹ Central T. Co. v. Pullman P. Co., 139 U. S. 24.

² National, etc. Co. v. Home Sav. Bank, 181 Ill. 35, 72 Am. St. Rep. 245; Davis v. Old Colony, 131 Mass. 258, 41 Am. St. Rep. 258.

³ Pearce v. Madison, etc. Co., 21 How. 441; Central, etc. Co. v. Pullman, etc. Co., 139 U. S. 24.

⁴ Cumberland, etc. Co. v. City of Evansville (1903), 127 Fed. 187; Chicago, etc. Co. v. Union

argument, that corporations, being ideal and imaginary beings, created by the sovereign authority, should be subject to, and limited by, the will of the sovereign, as expressed in the charters or acts creating them, or the provisions of the general laws under which they are instituted; that every person, dealing with them, is presumed to have notice of the public acts and general laws, and hence of the powers conferred thereby upon them; and that, having such notice, no one should be allowed to enforce the performance of a contract, made with them in relation to matters not authorized by such acts or general laws. It has been further maintained that, as by creating a private corporation, a part of the sovereign power of the State has been conferred upon it, and that, as the contract thereby entered into, between the State and the corporation, is irrevocable, any power exercised on the part of the corporation, beyond what has been conferred, should be ignored by courts, as it would be an infringement upon the remaining or reserved rights of the State, which might otherwise be indefinitely extended, and the recognition of such acts would, therefore, be dangerous to State sovereignty, and against public policy.⁵ Again, it has been said that a recognition of *ultra vires* acts, as valid, would be against public policy, for the reason that the assets and income of the corporation might be expended in unauthorized undertakings and speculations, and the corporation thereby prevented from performing its part of the contract with the State; and because the non-assenting stockholders and creditors of the corporation, might thereby suffer loss, against which they should be protected.⁶

Pacific R. Co. (1891), 47 Fed. 15; Chief Justice Marshall in *Head v. Providence Ins. Co.* (1804), 2 Cranch. 127; *People v. Utica Ins. Co.* (1818), 15 Johns. 357, 8 Am. Dec. 243; *New York Firemen's Ins. Co. v. Sturges* (1824), 2 Cow. 664; Chief Justice Taney in *Perine v. Chesapeake, etc. Co.* (1850), 9 How. 172; *Pearce v. Madison, etc. Co.* (1858), 21 How. 441. This is the first case in the United States supreme court where the doctrine of *ultra vires* was directly considered. *Thomas v. Railroad Co.* (1879), 101 U. S. 71. This is the next case in that court to consider that subject, and the one cited by the courts oftener than

any other case bearing upon this doctrine, that corporate powers are such only as the charter and statutes confer. *Davis v. Old Colony R. Co.* (1879), 131 Mass. 258, 41 Am. Rep. 221. In this case, opinion by Chief Justice Gray (now associate justice of U. S. supreme court), he examines elaborately the doctrine of *ultra vires* in 53 cases on the subject. *Central, etc. Co. v. Pullman Palace Car Co.* (1890), 139 U. S. 24, opinion by Associate Justice Gray.

⁵ G. W. Field in 13 Am. L. Rev. 632.

⁶ G. W. Field in 13 Am. L. Rev. 632.

§ 889. **The early rigid doctrine. Tendency to relax.**—The old rule of *ultra vires* has been changed, so that no one, but the State, or some person specially interested in the corporation, will be heard to complain of the irregularity, where its purposes are not illegal.⁷ Regardless of natural justice, or of the principles of estoppel, the courts of fifty years ago, rigidly withheld their aid in the enforcement of an *ultra vires* contract; as, in the collection of a promissory note, for money received from a corporation which had no banking powers;⁸ or, where a corporation gave its note, for money received and expended, for a purpose not authorized in its charter.⁹ Except in the federal courts, many acts of strictly private corporations, which formerly would have been held *ultra vires*, are now sustained, as within the implied powers. Acts and contracts of the ordinary private corporation, are now sustained, as within its implied powers, so that, in the absence of any objection by the State, or by shareholders, or by creditors, the strictly private corporation may now do almost anything which an individual is permitted to do.¹⁰ "We know of no rule or principle, by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions, not coming within the exact scope of those designated."¹¹ A bank has no authority to subscribe to a benevolent enterprise, but the modern view of *ultra vires*, is that the acts of a strictly private corporation, though in excess of its powers, can not be enjoined by the State, if no one is injured, its stockholders assent, and its creditors are paid.¹² The English doctrine may be summarized thus: Corporations are created for fixed purposes, with certain specific powers. It is deemed to be public policy to keep them strictly within the bounds so defined. There is an implied prohibition to go beyond such limits, and all persons, dealing with a corporation, are charged with notice of the limitations upon its authority. Therefore, every contract of a corporation, or its agents, which exceeds the powers of the corporation, violates this implied prohibition, and contravenes such public policy, and is

⁷ Farwell Co. v. Wolf (1897), 96 Wis. 10, 37 L. R. A. 138.

⁸ Fleckner v. United States Bank, 8 Wheat. (U. S.) 338.

⁹ Pennsylvania, etc. Co. v. Dan-
dridge, 8 Gill & J. (Md.) 248, 29
Am. Dec. 543.

¹⁰ Farwell Co. v. Wolf (1897),
96 Wis. 10, 37 L. R. A. 138.

¹¹ Brown v. Winnisimmet Co.
(1865), 93 Mass. 326.

¹² Kent v. Quicksilver Min. Co.
(1879), 78 N. Y. 186.

illegal and void. Consequently, as to such contracts there can be no ratification or estoppel.¹³ An *ultra vires* act is invalid, when unauthorized; but it is not necessarily illegal, that is, unlawful, unless it be expressly prohibited, or is contrary to settled public policy, or is opposed to good morals, or otherwise, is in violation of law.¹⁴ *Ultra vires* does not include illegal acts, they are something more than *ultra vires*. An act may be illegal, but not *ultra vires*; as, a railroad corporation may give a lower rate to one customer, than to another. This is illegal, but is not *ultra vires*.¹⁵ Acts are *ultra vires* the corporation, when beyond the corporate powers. These are necessarily conferred by the legislature. But any such act authorized to the corporation, is, nevertheless *ultra vires* the directors, when authority to do the act is withheld from them, by their direct source of authority, the stockholders. The stockholders can not ratify and validate an act *ultra vires* the corporation, but may ratify any such authorized act, which is beyond the power of the directors.¹⁶ The term, *ultra vires*, is legitimately applicable only to the acts of the corporation as such, which are in excess of the corporate authority, that is, to the acts of the majority of the stockholders, rather than to the acts of directors, and other officers, in excess of their authority, as managers of the internal affairs of the corporation.¹⁷

§ 890. *Ultra vires* contracts executed.—Executed *ultra vires* contracts come under the same principle as those of the preceding sections, for the complete execution implies that a consideration has been paid to, and benefits received by, the corporation, and they will be enforced against it, though it has exceeded its chartered powers.¹⁸ All courts are in accord with the prop-

¹³ J. C. Harper in 12 Cent. L. J. 386; East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775; McGregor v. Deal, etc. R. Co., 18 Q. B. 618; Leake, Contracts, 582; 5 Am. L. Rev. 272, 282, article by O. W. Holmes, Jr.; Ashbury Ry. Co. v. Richie (1875), 7 H. L. 653; Attorney General v. Great Eastern Co., 5 App. Cas. 473.

¹⁴ Thomas v. Railroad Co., 101 U. S. 71, and *Vide infra*, § 909.

¹⁵ Anderson v. Midland Ry., 85 L. T. Rep. 408.

¹⁶ Ashbury Ry. Co. v. Richie, L. R. 7, H. L. 653.

¹⁷ Camden, etc. R. Co. v. Mays Landing, etc. Co., 48 N. J. Law, 530.

¹⁸ Bradley v. Ballard, 55 Ill. 413; Zabriskie v. Cleveland, etc. R. Co., 23 How. 381; Bissell v. Michigan, etc. R. Co., 22 N. Y. 258; Wright v. Hughes (1889), 119 Ind. 331; Cary v. Cleveland, etc. R. Co., 29 Barb. 35; Goff v. American Linen, etc. Co., 21 N. Y. 124; McClure v. Manchester, etc. R. Co., 13 Gray, 124; Chapman v. Mad River, etc. R. Co., 6 Ohio, 137; Hall v. Mutual L. I. Co., 32 N. H. 295; Railroad Co. v. Howard, 7 Wall. 392; Mott

osition that, in cases of *ultra vires* contracts, fully executed on both sides, neither party can maintain any action to rescind the contract, or to recover any part of the consideration.¹⁹ It is well to repeat the proposition, which seems to be established by the more recent decisions, that, where a contract has, in good faith, been fully performed, either by the corporation or the other party, the one who has thus received the benefit, will not be permitted to resist its enforcement by the plea of mere want of power.²⁰ Time and again, corporations have been held estopped to plead *ultra vires* to an action on the contract, performed by the other parties, where the corporation has received the benefit, although clearly beyond its powers.²¹ Thus, where an insurance company, after assuming the policies of another company, substituted notes for the securities, deposited by the latter company as required by statute, it was held that the former company could not say that the notes, by which it obtained valuable assets, were void, because *ultra vires*.²² And, where one sells bonds to a national bank, at a certain price, the bank agreeing to resell the bonds of the vendor, at the same price or less, but, the bonds subsequently appreciating in value, the bank refused to resell them,—in a suit by the vendor, for the breach of contract, the bank can not escape liability, by setting up that it had no authority, under the national

v. United States Trust Co., 19 Barb. 568; Leasure v. Hillegas, 7 Serg. & R. 320; Runyon v. Coster, 14 Pet. 122; McLindo v. St. Louis, 10 Mo. 577; Union Nat. Bank v. Mathews, 98 U. S. 621.

¹⁹ First Nat. Bank of Xenia v. Stewart, 107 U. S. 676; Union Trust Co. v. Illinois, etc. Co., 117 U. S. 468; Long v. Georgia Pacific Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931.

²⁰ J. C. Harper in 12 Cent. L. J. 389; Darst v. Gale, 83 Ill. 136; Lawrence, C. J., in Bradley v. Ballard, 55 Ill. 417; Cozart v. Georgia R. Co., 54 Ga. 379; Atlantic & P. Tel. Co. v. Union, etc. R. Co., 1 Fed. Rep. 745; Dimpfel v. Ohio, etc. Co., 8 Reporter, 641; Hitchcock v. Galveston, 96 U. S. 341; Natchez v. Mallery, 54 Miss. 499; Thompson v. Lambert, 44 Iowa, 239; Pittsburg, etc. R. Co. v. Allegheny Co., 79 Pa. St. 210, 215;

Watts' Appeal, 78 Pa. St. 370, 392; De Groff v. American, etc. Co., 21 N. Y. 124; Galion v. Hays, 29 Ohio St. 330, 340; Railway Co. v. McCarthy, 96 U. S. 258, 267; Field, Corp., § 273. *Contra*—older cases—which can not now be considered as the law, except in some instances, in their own states. Hood v. New York, etc. R. Co., 22 Conn. 502 (but see Converse v. Norwich, etc. Co., 33 Conn. 166, 180); Pennsylvania, etc. Co. v. Dandridge, 9 Gill & J. 248; Downing v. Mount Washington, etc. Co., 42 N. H. 230; President v. Forman, 29 Md. 524; Bank of Chillicothe v. Swayne, 8 Ohio St. 257 (but see 29 Ohio St. 330 and 341; 27 Ohio St. 343).

²¹ Oil Creek, etc. R. Co. v. Pennsylvania, etc. Co., 83 Pa. St. 160; State Board v. Citizens' St. Ry. Co., 47 Ind. 407.

²² Relfe v. Columbia Life Ins. Co., 10 Mo. App. 150.

bank act, to buy the bonds, as it might have discharged its obligation by returning the bonds, and receiving back the purchase money; and to permit it to retain the bonds, would be to allow it to profit by its own violation of the act.²³ It is no defense to an action for breach of a contract by a corporation, that, in entering into the contract, it violated its own rules, that fact being within its knowledge at the time the contract was entered into.²⁴ A corporation making an *ultra vires* contract for goods, and having received a part of them, the seller may recover, for those actually delivered, and the company can not recoup the damages arising from want of delivery of the remainder.²⁵ Likewise, a corporation may recover the value of groceries, sold to the defendant through an agent of the corporation, the principal being undisclosed, although the corporation was chartered for the purpose of manufacturing woolen goods, and the sale was *ultra vires*.²⁶ Conversely, the other party has been held estopped, where the corporation had performed the contract.²⁷ So, where certain residents of a county, bound themselves for enough to pay for a right-of-way, and the company constructed the road, the promisors could not plead *ultra vires*.²⁸ And, generally, the power of a corporation to purchase, and sue upon bonds, can not be questioned by the obligor in the bonds.²⁹ It has been very justly said, that, as it is manifest that the State has an ample remedy for misuse or abuse of powers conferred upon a corporation, or for a usurpation of powers and franchises not conferred upon it, that the application of the doctrine of *ultra vires* can be of no service to the State (in restraining usurpations of power on the part of the corporation, or in promoting the public interest), while it encourages dishonesty and sets aside general principles of the law, by enabling a corporation to take advantage of its own wrong,—therefore the doctrine of *ultra vires*, so far as it affects executed contracts, is wanting in principle, and rests upon no solid foundation.³⁰

²³ Logan Co. Nat. Bank v. Townsend (Ky. 1887), 3 S. W. Rep. 122.

²⁴ Samuel v. Fidelity & Casualty Co. (1888), 49 Hun, 122.

²⁵ Day v. Spiral Spring Buggy Co. (1885), 57 Mich. 146.

²⁶ Slater Woolen Co. v. Lamb (1887), 143 Mass. 420.

²⁷ Whitney Arms Co. v. Barlow, 63 N. Y. 62; Newbury, etc. Co. v. Weare, 27 Ohio St. 343, 353; Ches-

ter Glass Co. v. Dewey, 16 Mass. 94, 102; Gold Min. Co. v. National Bank, 96 U. S. 640; National Bank v. Matthews, 98 U. S. 621.

²⁸ Chicago & Atlantic Ry. Co. v. Derkes, 103 Ind. 520.

²⁹ Franklin Avenue German Savings Inst. v. Roscoe Board of Education, 75 Mo. 408.

³⁰ G. W. Field in 13 Am. L. Rev. 658.

§ 891. **Ultra vires contracts executory.**—Contracts made in excess of the powers of a corporation which are executory on both sides, no part of the consideration having been paid,—will not be enforced.³¹ The courts agree, that, so long as an *ultra vires* contract remains unexecuted, in whole or in part, by either party to it, it is void; neither party is estopped to deny its validity, and no action can be based upon it, by either party to it.³² One court has distinctly stated the limits of the proposition, in saying that, as it understands the rule, *ultra vires* prevails in full force only where the contracts of private corporations remain wholly executory.³³ Where a corporation makes a contract that is in excess of its chartered powers, it may well be that, while the agreement remains wholly executory, it can not be enforced. So long as the contract is unexecuted, it does not estop the corporation, because the power of a corporation, like that of a person under a legal disability, can not be enlarged by the mere form of a contract, which it had no capacity to make.³⁴ Accordingly, *ultra vires* may be pleaded to a covenant to pay in advance, rent reserved in a written lease, the consideration being future, not past, occupation.³⁵ And, where a banking corporation, through its president, subscribed to a creamery, but before any act was done, or expenditures made, on the faith of his subscription, it was withdrawn; it was held that, as it was simply an executory contract, the subscription could, at the time, be withdrawn, and that the bank was not liable.³⁶ Conversely, a corporation can not enforce an executory contract, made in excess of its powers.³⁷ Where the contract is *ultra vires* and irregular, and the claim is merely for the recovery of a sum of money, acts of part performance, or even full performance, will not cure the insufficiency of the contract, and the other contracting party may plead *ultra vires*.³⁸ So no action lies for money due under a verbal contract to employ a person for a matter outside of the ordinary business of the com-

³¹ Parish v. Wheeler, 22 N. Y. 508.

³² Central, etc. Co. v. Pullman's Palace Car Co., 139 U. S. 24; McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203; Louisville, etc. Co. v. Louisville Trust Co., 174 U. S. 552; Nashau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14.

³³ Thompson v. Lambert (1876), 44 Iowa, 248.

³⁴ Wright v. Hughes, (1889), 119 Ind. 329; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543.

³⁵ Oregonian Ry. Co. v. Simpson, 23 Fed. Rep. 214.

³⁶ Holt v. Winfield Bank, 25 Fed. Rep. 812.

³⁷ Nassau Bank v. Jones, 95 N. Y. 115.

³⁸ Crampton v. Varna Ry. Co. (1872), 7 Ch. 562; Jackson v. North Wales Ry. Co., 6 R. C. 113.

pany.³⁹ If, however, there have been acts of part-performance, which the company must be taken to have acquiesced in, and to have thus adopted the contract, specific performance will be decreed.⁴⁰

§ 892. Part-performance of contracts. Contracts executed on one side.—Where an *ultra vires* contract remains executory on both sides, part-performance, by either or both parties, will not sustain an action by the other, for damages, or for specific performance.⁴¹

Contract executed on one side.—There is direct conflict of opinion, where the contract has been executed on one side, and the consideration has been received by the other, upon the question whether that will support an action, either on the contract, or in disaffirmance of it, and for recovery of the consideration, or its value. The United States Supreme Court, and the courts of several States, including Massachusetts, Tennessee, Alabama, and others, hold, that such unilaterally executed contracts, although *ultra vires* only for lack of authority, are absolutely void; and that part-performance, and the payment of the consideration, do not estop the other party to set up that the contract is *ultra vires*;⁴² and that, if in any such case, such party were estopped, "then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them, which the legislature has withheld."⁴³ And, even though the contract of a *quasi*-public corporation be in excess of its express powers, if it be not immoral, or prohibited, and has been executed on the one side, it will be enforced upon the other, to the extent of doing equity. This is the tendency of the State courts to hold with New York, but herein they are in conflict with the Supreme Court of the United States. A subscriber to stock may withdraw his

³⁹ Cope v. Thames Haven Dock & Ry. Co., 3 Ex. 841; Browne & Theobald's Railway Law, 108.

⁴⁰ Wilson v. West Hartlepool Ry. Co., 2 De Gex, J. & S. 475; Laird v. Birkenhead Ry. Co., Johnson (Eng. V.-Ch), 500; London, etc. Ry. Co. v. Winter, Craig & P. 57. And see Cook v. Corporation of Seaford, 6 Ch. 551.

⁴¹ Thomas v. West Jersey R. Co.,

101 U. S. 71; Day v. Spiral etc. Co., 57 Mich. 146, 58 Am. Rep. 352.

⁴² Central, etc. Co. v. Pullman's Palace Car Co., 139 U. S. 24; National, etc. Assn. v. Home Sav. Bank, 181 Ill. 35, 72 Am. St. Rep. 245; Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26.

⁴³ City Council, etc. v. Montgomery, etc. Co., 31 Ala. 76.

subscription, if the company locates its works elsewhere than at the place agreed in the articles of association.⁴⁴

In the Supreme Court of the United States.—Upon this question, in the Supreme Court of the United States, Mr. Justice Gray said, "all contracts made by a corporation, beyond the scope of its powers, are unlawful and void, and this upon three distinct grounds: the obligation of everyone contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. . . . The objection to the contract is not merely, that the corporation ought not to have made it, but that it could not make it. The contract can not be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. . . .

When the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws. . . . The courts, while refusing to maintain any action upon the unlawful contract, . . . by permitting property or money to be recovered back, or compensation to be made, . . . do not affirm, but disaffirm, the unlawful contract."⁴⁵ Where State courts follow this rule, the following are among cases of its application: Where a railroad corporation made an *ultra vires* purchase of a steamboat, to be run in connection with its road, and gave its notes therefor, and received and used the boat, it was held that no action could be maintained on the notes;⁴⁶ where an insurance company issued a policy upon a risk not within its powers, and received the premium, it was held not liable on its policy.⁴⁷ A corporation was held not liable on a guaranty by it, of a dividend on the stock of another corporation, where the subscription to it was induced by the guaranty;⁴⁸ and where, upon an *ultra vires* contract by a corporation to purchase property

⁴⁴ *Auburn, etc. Works v. Schultz* (1891), 143 Pa. St. 256.

⁴⁵ *Central, etc. Co. v. Pullman Palace Car Co.*, 139 U. S. 24.

⁴⁶ *Pearce v. Madison, etc. Co.*, 21 How. (U. S.) 441.

⁴⁷ *Andrews v. Union, etc. Co.*, 37 Me. 257.

⁴⁸ *Memphis, etc. Co. v. Memphis & Charleston R. Co.*, 85 Tenn. 703.

to be manufactured for it, the contract was executed by the contractee's manufacture and tender of the property, it was held not to entitle him to recover upon an action for the price.⁴⁹ But that strict doctrine, that an *ultra vires* contract, though fully executed on one side, will not support an action, is not generally recognized; on the contrary, it is held by many State courts, that in case of a contract with a corporation, merely *ultra vires* because beyond the powers, but which is not immoral or expressly forbidden, or otherwise illegal, and, where there has been performance by either party, and receipt of its benefits by the other, such person is estopped to plead *ultra vires* to escape liability on contract.⁵⁰ In Illinois it was held that a bank, after establishing an investment department, and receiving loans and deposits upon the faith of deeds of trust to secure the lenders, could not repudiate the security on the ground that it was *ultra vires*.⁵¹ In the case of an *ultra vires* lease, made by a corporation in New Jersey, the court said: "In the conflict of judicial opinion on this subject, this court may adopt, and should adopt, the rule which will produce the best results in the administration of justice. In my judgment, the true rule is, that, when the transaction is complete, and the party, seeking relief, has performed on his part, the plea of *ultra vires* by the corporation, which has acquiesced in it, is inadmissible, in an action brought against it for not performing its side of the contract, in all those instances, where the party, who has performed, can not, upon rescission, be restored to his former status. . . . The underlying principle is, that the corporation can not set up its own infirmity when it is unconscionable to do so. The law forbids the defense, on account of the flagrant injustice which would otherwise be done. The question of corporate power is not entertained. To enable recompense to be had to this extent, the contracts are respected, not that they rest in authority, but because good conscience requires it."⁵² A person who has purchased and received goods from a corporation, can not defeat any action for the price, on plea that, to deal in, or sell the goods, was *ultra vires* the corporation;⁵³ nor conversely, can the corporation, on like plea, avoid its undertaking to pay

⁴⁹ Downing v. Mt. Washington Road Co., 40 N. H. 230.

⁵⁰ Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Bath, etc. Co. v. Claffy, 151 N. Y. 24, 36 L. R. A. 664.

⁵¹ Ward v. Johnson, 95 Ill. 215.

⁵² Camden, etc. Co. v. May's Landing, etc. Co., 48 N. J. Law, 530.

⁵³ Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504.

for the purchased property.⁵⁴ The lessee under an *ultra vires* lease, by a corporation, where he has occupied the premises, can not defeat an action for the rent, by pleading *ultra vires*.⁵⁵ Where corporations have entered into an *ultra vires* partnership, and received the consideration for their partnership contract, they can not defeat their partnership liability upon it, by setting up that the business was *ultra vires* the corporation.⁵⁶ And, where railroad companies, without legislative authority therefor, agreed to consolidate, and sold a ticket to a passenger, for a price received, they were not allowed to escape liability for injury to him and his baggage, on plea of *ultra vires* against the consolidation, and the contract with the passenger.⁵⁷

§ 893. **Restoration of that received, a condition of rescission of contract.**—The rule is the same, even where no fraud was intended or committed.⁵⁸ In other words, when a corporation has repudiated a contract as *ultra vires*, it must restore to the other party whatever it may have obtained from him;⁵⁹ unless the thing acquired has become so blended with the corporate property, that it can not be rendered up, without infringing the rights of persons who have never assented to the contract, nor in any way acquiesced in it.⁶⁰ Under the rule, in equity, that a corporation is accountable, for benefits which it has received under a transaction *ultra vires*, it was held that the court, while setting aside, as *ultra vires*, a contract, should compel an account for the benefit had, and this, not on the basis of bare reimbursement, but of a fair compensation, which should include the payment of interest also.⁶¹ Having had the benefit of the transaction, the law implies a contractual or *quasi* contractual obligation to pay, and neither party to the contract, can defeat recovery by plea

⁵⁴ Dewey v. Toledo, etc. Co., 91 Mich. 351.

⁵⁵ Bath, etc. Co. v. Claffy, 151 N. Y. 24, 36 L. R. A. 664.

⁵⁶ Bissell v. Michigan, etc. R. Co., 22 N. Y. 258.

⁵⁷ Bissell v. Michigan, etc. R. Co., 22 N. Y. 258.

⁵⁸ Sherman Center Town Co. v. Morris (1890), 23 Pac. Rep. 569.

⁵⁹ Brice's *Ultra Vires* (2d Eng. ed.), 769; Newcastle Northern R. Co. v. Simpson, 23 Fed. Rep. 214; Humphrey v. Patrons' Mercantile Assn., 50 Iowa, 607; White v.

Franklin Bank, 22 Pick. 181; *In re* Cork, etc. Ry. Co., L. R. 4 Ch. 748; Ernest v. Nicholls, 6 H. L. Cas. 401; Burge's and Stock's Case, L. R. 5 Ch. 309; Hawken v. Bourne, 8 Mees. & W. 703; Hall v. Swansea, 5 Q. B. 526; Hawtayne v. Bourne, 7 Mees. & W. 595; *Ex parte* Cropper, 1 De Gex, M. & G. 147.

⁶⁰ Taylor on Corporations, § 310, citing Hill's Case, L. R. 9 Eq. 605.

⁶¹ Newcastle Northern R. Co. v. Simpson, 23 Fed. Rep. 214.

that the contract was *ultra vires*.⁶² Illustrations of recovery, under such implied contract, are: recovery under an *ultra vires* lease, of value of use and occupation of the land, where an action could not be maintained for rent due, under the lease;⁶³ recovery of the money by a corporation, which in advance paid money under *ultra vires* contract, for purchase of goods, the other party retaining both the money and the goods;⁶⁴ and recovery of the consideration paid for *ultra vires* bonds, issued and sold by a corporation.⁶⁵ The established rule in Alabama is, that a corporation is not estopped, by reason of having received the benefits of a contract which is *ultra vires*, from setting up its invalidity in defense of a suit brought to enforce it.⁶⁶

§ 894. **Enforceability of *ultra vires* contracts.**—In New York, Massachusetts, and Wisconsin, it is the rule, as to *ultra vires* contracts carried out by one party, that the other party can not refuse performance, while retaining the benefits received. The New York court of appeals said:—"That kind of plunder, which holds to the property, but pleads the doctrine of *ultra vires* against the obligations to pay for it, has no recognition or support in the law of this State."⁶⁷ On the contrary, the United States Supreme Court rigidly adheres to the old rule against the enforceability of a contract which is *ultra vires*. "The doctrine of *ultra vires*, by which a contract, made by a corporation beyond the scope of its corporate powers, is unlawful, and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds; the obligation of any one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks, which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."⁶⁸ "A railroad corporation, unless authorized by its act of incorporation, or by other statutes so to do, has no power to guarantee the bonds

⁶² Slater, etc. v. Lamb, 143 Mass. 420.

⁶³ Brunswick Gaslight Co. v. United Gas, etc. Co., 35 Me. 532, 35 Am. St. Rep. 385.

⁶⁴ Northwestern, etc. Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781.

⁶⁵ Paul v. City of Kenosha, 22 Wis. 266, 94 Am. Dec. 598.

⁶⁶ Chewacla Lime Works v. Dismukes (1889), 87 Ala. 344; Sherwood v. Alvis, 83 Ala. 115. *Vide infra*, § 898.

⁶⁷ Seymour v. Spring Forest, etc. Assn. (1895), 144 N. Y. 333, 26 L. R. A. 859.

⁶⁸ McCormick v. Market Bank (1897), 165 U. S. 538.

of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires*, unlawful, and void, and incapable of being made good by ratification, or estoppel.⁶⁹ Though a hardware corporation may not become a borrower from, or stockholder in, a building association, yet he can not repudiate his mortgage, if given for a loan.⁷⁰ A stockholder of a railway company, as lessee of another corporation, can not object that the lessor had no power to own the railroad.⁷¹ Though a national bank has no authority to receive, and collect, and reinvest, securities, in doing so, it must account for them, and their proceeds.⁷² A corporation, engaging in the hotel business, can not repudiate its liability on the ground that the business was *ultra vires*.⁷³

§ 895. Contracts which are enforceable against, but not by the corporation.—The mere knowledge on the part of the corporation, that the other party is going to use the proceeds of the contract for some illegal purpose, does not render the contract void, so far as it is concerned, provided it does not participate in the illegal undertaking.⁷⁴ It may be laid down as the rule, that the agreement must be to do, or to further, some illegal or immoral purpose, or some purpose in violation of public policy. The element that destroys the validity of the agreement, is the purpose, by the agreement, to effect the forbidden end, else the consideration for the promise must be to do an illegal act. If this were not the rule, then a contract might be declared void, as against public policy or public law, that does not stipulate for the violation of the one, or the other.⁷⁵ When a corporation makes a prohibited contract, while executory on both sides, it is binding on neither; and, if executed on either side, the courts will refuse to lend any aid, to the enforcement by the other; subject, however, to this just exception, that, if the charter clearly intended the contract to be illegal as to the corporation only, and

⁶⁹ Louisville, etc. Ry. v. Louisville Trust Co. (1899), 147 U. S. 567. *Vide supra*, LIABILITY OF OFFICERS, §§ 746-767.

⁷⁰ Bowman, v. Foster, etc. Co. (1899), 94 Fed. 592.

⁷¹ Rogers v. Nashville, etc. Ry. (1898), 91 Fed. 299.

⁷² Emmerling v. First National Bank (1899), 97 Fed. 739.

⁷³ Magee v. Pacific, etc. Co. (1893), 98 Cal. 678, 36 Am. St. Rep. 199.

⁷⁴ Taylor on Corporations, § 293; Puryear v. McGavock (1871), 9 Heisk. 461; Jones v. Planters' Bank (1872), 9 Heisk. 455.

⁷⁵ Puryear v. MaGavock (1871), 9 Heisk. 461, quoting Naff v. Crawford, 1 Heisk. 116.

not as to the other party, it may be enforced against, though not by, the corporation.⁷⁶ An illegal corporate act can not be ratified, nor made valid, even by the unanimous consent of the stockholders.⁷⁷ Nor can the doctrine of estoppel be invoked, to bind a corporation to a contract forbidden by law.⁷⁸

§ 896. *Ultra vires* as a defense.—The first enunciation in this country, of the principles, in support of the defense of *ultra vires*, was by Chief Justice Marshall, of the Supreme Court of the United States, in 1804; the learned Justice saying: "Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its corporate existence, all the qualities and disabilities annexed by the common law to the ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and be capable of exercising its faculties only in the manner which that act authorizes. With these bodies, which have only a legal existence, the act of incorporation is an enabling act. It gives them all the powers they possess. It enables them to contract; and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract, than if the body had never been incorporated."⁷⁹ Upon these principles, thus declared, were afterward based the decisions in the Dartmouth college case.⁸⁰ The exercise by a corporation, of any power not specifically granted, or necessary to carry into effect the purposes, for which it was incorporated, is *ultra vires*. The defense of *ultra vires* is available against all persons, because they are bound to know from the law of its existence, that the corporation has no power to perform the act.⁸¹ The doctrine of *ultra vires* as a defense, was

⁷⁶ "*Ultra Vires*," by G. H. Wald, 6 Cent. L. J. 5, citing *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Tracy v. Talmadge*, 14 N. Y. 162.

⁷⁷ *Thomas v. The Railroad*, 101 U. S. 70, and authorities there reviewed; *Salem Mill-Dam Co. v. Ropes*, 6 Pick. 23, 32; *Riche v. Ashbury Railway Carriage, etc. Co.*, L. R. 7 H. L. 653.

⁷⁸ *In re Comstock*, 3 Sawy. 218; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 185; *Ogdensburgh, etc. R. Co. v. Vermont, etc. R. Co.*, 4 Hun, 268.

⁷⁹ *Heard v. Providence Ins. Co.*, 2 Cranch (1804), 127.

⁸⁰ *Dartmouth College Case*, 4 Wheat. 518; *Gozzler v. Corp. of Georgetown*, 6 Wheat. 593; *Fleckner v. Bank of United States*, 8 Wheat. 338.

⁸¹ *People v. Utica Ins. Co.* (1818), 15 Johns. 357, 8 Am. Dec. 243; *New York, etc. Co. v. Sturges* (1824), 2 Cow. 664; *Beach v. Fulton Bank* (1829), 3 Wend. 574; *Bank of Augusta v. Earle* (1839), 13 Pet. 519; *Perrine v. Chesapeake, etc. Co.* (1850), 9 How. 172.

evolved for the purpose of confining corporations to the exercise of only such powers as the State has conferred upon them, and powers incident thereto. If the corporation makes a contract beyond its power to make, or which is prohibited, or is otherwise contrary to law, it is the duty of the court, to declare the contract void, without inquiry into the relative condition of the parties. It is the general rule, as to *ultra vires* contracts, that any contract made by a corporation, not necessary and proper, directly or indirectly, to enable it to answer the purpose of its creation,—is void, and neither a court of law, or of equity, can enforce it.⁸² In *Central Transportation Company v. Pullman, etc. Co.*, where all the cases, bearing upon this subject were cited, examined, and reaffirmed, it was said by Associate Justice Gray; that, “a contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the objects of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not voidable only, but wholly void, and of no legal effect.

The objection to the contract is not merely, that the corporation ought not to have made it, but that it could not make it. The contract can not be ratified by either party, because it could not have been authorized by either. No performance, on either side, can give the *unlawful contract* any validity, or be the foundation of any right of action upon it.”⁸³ When acts of corporation are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation can not perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board of the shareholders, that the affairs shall be managed, and the funds applied solely for carrying out the objects for which the corporation was created.⁸⁴ Whether a contract, as originally made, was *ultra vires*, is not a very important inquiry upon suit brought upon the contract. If it was, the State, under whose sovereignty the corporation

⁸² *Thomas v. R. R. Co.*, 101 U. S. 71; *Central Trans. Co. v. Pullman Co.*, 131 U. S. 24; *Reese on Ultra Vires*, § 70; *Alabama Ins. Co. v. Central Assn.*, 54 Ala. 73; *Simmons v. Troy Works*, 92 Ala. 427, 9 South. 160.

⁸³ *Central Trans. Co. v. Pullman, etc. Co.* (1890), 139 U. S. 24.

⁸⁴ *Whitney Arms Co. v. Barlow* (1875), 63 N. Y. 68; *Earl of Shaftsbury v. North Staffordshire R. Co.*, L. R. 1 Eq. 593; *Taylor v. Chichester, etc. R. Co.*, L. R. 2 Exch. 356; *Bissell v. Michigan, etc. R. Co.*, 22 N. Y. 258.

dwells, and by whose act and favor it exists, has no interest in arresting its action for the recovery of moneys, equitably due upon a contract fully executed, and a work fully accomplished, whatever may be its right to annul its charter. The shareholders, whose confidence has been abused, and whose funds have been diverted from their proper use, have a direct interest in reclaiming and restoring to proper custody, and applying to legitimate uses, the funds which have been diverted and improperly used, for purposes other than the legitimate business of the corporation. But the plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary, would accomplish a legal wrong.⁸⁵ In view of the inroad of exceptions to the rule, it has become practically true, that the theory of *ultra vires*, based upon the limited capacities of corporations, has given way to a more modern one, which rests the doctrine on illegality.⁸⁶ In the absence of proof, showing a want of authority on the part of a corporation, in making a contract, or of a violation of its charter, a claim, that the contract is *ultra vires* will not be upheld; every presumption is to the contrary.⁸⁷ The defense that bonds issued by a corporation, are invalid, under a constitution prohibiting the increase of the bonded debt of a corporation, without the consent of the majority of the stockholders in value, should be specially pleaded.⁸⁸ In case of an *ultra vires* contract, evidenced by a negotiable instrument, which before maturity has passed into the hands of a *bona fide* purchaser for value, the corporation can not avoid liability, by setting

⁸⁵ Whitney Arms Co. v. Barlow (1875), 63 N. Y. 69, *per* Allen, J.

⁸⁶ G. H. Wald in 6 Cent. L. J. 5, citing Att'y-Gen. v. Great Northern Ry. Co., 6 Jur. N. S. 1006; McGregor v. Dover, etc. Ry. Co., 18 Q. B. 618; Taylor v. Chichester, etc. Ry. Co., L. R. 2 Ex. 356. It is thus stated by Blackburn, J., in Riche v. Ashbury Ry. Car Co., L. R. 9 Exch. 244, at p. 262: "I do not entertain any doubt that if on the true construction of any statute creating a corporation, it appears to be the intention of the legislature, express or implied, that the corporation shall not

enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into, contrary to the enactment, as *illegal* and therefore wholly void, and can not be ratified. The test then is, not, did the legislature expressly enable the corporation to make the particular contract, but has it prohibited it, and every act not prohibited by the statute stands."

⁸⁷ Rider Life Raft Co. v. Roach, 97 N. Y. 378.

⁸⁸ German Sav. Inst. v. Jacoby (Mo. 1889), 11 S. W. Rep. 256; Mo. Const., art xii, § 8.

up the defense of *ultra vires*,⁸⁹ or, if one takes a corporation note, on acceptance, in ignorance of the fact that it is merely accommodation paper.⁹⁰ The corporation has no power to accept, or issue, or indorse, a negotiable paper, for the mere accommodation of another person,⁹¹ but it can not plead its want of power, against a *bona fide* purchaser for value, before maturity.⁹² It may so plead against a purchaser, with notice that the instrument was issued *ultra vires*.⁹³

§ 896a. **Ultra vires as a defense by the corporation against third parties, distinguished from its defense against stockholders.**—"The question, as between stockholders and the corporation, is a very different one from that which arises between the corporation itself, and strangers dealing with it; and the principle established, when the contract arises between strangers and the corporation, is whether the act, in question, is one which the corporation is not authorized to perform, under any circumstances, or one that may be performed by the corporation, for some purposes, but may not for others. In the former case, the defense of *ultra vires* is available to the corporation, as against all persons, because they are bound to know from the law of its existence, that it has no power to perform the act. But in the latter case, the defense may, or not, be available, depending upon the question, whether the party dealing with the corporation, is aware of the intention to perform the act for an unauthorized purpose, or, under circumstances, not justifying its performance. And the test, as between strangers having no knowledge of an unlawful purpose, and the corporation, is to compare the terms of the contract with the provisions of the law, from which the corporation derives its powers, and, if the court can see that the act to be performed, is necessarily beyond the powers of the corporation, for any purpose, the contract can not be enforced,—otherwise it can. . . Strangers are presumed to know the law of the land, and they are bound, when dealing with corporations, to know the powers conferred by their charters.

⁸⁹ Wright v. Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701; Louisville, etc. Co. v. Louisville Trust Co., 174 U. S. 552; Wood v. Corry, etc. Co., 44 Fed. 146.

⁹⁰ Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep.

322; National Park Bank v. German, etc. Co., 116 N. Y. 281.

⁹¹ National Park Bank v. German, etc. Co., 116 N. Y. 281.

⁹² National Park Bank v. German, etc. Co., 116 N. Y. 281.

⁹³ National Park Bank v. German, etc. Co., 116 N. Y. 281.

These are open to their inspection, and it is easy to determine whether the act is within the scope of the general powers for that purpose."⁹⁴ *Ultra vires* is no defense to a contract, made, not in the exercise of a power, not conferred, but by abuse of a general power in a particular instance, the abuse not being known to the contractee.^{94a} The doctrine of *ultra vires*, in its application, has two phases, one, where the public is concerned, and the other, where the question is between the corporation and the stockholders, or third parties dealing with the corporation, and through it with the shareholders. When the public is concerned to restrain a corporation, within the limit of its charter power, an assent by the stockholders, to the exercise of unauthorized power by the corporation, will be of no avail. When the question is the right of the shareholder to restrain the corporation within its authorized powers, he may, in many cases, be denied, by reason of his express, or tacit consent to the corporate action. Where the corporation does acts, to the harm of the public, they are *per se* illegal, or are *mala prohibita*. Then no assent of the shareholder can validate them. But, where the corporation does acts, not thus illegal, though they are unauthorized, which acts affect only the interest of the stockholder, they may be validated by assent of the stockholders, so that strangers to them, dealing in good faith with the corporation, will be protected, in a reliance upon those acts.^{94b}

§ 897. As a defense by a corporation which has received benefits.—A corporation can not retain property acquired under a transaction *ultra vires*, and at the same time repudiate its obligations under the same transaction.⁹⁵ And, if a contract, made

⁹⁴ Chief Justice Sawyer in *Miners' Ditch Co. v. Zellerbach* (1869), 37 Cal. 543, 99 Am. Dec. 930.

^{94a} *Monument Nat. Bank v. Globe Works* (1869), 101 Mass. 57, 3 Am. Rep. 322.

^{94b} *Kent v. Quicksilver M. Co.* (1879), 78 N. Y. 159.

⁹⁵ *Memphis & Little Rock R. Co. v. Dow*, 19 Fed. Rep. 388; *National Bank v. Matthews*, 98 U. S. 621; *Stewart v. National Bank*, 2 Abb. U. S. 424; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Bissell v. Michigan, etc. R. Co.*, 22 N. Y. 264; *Tracy v. Tal-*

mage, 14 N. Y. 162, 67 Am. Dec. 132; *Parish v. Wheeler*, 22 N. Y. 494; *De Graff v. American, etc. Co.*, 21 N. Y. 124; *Taylor County v. Baltimore, etc. R. Co.* (1888), 25 Fed. Rep. 161, 4 Ry. & Corp. L. J. 10; *Louisville, etc. Ry. Co. v. Flannagan* (1888), 113 Ind. 488; *Durst v. Gale*, 83 Ill. 136; *Hertz v. San Francisco*, 33 Cal. 134; *Connecticut River Savings Bank v. Fiske*, 60 N. H. 363; *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331. *Of. Illinois Central R. Co. v. Thompson*, 116 Ill. 159.

by it, is not in violation of the terms of the charter of the corporation, or of any statute, prohibiting it, the corporation is liable on the contract.⁹⁶ And a corporation, like a natural person, may be compelled to account for benefits received from a transaction, even if it be one not enforceable, by reason of the fact that its agents had no right to make it, it being neither illegal nor immoral.⁹⁷ "However the contractual power of a corporation may be limited under its charter, there is no limitation of its power to make restitution to the other party, whose money or property it has obtained through an unauthorized contract; nor, as a corporation, is it exempted from the common obligation, to do justice, which binds individuals, for this duty rests upon all persons alike, whether natural or artificial."⁹⁸ To relieve injustice and hardship, the doctrine seems to have been introduced, that, although a contract may be void as *ultra vires*, still a recovery may be had of a corporation, for money or property received on such void contract, on an implied agreement to return the property, or other consideration received, or pay for the same, so much as it may reasonably be worth.⁹⁹ This is the rule, even in those jurisdictions which strictly apply the doctrine of *ultra vires*. The action allowed on implied contract, for money had and received, or for value of the property, is in disaffirmance of the *ultra vires* contract, and not to enforce it.¹ "In some of the cases, it has been said, that, while the general rule is, that acts and contracts in excess of the charter of a corporation, are

⁹⁶ State Board of Agriculture v. Citizens' Street Ry. Co., 47 Ind. 407, 17 Am. Rep. 702; Hitchcock v. Galveston, 96 U. S. 311.

⁹⁷ Manville v. Belden Mining Co., 17 Fed. Rep. 425.

⁹⁸ Manchester, etc. Co. v. Concord R. Co., 66 N. H. 100, 49 Am. St. Rep. 582, 9 L. R. A. 689.

⁹⁹ "*Ultra Vires*," by G. W. Field, 13 Am. Rev. 647; Allegheny City v. Clarkan, 14 Pa. St. 81; Dill v. Wareham, 7 Metc. 438; McCracken v. San Francisco, 16 Cal. 571; East London, etc. Ry. Co. v. Bailey, 4 Bing. 283; Mayor v. Charlton, 6 M. & W. 815; Paine v. Strand Union, 8 Q. B. 326; Curtis v. Leavitt, 15 N. Y. 9; Moss v. Rossie Min. Co., 5 Hill, 137; Peterson v. Mayor, 17 N. Y. 449; Hooker v. Eagle Bank,

30 N. Y. 83; Steamboat Co. v. McCutcheon, 13 Pa. St. 13; Hague v. City of Philadelphia, 48 Pa. St. 527; City of Baltimore v. Reynolds, 20 Md. 1; Richard v. Warren Co., 31 Md. 381; Zoetman v. San Francisco, 20 Cal. 96; Argenti v. City of San Francisco, 16 Cal. 255; Steam Nav. Co. v. Wood, 17 Barb. 378; Bank v. Hammond, 1 Rich. 281; Southern, etc. Co. v. Lanier, 5 Fla. 110; Silver Lake Bank v. North, 4 Johns. Ch. 376; Tracy v. Talmadge, 14 N. Y. 162; Leavitt v. Palmer, 3 N. Y. 19; Gas Co. v. San Francisco, 9 Cal. 453.

¹ Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40; Day v. Spiral, etc. Co., 57 Mich. 146, 58 Am. Rep. 352; Slater, etc. Co. v. Lamb, 143 Mass. 420.

ultra vires, and therefore not binding on a company, yet, after a corporation has enjoyed the benefit of an act or contract performed in its behalf, it will be estopped, when charged with responsibility on account of the act or contract, from setting up, as a defense, that the transaction was *ultra vires*. "This statement of the law is certainly inaccurate. It has never been denied that the principles of the law of agency apply to corporations and to individuals alike, and it is certain that, according to the elementary principles of the law of agency, a person does not become responsible for acts performed in his name merely because the acts have accrued to his benefit. A person may become responsible for an unauthorized act performed in his behalf, by ratifying the act; but ratification would imply an intention to adopt the unauthorized act. Ratification, by a corporation, of an act in excess of its charter, means ratification by the entire body of shareholders; no agent of a corporation has authority to ratify an act which he had not original authority to do."²

§ 898. As defense against a corporation which has given benefits.—A corporation can not avail itself of the defense of *ultra vires* when the contract itself has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the contract. If an action can not be brought directly upon the agreement, either equity will grant relief, or an action in some other form will prevail. The same rule holds conversely. If the other party has had the benefit of a contract, fully performed by the corporation, he will not be heard to object, that the contract and performance were not within the legitimate powers of the corporation.³ In fact, the principle of the last section has been repeatedly held to be as applicable to the other contracting party, as to the corporation.⁴ A purchaser,

² Morawetz on Corp., p. 551, § 581.

³ Whitney Arms Co. v. Barlow (1875), 63 N. Y. 70; *Ex parte* Chippendale, 4 De G., M. & G. 19; *In re* National, etc. Soc., L. R. 5 Ch. App. 309; *In re* Cork, etc. R. Co., L. R. 4 Ch. App. 748; Fishmongers' Co. v. Robertson, 5 McG. 131.

⁴ De Graff v. American, etc. Co. (1860), 21 N. Y. 124, where the court says: "But again, if it be conceded that defendants had no

right to enter into the contract of sale in this case and bind the company to perform the obligations assumed, viewed as a mere question of corporate power, yet having undertaken to do so, and having received the full consideration agreed to be paid by the plaintiff, and he having fulfilled his entire contract, they cannot now be permitted to set up that excess of authority to excuse them from that part of the contract which imposes an obligation upon

who acquired by contract, and under an agreement to pay for it, the property of a corporation, can not defeat the claim for the purchase-price, by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either in services or property, can not avail himself of the objection that the contract, thus fully performed by the corporation, was *ultra vires*, or not within the chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail, in an action by the corporation.⁵ The only justification for such a plea by an individual, sued upon a contract with a corporation, is, that the obligation is not mutual, as the other party, the corporation, would not be bound by it. But upon the general ground of reason and justice, no such answer can be set up. The defendants, having had the benefit of the performance by the corporation, of the several stipulations into which they have entered, have received the consideration for their own promise; such promise by them is, therefore, not *nudum pactum*; they never can want to sue the corporation upon the contract, in order to enforce the performance of their stipulations, which already have been voluntarily performed, and

them. It is very clear that if the plaintiff in this suit had been prosecuted upon one of the notes given by him upon the purchase, he could not, having accepted and retaining the goods, have set up as a defense want of power in the defendants to enter into the contract. The same rule of right and the same measure of justice will be exacted in this suit. This principle has been repeatedly held as applicable to an individual attempting to screen himself from liability when contracting with a corporation, when seeking to escape responsibility on the plea of *ultra vires* for acts deliberately done with all usual and needful formalities; and where they have received the entire benefit they contracted for, such a defense should no longer be tolerated in our courts." *National Bank v. Whitney*, 103 U. S. 99; *Diamond Match Co. v. Roeber*, 106 N. Y.

472, 60 Am. Rep. 464; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 70, 20 Am. Rep. 504; *Steam Navigation Co. v. Weed*, 71 Barb. 378; *Leavitt v. Pell*, 27 Barb. 322; *Standard Oil Co. v. Shofield*, 16 Abb. N. C. 372; *Oil Creek, etc. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160, where in a suit between two corporations it was said "We do not think the defendants are in a position to defend upon the ground of the illegality of the contract. There were mutual covenants and mutual advantages. The defendants had enjoyed the advantages such as they were." *Chicago, etc. Ry. Co. v. Derkes*, 103 Ind. 520; *Ehrman v. Union Central, etc. Ins. Co.*, 35 Ohio St. 324.

⁵ *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 69; *Diamond Match v. Roeber* (1887), 106 N. Y. 473.

therefore, no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them, on the ground of inability of the corporation, which suit they can never want to sustain.⁶ Another reason for the rule is, that one is presumed to know the limitations of the authority of the corporation with which he was dealing, and is estopped to plead its want of authority.⁷ This reason applies with peculiar force to officers of a corporation, sued by it, for the conversion to their own use, of stock which they had purchased for the company, and therefore they can not plead, by way of defense, that the purchase was *ultra vires*.⁸ When a railroad company, under an *ultra vires* lease, uses the road and rolling-stock of another company, the former can not defeat an equity suit, for an accounting, and a return of the property.⁹

Restoration as condition of rescission.—In equity, either party to an *ultra vires* contract of a corporation, upon repudiating it, must restore what was received under the contract, as condition precedent to its rescission. "Many cases hold, that a corporation, which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power, when sued upon such contracts; but that doctrine does not apply to a case where, a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asked to be permitted to retake what he has parted with under it. I take it, there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying, that the obligation to return the property, transferred under these contracts, is mutual, and shall not be enforced against one of the parties, without being, at the same time, enforced against the other."¹⁰ The exact contrary of the general principle, is held in Alabama, that, when a person has made a contract with a cor-

⁶ Whitney Arms Co. v. Barlow (1875), 63 N. Y. 70; Fishmongers' Co. v. Robertson, 5 McG. 131; Rutland, etc. R. Co. v. Proctor, 29 Vt. 93; Farmers, etc. Bank v. Detroit, etc. R. Co., 17 Wis. 372; Silver Lake Bank v. North, 4 Johns. Ch. 370; Parish v. Wheeler, 22 N. Y. 494; Palmer v. Lawrence, 3 Sandf. 161; Steam Navigation Co. v. Weed, 17 Barb. 378.

⁷ Pearce v. Madison, etc. R. Co., 21 How. 441, 443; Alexander v.

Cauldwell, 83 N. Y. 480; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Downing v. Mt. Washington Road Co., 40 N. H. 230.

⁸ St. Louis Stoneware Co. v. Partridge, 8 Mo. App. 217.

⁹ Manchester, etc. R. Co. v. Concord R. Co., 66 N. H. 100, 92 L. R. A. 689, 20 Am. St. Rep. 982.

¹⁰ American, etc. Co. v. Union, etc. Co., 1 McCary, 188, 1 Fed. 745.

poration which is *ultra vires*, and has received the benefit of it, neither he, nor those claiming under him, are estopped from setting up the invalidity of the contract, in defense of a suit to enforce it.¹¹

§ 899. Knowledge when not presumed in third persons.—When an act, in its external aspect, is within the general powers of a company, and is only unauthorized, because it is done with a secret unauthorized intent, the defense of *ultra vires* will not prevail against a stranger, who dealt with the company without notice of its intent.¹² When the lack of power is patent, by comparison of the contract and the charter, the party dealing with the corporation, is charged with knowledge of the extent of the corporate power, and the *ultra vires* character of the contract, and can

¹¹ Chambers v. Falkner (1880), 65 Ala. 448. In this case the court gives the reason of the exceptional rule in Alabama which is consistently followed, saying; "There are authorities which support the proposition, so vigorously pressed by appellant's counsel, that as the mortgagor has reaped all the benefits of the transaction—has obtained and used the money of the corporation—all who claim under him should be estopped from denying the corporate power to make the contract. The proposition is not new in this court. It was pressed upon the consideration of the court in the leading case of City Council v. Montgomery, etc. Co., 31 Ala. 76-88. In answer Stone, J., speaking for the court, said: 'If this doctrine be established, these corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature has withheld. A proposition so erroneous can scarcely need argument to overturn it.' More recently the proposition was again pressed, and the answer of

Judge Stone was again: 'A party dealing with a corporation, in a matter not within the purview of its delegated power, does not estop himself from setting up, in defense, the want of authority in the corporation to make the contract. . . . In such case the doctrine of estoppel cannot be held to apply, without clothing corporations with the ability to increase their powers indefinitely by sheer usurpation. Such contracts on the part of a corporation are *ultra vires* and void, and no right of action can spring out of them.' Marion Sav. Bank v. Dunkin, 54 Ala. 471. These were not hasty, ill-considered opinions. They were the result of careful research and deliberation, and all but the latter case have stood unquestioned by the profession for many years." *Vide supra*, § 893.

¹² Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; Tracy v. Talmage (1856), 14 N. Y. 162, 67 Am. Dec. 132; Moss v. Rossie, etc. Co. (1843), 5 Hill, 137; Oxford Iron Co. v. Spradley (1874), 51 Ala. 171; Natoma Water, etc. Co. v. Clarkin (1860), 14 Cal. 544, 552; Thompson v. Lambert, 44 Iowa, 239; Eastern Counties Ry. Co. v. Hawkes, 5 H. L. Cas. 331.

not hold the corporation liable upon it; and for his ignorance of the law, and of the facts which he was presumed to know.¹³

Ignorance as to form or mode of contracting.—Where the manner or form of making the authorized contract by a corporation, fails to comply with the charter requirement, in such way that the other party might not know whether or not corporate officers had complied with the form,—non-compliance with it can not be pleaded by the corporation, in avoidance of the contract.¹⁴ “When the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply.”¹⁵ That a mining plant bought by a mining company, and adapted to its business, contained some properties that the company buying might not be authorized to purchase, does not avoid the notes given for the plant.¹⁶ So, if a company properly using land, purchase other lands, it can not evade payment, by pleading that the purchase was unnecessary for the purposes of the corporation.¹⁷ A lender to a company, having power to borrow money, need not see to it that it is applied to its legitimate business;¹⁸ nor, if the corporation borrows money which it has apparent power to borrow, and uses it for an unauthorized purpose, without the knowledge of the lender.¹⁹ The rule, as to participation with a corporation, in doing an *ultra vires* act, is based upon no different principle than that of participation in any illegal contract.²⁰ And the fact of knowledge of the company’s purpose, without any fraudulent intent on the part of the person dealing with it, will not defeat the latter’s action.²¹ The note of a manufacturing corporation, in the hands of a holder, in good faith, for value, who took it before maturity, and without knowledge that the maker had not received full consideration,—could be enforced against the corporation, al-

¹³ Davis v. Old Colony R. Co., 131 Mass 258, 41 Am. Rep. 221.

¹⁴ Medbury v. New York, etc. Co. 26 Barb. (N. Y.) 564; Louisville, etc. Co. v. Louisville Trust Co., 174 U. S. 552.

¹⁵ Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

¹⁶ Moss v. Rossie, etc. Co., 5 Hill, 137 (1843).

¹⁷ Natoma, etc. Co. v. Clarkson (1860), 14 Cal. 544, 552.

¹⁸ Thompson v. Lambert (1876), 44 Iowa, 239; Bradley v. Bullard, 55 Ill. 413.

¹⁹ Lucas v. White, etc. Co., 70 Iowa, 541, 59 Am. Rep. 449.

²⁰ Tracy v. Talmadge (1856), 14 N. Y. 162.

²¹ Thompson v. Lambert (1876), 44 Iowa, 239; Parish v. Wheeler, 22 N. Y. 494.

though it was made as accommodation note. This, on the ground that the corporation had power to make promissory notes, and the making of an accommodation note, was only an abuse of that power, which abuse was, of course, unknown to the holder or purchaser for value.²² Of this distinction, Clark & Marshall, in their work upon Private Corporations, observe: "whether such a distinction as this is sound, admits of very reasonable doubt. If a corporation is authorized to make a particular contract, and exceeds its power in this respect, it certainly acts without any power over the subject, in so far as the excess is concerned. If it is authorized to make loans on personal security only, and it makes a loan on a real estate mortgage, it certainly acts without power in taking the mortgage. The same is true, where a corporation is authorized to borrow money, or to buy goods, for the purposes of its legitimate business, and it borrows money, or buys goods to be used in a business which it has no power to carry on. It may well be, in such cases, that the party—the corporation or the other party, as the case may be—should not be permitted to escape liability on the contract, after receiving the benefit of it, as is held by many courts; but it is more reasonable to allow an action in such cases, if at all, on the ground that equitable principles require that the party, who has received and retains the benefits of the contract, should be held estopped to say that the contract was *ultra vires*, than to attempt to make a distinction, shadowy to say the least, between want of power on the part of the corporation, and mere excess of power,—an attempt which, even, if the distinction is not altogether illogical, must result, and has resulted, in confusion and conflicting decisions. It seems absurd to say that a corporation, which takes a mortgage to secure a loan, when its charter expressly declares that it shall have the power to loan money on personal security only, acts, not without power, but merely in excess of power, in taking the mortgage. Making the loan is within the power of the corporation, but taking the mortgage is as entirely beyond its power, as if it were not authorized to make the loan at all."²³

§ 900. **Contracts ultra vires only in part.**—Where a corporation, within its powers, issues bonds and secures them by a

²² Monument Nat. Bank v. Globe Works (1869), 101 Mass. 57, 3 Am. Rep. 322; Reese on *Ultra Vires*, § 32.

²³ Clark & Marshall Pr. Corps., § 214, p. 581.

mortgage which is *ultra vires*, the validity of the bonds is not affected²⁴—and if the mortgage be within its powers, but includes property beyond its power to encumber, the mortgage is valid as to included property, which the corporation had power to so encumber.²⁵ The federal courts rigorously uphold the rule, so long therein established and applied; but the tendency, in some States, is to limit the application of the doctrine of *ultra vires*, especially in regard to partially executed contracts. Thus, the New York court of appeals is in conflict with the Supreme Court of the United States. It has established the rule in that State, that an *ultra vires* contract is there enforceable, where there has been part-performance, and the stockholders have not objected, and the creditors have not been injured.²⁶ The court says: "that kind of plunder, which holds on to the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support, in the law of this State."²⁷ Similarly, it is held in Wisconsin,²⁸ also in Massachusetts,²⁹ that persons who acquiesce in such *ultra vires* acts, are estopped to deny their validity. "Corporations, like natural persons, have power and capacity to do wrong, and when they break over the restraints, imposed by the charter, they can not escape liability, on the ground that their contract was unauthorized by the charter, and thus be permitted to take advantage of their own wrong."³⁰ There is no implied prohibition of, nor is public policy violated by, corporate acts, simply *ultra vires*, and therefore they are not void, but merely voidable.³¹

²⁴ Philadelphia, etc. Co. v. Louis, 33 Pa. St. 33, 75 Am. Dec. 574.

²⁵ Hendee v. Pinkerton, 96 Mass. 381.

²⁶ Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Martin v. Niagara, etc. Co., 122 N. Y. 165; Bath, etc. Co. v. Claffey, 151 N. Y. 24, 36 L. R. A. 664.

²⁷ Seymour v. Spring etc. Co., 144 N. Y. 333 26 L. R. A. 859.

²⁸ Farwell Co. v. Wolfe, 96 Wis. 10, 37 L. R. A. 138, 65 Am. St. Rep. 32.

²⁹ Brown v. Winnisimmet Co., 93 Mass. 326; Nims v. Mount, etc., 160 Mass. 177, 22 L. R. A. 364, 39 Am. St. Rep. 467.

³⁰ Bissell v. Michigan, etc. R. Co., 22 N. Y. 258.

³¹ This is the conclusion of a writer, Mr. J. C. Harper, in 12 Cent. L. J. 387, who cites in support of the doctrine many cases announcing exceptions to the strict rule of *ultra vires*. He further says the case of Franklin Co. v. Lewiston Sav. Bank, 68 Me. 43, decided in 1877, adheres to the old rule, and is the only recent case that he has been able to find that does, and that upon the facts was an extreme case. There the trustees of a savings society, although at the time having no funds for investment, subscribed for fifty thousand dollars of stock in a manufacturing company. The trustees not being able to pay, their treasurer, who held the same position in the manufacturing

§ 901. **Excess of conferred power distinguished from want of power.**—Distinction has been made in some courts (applying the doctrine of *ultra vires*), between acts and contracts simply in excess of power, from those entirely beyond the corporate powers; as, in the taking by a bank, in payment of a debt, a note at twelve per cent., instead of ten per cent.,³² its limit of power to charge; and in the making of a loan by a corporation, for two years, instead of one; and on a note and mortgage, instead of bond and mortgage,³³—and a loan by a corporation upon a note secured by mortgage on land, where the corporation had authority to loan money only upon personal security.³⁴ On the contrary, in a late case in Illinois, it was held, that a building and loan association, authorized to deal with its members by purchase and sale to them of real estate, upon money loans to them secured thereupon, had no power to loan its funds upon real estate, upon which it had no lien, and in which it had no interest.³⁵ An agreement of a corporation, which is formed for the manufacture and sale of brakebeams, and other railroad appliances, to loan its money to the private enterprise of its president, and others as partners, is *ultra vires* and void.³⁶ A corporation, for manufacture of malt and sale of grain, can not acquire and hold bank stock, as an investment for profit.³⁷

§ 902. **Ultra vires doctrines applied to torts.**—The general doctrine is now held, that a corporation is liable for the negligence and other torts of its agents and servants, even when relating to, and connected with, acts of the corporation that are *ultra vires*.³⁸ Corporations, like natural persons, have power and capacity to

company also, paid the money to himself as treasurer of the latter, and took therefor the notes of the savings society, secured by the stock, which was issued directly to the manufacturing company as collateral. The savings society received no benefit whatever from the stock. Suit being brought upon the notes the supreme court held the contract *ultra vires* and therefore illegal and void.

³² Rock River Bank v. Sherwood, 10 Wis. 230, 78 Am. Dec. 669.

³³ Germantown, etc. Ins. Co. v. Dhein, 43 Wis. 420, 28 Am. Rep. 249.

³⁴ Littlewort v. Davis, 50 Miss. 403.

³⁵ National, etc. Assn. v. Home Sav. Bank, 181 Ill. 35, 72 Am. St. Rep. 245.

³⁶ Leyh v. American, etc. Co., 68 N. E. 713 (Ill. 1903).

³⁷ Hunt v. Hauser, etc. Co., 96 N. W. 85 (Minn. 1903).

³⁸ Merchants' Bank v. State Bank (1870) 10 Wall. 604; National Bank v. Graham (1879), 100 U. S. 609; Bissell v. Michigan, etc. R. Co. (1860), 22 N. Y. 258; Buffet v. Troy, etc. R. Co., 40 N. Y. 168 (1869); Booth v. Farmers' Bank (1872), 50 N. Y. 396; Green's Brice's *Ultra Vires*, 263, n.

do wrong. In their contracts and dealings, they may break over the restraints imposed upon them by their charters; and when they do so, their exemption from liability can not be claimed, on the mere ground that they have no attributes or faculties which render it possible for them thus to act.³⁹ Corporations are liable for every wrong of which they are guilty, and in such cases, the doctrine of *ultra vires* has no application.⁴⁰ "It would, indeed, be an anomalous result in legal science, if a corporation should be permitted to set up that inasmuch as a branch of the business, prosecuted by it, was wrongful, therefore all the special wrongs done to individuals, in the course of it, were remediless. But in such situations, corporate bodies, like individuals, can not take advantage of their own wrong by way of defense. If corporations are not to be held responsible for injuries to persons, done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such bodies, are, in a sense, *ultra vires*, and if the want of a franchise to do the tortious act, be a defense, then corporations have a dispensation from liability for these acts, peculiar to themselves."⁴¹ A common carrier, if it engages in *ultra vires* business,—as, if a railroad runs a steamboat line, in connection with its road,—is liable for injuries caused by negligence of its servants, in the conduct of such business.⁴² But, if the servant of a corporation, engaged in business within its powers to do, should, without authority from his employer, engage in any *ultra vires* transaction, and in conducting it, commit a tort, the corporation is not liable. Liability for torts is indeed a necessary corollary to the principle, that the corporate powers and faculties may be exercised by legal representatives.⁴³ It follows therefore, that a corporation, although regarded as an artificial entity, incapable of malice, which is a necessary incident of libel, is yet responsible for a libel committed by its agents in the course of its business, for they, as it were, transfer to the corporation the requisite qualities which make the libel possible.⁴⁴ This principle has been frequently recognized, and applied to various other torts, such as trespass, assault and battery, per-

³⁹ Bissell v. Michigan, etc. R. Co. (1860), 22 N. Y. 258.

⁴⁰ Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. (U. S.) 604; First Nat. Bank, etc. v. Graham, 100 U. S. 699.

⁴¹ New York, etc. Co. v. Haring,

47 N. J. Law, 137, 54 Am. Rep. 123.

⁴² Central, etc. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353.

⁴³ Railroad Co. v. Quigley, 21 How. 202.

⁴⁴ F. L. Cline in 5 So. L. Rev. 415.

sonal injuries, false representations and fraud.⁴⁵ Therefore, a corporation, when sued for a tort, can not defend, on the ground that the act, from which the tort resulted, was *ultra vires*.⁴⁶ Conversely, when damage is done to real estate, held by a corporation, the party by whose negligence it was caused, can not escape responsibility by showing that the corporation was not permitted, by its charter, to acquire title to the property, or that it acquired it for purposes unauthorized by law.⁴⁷ And it has even been held, that, where a corporation seeks an accounting upon an executed partnership transaction, the defendant can not set up that a partnership transaction was *ultra vires*, under the plaintiff's charter.⁴⁸

§ 903. **Remedy in equity, by injunction. Limited jurisdiction. Exception in case of nuisance.**—The right of a stockholder to restrain the corporation from *ultra vires* acts, is universally recognized. And this right may be exercised also by a creditor, either when the corporation is about to do such an act, or when the directors, or other officers or agents, purpose to assume powers not conferred upon the corporation.⁴⁹ A minority, or any single stockholder, may maintain a suit to restrain the corporation or its officers, from diverting its funds to any purpose unauthorized, or from carrying out an *ultra vires* contract. Other persons than the stockholders, may also maintain suit to enjoin an *ultra vires* act, in violation of their rights, and for which, at law, there is no adequate remedy.

⁴⁵ *McReady v. Guardians*, 9 Serg. & R. 94; *Moore v. Fitchburg R. Co.*, 4 Gray, 465; *Railroad Co. v. Derby*, 14 How. 468; *Etting v. Bank of United States*, 11 Wheat. 59; *National Exch. Co. v. Drew*, 2 Macq. H. L. Cas. 103. *Vide infra*, ch. XXIII.

⁴⁶ *Gruber v. Washington, etc. R. Co.*, 92 N. C. 1.

⁴⁷ *Farmers' Loan & Trust Co. v. Green Bay & Minnesota R. Co.*, 11 Biss. C. Ct. 334.

⁴⁸ *Standard Oil Co. v. Scofield*, 16 Abb. N. Cas. 372.

⁴⁹ 2 *Redfield on Railways*, § 211; *Kean v. Johnson*, 1 Stock. (N. J.) 401; *March v. Easton*, 40 N. H. 548; *Pratt v. Pratt*, 33 Conn. 446; *Durfee v. Old Colony, etc. R. Co.*, 5 Allen, 230; *Allen v. Curtis*, 26

Conn. 456; *McAleer v. McMurry*, 38 Pa. St. 126; *Green's Brice's Ultra Vires*, 73, 83, 215, 593; *Kernighan v. Williams*, L. R. 6 Eq. 228; *Atty.-Gen. v. Eastlake*, 11 Hare, 205; *Atty.-Gen. v. Norwich*, 25 L. J. Ch. 141; *Zabriskie v. Cleveland, etc. R. Co.*, 23 How. 381; *Memphis v. Dean*, 8 Wall. 64; *Bellmont v. Erie, etc. R. Co.*, 52 Barb. 637; *Bliss v. Anderson*, 31 Ala. 613; *Black v. Delaware, etc. R. Co.*, 7 C. E. Green, 130, 9 C. E. Green, 455; *Zabriskie v. Hackensack, etc. R. Co.*, 3 C. E. Green, 130; *Balfour v. Earnest*, 5 C. B. (N. S.) 691; *Mayor v. Groshon*, 30 Ind. 436; *Coleman v. Eastern, etc. R. Co.*, 10 Beav. 1; *Solomans v. Laing*, 12 Beav. 339; *Fisk v. Chicago, etc. R. Co.*, 53 Barb. 513.

The jurisdiction of a court of equity is limited to the protection of civil rights, and to cases, where full and adequate relief can not be had at law. It can not enforce a forfeiture, or otherwise administer punishment to a corporation, for violation of law.⁵⁰ To restrain the corporation from engaging in a prohibited transaction, or one, not authorized by its charter, the remedy of the State is at law, by *quo warranto* to forfeit the charter, or to oust the corporation from its exercise of the *ultra vires* act complained of.⁵¹

Exception, as to public nuisance.—A court of equity may enjoin an *ultra vires* act, which is, or threatens to be, a public nuisance, or to otherwise injure the public interests,⁵² as, to restrain a gaslight company from laying pipes in the public streets, on the ground that the company's powers have ceased, by failure to begin its business within the time required by its charter;⁵³ and, an action to restrain the *ultra vires* act of a corporation, in taking away the water of a public pond, in a way to impair its rightful public use for boating and fishing, and in a way to endanger the public health.⁵⁴ A corporation, laying gas mains in a city, without charter authority, creates a public nuisance, and may be enjoined, at suit of a private party, on ground of want of power, although impliedly licensed by the city.⁵⁵ This is a just and equitable right of the stockholders. They have a right, by virtue of the contract entered into, by, and between them and the corporation, to have the funds of the corporation appropriated to the objects and purposes for which it was instituted, and to dividends arising therefrom. The creditors have also the right to restrain general speculations, and *ultra vires* acts, as they have become creditors with the knowledge and understanding, that the corporation was constituted for certain purposes, and with certain powers, and it is to be presumed that the credit was given with a full knowledge of these matters, and in reliance on the ability of the debtor to meet the obligation based upon such purposes and powers.⁵⁶ The right of a shareholder, to maintain

⁵⁰ *Atty.-Gen. v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227.

⁵¹ *People v. North River, etc. Co.*, 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843.

⁵² *Atty.-Gen. v. Jamaica, etc. Corp.*, 133 Mass. 361.

⁵³ *People v. Equity Gaslight Co.*, 141 N. Y. 232; *Atty.-Gen. v. Bay,*

etc. Co., 115 Mass. 431; 99 Mass. 148, 96 Am. Dec. 717.

⁵⁴ *Atty.-Gen. v. Jamaica, etc. Corp.*, 133 Mass. 361.

⁵⁵ *Seattle, etc. Co. v. Citizens,' etc. Co.* (1903), 123 Fed. 588.

⁵⁶ *G. W. Field in 13 Am. L. Rev.* 659.

a bill in equity to impeach *ultra vires* acts, extends also to *acts of a majority* of the stockholders.⁵⁷ As corporate acts are done by directors, or officers, who are trustees for the purpose of carrying out the purpose of incorporation, it is the duty of courts of equity to protect stockholders and creditors, by requiring the officers to keep within the limits of corporate powers.⁵⁸ If, then, a corporation makes a contract manifestly beyond its powers, a court of chancery, on the application of a stockholder, who has not participated or acquiesced in the act, will restrain the corporation from carrying out the contract.⁵⁹ But a court of law will sustain no action on such a contract against the corporation.⁶⁰ The courts will, of course, not sustain a bill in equity, against acts not *ultra vires* but performed with all required formality, unless in case of fraud or oppression.⁶¹ For a court of equity will not unnecessarily interfere with the internal policy of a corporation.⁶² It has been said that "no case can be found where the general management of corporate property has been subject to the restrictions of judicial powers, unless, indeed, in the case of a clear violation of express law; or a wide departure from chartered powers."⁶³ The court can not undertake to decide questions of corporate polity merely.⁶⁴ Nor can it attempt to supply the only prerequisite to the adoption of any corporate policy—to wit, a majority vote of the stockholders.⁶⁵ This rule is only departed from, when there are such dissensions in the corporate management, as to make it practically impossible to carry on the business.⁶⁶

⁵⁷ *City of Chicago v. Cameron*, 120 Ill. 447.

⁵⁸ *Selden, J., in Bissell v. Michigan, etc. R. Co.*, 22 N. Y. 258; *Coleman v. Eastern, etc. R. Co.*, 10 Beav. 1; *Cohen v. Wilkinson*, 12 Beav. 125; *Solomons v. Laing*, 12 Beav. 339.

⁵⁹ *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

⁶⁰ *Elevator Co. v. Memphis & Charleston R. Co.* (1887), 85 Tenn. 703, 4 Am. St. Rep. 798.

⁶¹ *Gorman v. Guardians' Sav. Bank*, 4 Mo. App. 180; *Macdougall v. Gardiner*, 1 Ch. Div. 13; *Pender v. Lushington*, 1 Ch. Div. 70; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 114; *Foss v. Harbottle*, 2 Hare, 495.

⁶² *Beecher v. Wells, etc. Co.*, 1 Fed. Rep. 276; *Camblos v. Phila-*

delphia, etc. R. Co., 4 Brews. 563; *Bach v. Pacific, etc. Co.*, 12 Abb. Pr. (N. S.) 373; *Bloxham v. Metropolitan Ry. Co.*, L. R. 3 Ch. 337; *Walker v. Mad River, etc. Ry. Co.*, 8 Ohio, 38.

⁶³ *Bach v. Pacific, etc. Co.*, 12 Abb. Pr. (N. S.) 373.

⁶⁴ *Tuscaloosa Manuf. Co. v. Cox*, 68 Ala. 71; *Fountain Ferry, etc. Co. v. Jewell*, 8 B. Mon. 140.

⁶⁵ *Tuscaloosa Manuf. Co. v. Cox*, 68 Ala. 71; *Ramsey v. Erie Ry. Co.*, 7 Abb. Pr. (N. S.) 156; *Edwards v. Shrewsbury, etc. Ry. Co.*, 2 De G. & S. 537; *Bailey v. Birkhead, etc. Ry. Co.*, 12 Beav. 433.

⁶⁶ *Lawrence v. Greenwich, etc. Co.*, 1 Paige, 587; *Featherston v. Cooke*, L. R. 16 Eq. 298; *Trade Auxiliary Co. v. Vickens*, L. R. 16 Eq. 303.

Where shareholders are deprived of their right of representation, *ultra vires* acts may be restrained, pending litigation to enforce the right of representation.⁶⁷ It is universally held, that an uninterested person, who is not a stockholder, can not raise the question of *ultra vires* in an action against the company.⁶⁸ Persons, not members of a corporation, have no cause of action against it, for violation of its constitution by its officers and members.⁶⁹

§ 904. **A single stockholder may restrain.**—As any stockholder may restrain the diversion of corporate funds for any purpose not embraced in the original purposes of the corporation, so no majority, however large, can compel a stockholder to submit to any fundamental change in the business or objects of the company.⁷⁰ A stockholder, by becoming such, contracts with the corporation, that he will submit his interests to the direction and control of the proper officers of the company, in carrying out the objects and purposes for which it was instituted; and the undertaking on the part of the company is, that the objects and purposes of its institution shall not be changed, without, at least, the unanimous consent of all the stockholders, and that no other responsibilities or hazards shall be imposed on the stockholder, than those that grow out of the original undertaking.⁷¹ As intimated, the right to restrain by injunction, exists in a stockholder, though every other stockholder may favor the *ultra vires* acts.⁷² And this is so, even if a majority of the shareholders, at a meeting of the company, condemn the course adopted by the plaintiff.⁷³ For it is not within the power of the majority, to ratify any *ultra vires* act, against the will of a single dissenting shareholder.⁷⁴ In case

⁶⁷ Mackintosh v. Flint, etc. R. Co., 34 Fed. Rep. 582.

⁶⁸ New Orleans, Mobile, etc. R. Co. v. Ellerman (1881), 105 U. S. 166.

⁶⁹ Tomlinson v. Bricklayers' Union, 87 Ind. 308.

⁷⁰ Clearwater v. Meredith, 1 Wall. 25; Hartford, etc. R. Co. v. Crosswell, 5 Hill, 383; McCray v. Junction R. Co., 9 Ind. 358; Winter v. Muscogee R. Co., 11 Ga. 438; Middlesex, etc. Co. v. Locke, 8 Mass. 268.

⁷¹ G. W. Field in 13 Am. L. Rev. 659.

⁷² Hoole v. Great W. R. Co., L. R.

3 Ch. App. 262; Menier v. Hooper Tel. Works, L. R. 9 Ch. App. 350; Bird v. Bird, etc. Co., L. R. 9 Ch. App. 358; Green's Brice's *Ultra Vires*, 593.

⁷³ See Beman v. Bufford, 1 Sim. (N. S.) 550, 20 L. J. Ch. 537; Winch v. Birkenhead Ry. Co., 16 Jur. 1035; Bagshaw v. Eastern Union Co., 19 L. J. Ch. 410; Haen v. London & N. W. Ry. Co., 30 L. J. Ch. 817; Great Western Ry. Co. v. Rushout, 5 De G. & S. 290.

⁷⁴ Bird v. Bird's Patent, etc. Co., 9 Ch. 358; Abbott v. American, etc. Co., 4 Blatch. 489, 33 Barb. 578; Adriance v. Roome, 52 Barb. 399;

an action is brought, it may be brought solely on behalf of the plaintiff, or it may be brought as representative of others also; and when the acts complained of, are of those having control of a majority of the stock, the company may be made a party defendant.⁷⁵ When an agreement has been made by the president of a railroad, subject to the approval of the directors and stockholders, to do something which is *ultra vires*, and the directors have approved it, the court will interfere, by injunction, upon the application of a single stockholder.⁷⁶ Where the president of a railroad is the general manager, and constitutes about all there is of the company, a demand upon, and a refusal by him, is sufficient to entitle the stockholder to bring suit in his own name, to have construction bonds of the company, unlawfully issued by the president, declared *ultra vires* and void.⁷⁷ And, where a court of equity would have interfered, at the suit of the stockholder, to prevent the unlawful delivery of the bonds by the president, to pay the debts of other corporations which he controlled, it will interpose, after there has been such delivery, and cancel the bonds in the hands of holders with notice, and release the trust deed securing them.⁷⁸ Thus, where, in a suit by the stockholders of a railroad company, to have certain of its construction and equipment bonds declared *ultra vires*, and the deed of trust securing them, canceled, the court found, that the president and general manager, without any authority, used the bonds, which came into his hands to pay debts of other corporations, of which he had control, and "not in any way about the construction, equipment, or operation" of the railroad company, and that the holders of the bonds acquired them with full notice of such misapplication;

Taylor v. Earle, 8 Hun, 1; Smith v. New York, etc. Co., 18 Abb. Pr. 419; Brady v. Mayor, 16 How. Pr. 432; Barclay v. Quicksilver Mining Co., 9 Abb. Pr. (N. S.) 284; Kean v. Johnson, 9 N. J. Eq. 401; Middlesex, etc. R. Co. v. Boston, etc. R. Co., 115 Mass. 347; Robbins v. Clay, 33 Me. 132; Tippecanoe County v. Lafayette, etc. R. Co., 50 Ind. 85; Ashbury Railway Carriage Co. v. Riche, L. R. 7 H. L. 653; Lyde v. Eastern Bengal Ry. Co., 36 Beav. 10; Taylor on Corporations, 268.

⁷⁵ Atwood v. Merryweather, 5

Eq. 464, and note; Menier v. Hooper's Tel. Works, 9 Ch. App. 350; Mason v. Harris, 11 Ch. Div. 97; 27 Week. Rep. 699; Browne & Theobald's Railway Law, 104; Hoole v. Great Western Ry. Co., 3 Ch. 262; Simpson v. Westminster, etc. Hotel Co., 8 H. L. Cas. 712.

⁷⁶ Elkins v. Camden & Atlantic R. Co., 36 N. J. Eq. 5.

⁷⁷ City of Chicago v. Cameron (1887), 120 Ill. 447.

⁷⁸ City of Chicago v. Cameron (1887), 120 Ill. 447.

the findings excluded the hypothesis, that the corporations, whose debts were thus paid, might have agreed to construct or equip the road in part, and were sufficient to support a decree, declaring the bonds null and void, as against the railroad company.⁷⁹

§ 905. **Dissenting stockholders' suit to enjoin.**—Any dissenting stockholder, not estopped, may, in his own name, maintain a suit in equity, for relief against an *ultra vires* act of the corporate officers, or of the other shareholders,⁸⁰ which threatens diversion or misapplication of the corporate funds or assets, or to ruin the corporation, or to render it unable to carry out its objects. Holders of a majority of the stock in a corporation, have a right to control it, and the minority can not interfere, unless they show some good reason for interference. They must establish, by their complaint, that they have exhausted the means within their power to obtain redress for their grievance, or corporate action in conformity with their wishes, and that their effort, to obtain redress at the hands of the directors and other stockholders, has been earnest and faithful.⁸¹ But, "it is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those, who administer them, from doing acts which would amount to a violation of the charter or to prevent any misapplication of their capital or profits, which might result in lessening the dividends of stockholders, or the value of their shares. Either may be protected by the franchises of a corporation, if the acts intended to be done, create, what is in the law denominated, a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right, growing out of it, for which there is not an adequate remedy at law."⁸² It is no sufficient answer to the suit of a dissenting stockholder, in case of an *ultra vires* act, to say that no wrong or fraud was intended, or that it would benefit the corporation, and be no injury

⁷⁹ *City of Chicago v. Cameron* (1887), 120 Ill. 447.

⁸⁰ *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch (U. S.), 299.

⁸¹ *Alexander v. Searcy* (1889), 81 Ga. 536.

⁸² *Mr. Justice Wayne in Dodge v. Wolsey*, 18 Howe (U. S.), 331.

to the stockholders. The fact is enough, that it is *ultra vires*.⁸³ Any stockholder may sue, to enjoin any *ultra vires* act that may render the corporate charter subject to forfeiture, or that otherwise tends to destroy the corporation.⁸⁴ It is not enough, that there may be a doubt, as to the authority of the directors, or as to the wisdom of their proceedings. Grievances, real and substantial, must exist, and, before an individual stockholder can be heard, he must show, as said above, that he has exhausted all means within his reach, to obtain within the corporation itself, the redress of his grievances, or action in conformity to his wishes;⁸⁵ or, that any such effort would be futile, because the defendants are themselves guilty of the acts complained of, or refused to act, or that the time is too short to call a meeting of the shareholders, or that they approve of the wrong. The bill of complaint will be demurrable, unless it makes some such showing,⁸⁶ Before any dissenting stockholder can maintain a bill against the majority, there must be shown: (1) Some action, or threatened action of the directors or trustees, which is beyond the authority conferred by the charter or the law under which the company was organized; or (2) Such a fraudulent transaction completed, or threatened by them, either among themselves, or with some other party, or with shareholders, as will result in serious injury to the company, or the other shareholders; or (3) That the directors, or a majority of them, are acting for their own interests, in a manner destructive of the company or of the rights of the other shareholders; or (4) That the majority of the stockholders are oppressively and illegally pursuing, in the name of the company, a course in violation of the rights of the other shareholders, which can only be restrained by a court of equity; and, (5) It must also be made to appear that the complainant made an earnest effort to obtain redress, at the hands of the directors and shareholders of the corporation.⁸⁷ He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted,

⁸³ March v. Eastern Ry. Co., 43 N. H. 515; Byrne v. Schuyler, etc. Co., 65 Conn. 336, 28 L. R. A. 304.

⁸⁴ Manderson v. Commercial Bank, 28 Pa. St. 379; Rogers v. Lafayette etc. Works, 52 Ind. 304.

⁸⁵ Field, J., in Dimpfell v. Ohio, etc. R. Co., 110 U. S. 209.

⁸⁶ Detroit v. Dean, 106 U. S. 537; Flynn v. Brooklyn City Ark. Co., 9 App. Div. 269, 158 N. Y. 493; Hawes v. Oakland, 104 U. S. 450.

⁸⁷ Hawes v. Oakland, 104 U. S. 450, *per* Miller, J.

he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And if this is not done, he must show a case, where it could not be done, or it was not reasonable to require it. The efforts to induce such action, as complainant desires on the part of the directors, and of the shareholders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity;⁸⁸ but, as a rule, no such request or demand is necessary, to show, where the bill shows that the wrong complained of, is done or threatened by the directors, or by the majority of the members, or of the holders of a majority of the stock.⁸⁹ Refusal to sue by the officers, if there be any with authority to sue, will authorize suit by any stockholder.⁹⁰ A person who did not own stock at the time of fraudulent transactions complained of, or whose shares have not devolved upon him since by operation of law, can not maintain a suit to have such transactions declared illegal.⁹¹

§ 906. Acquiescence; laches by stockholders.—If a stockholder assents to acts *ultra vires*, or, although not originally or expressly assenting, has for an unreasonable time, acquiesced, and has permitted them to go unquestioned, so that other parties, who have acted upon the faith of them (as, for instance, by making large expenditures of money), would suffer great injury from their repudiation, a court of equity will not easily be induced to grant relief, at the instance of such a stockholder.⁹²

Acquiescence—implies knowledge of all the material facts.⁹³ Acquiescence in an act, is implied ratification of it.⁹⁴ The stockholder, who seeks to prevent the consummation of an *ultra vires* corporate act, or to avoid it, should be swift to make known his desires, and assert his rights through the tribunals, appointed for that purpose.⁹⁵ While a majority of the stockholders of a corpora-

⁸⁸ Hawes v. Oakland, 104 U. S. 450, *per* Miller, J.

⁸⁹ Heath v. Erie Ry. Co., 8 Blatchf. 347; Bell v. Montgomery Light Co., 103 Ala. 275, 15 South. 569.

⁹⁰ Brewer v. Boston Theatre, 104 Mass. 378; Crumlish v. Shenandoah, etc. Co., 28 W. Va. 623, 22 S. E. 90.

⁹¹ Alexander v. Searcy (1889), 81 Ga. 536; Hawes v. Oakland, 104

U. S. 450; Dimpfell v. Ohio, etc. R. Co., 110 U. S. 209.

⁹² Stewart v. Erie, etc. Co. 17 Minn. 372.

⁹³ Bi-spool, etc. Co. v. Acme Manuf. Co., 153 Mass. 404.

⁹⁴ Union Pacific Ry. Co. v. Chicago, etc. Co., 163 U. S. 564; Wheeler v. Home, etc. Bank, 188 Ill. 34, 80 Am. St. Rep. 161.

⁹⁵ Thompson v. Lambert (1876), 44 Iowa, 247; Watts' Appeal, 78 Pa. St. 370.

tion may maintain a bill in equity, in behalf of themselves and other stockholders, for fraud, conspiracy, or acts *ultra vires*, against the corporation, its officers, or others who participate therein, the minority stockholders, when they have been injured or damaged, by such acts, must act promptly, and not wait an unreasonable time. If they postpone their complaint from seven to fifteen years, they forfeit their right to equitable relief.⁹⁶ As the stockholders may be presumed to know what is done by their agents, the directors and officers of the corporation, if they neglect to restrain acts which may be *ultra vires*, and only after some considerable delay, make any objection thereto, neither the corporation, directors, nor stockholders, should be heard to complain that the acts were *ultra vires*, and therefore void.⁹⁷ More especially is this so, when the complainant has stood by and allowed the illegal transaction to be consummated, and has allowed and induced others to become interested in the corporation, on the sup-

⁹⁶ *Alexander v. Searcy* (1889), 81 Ga. 536. A delay of three and a half years was held a bar in *Peabody v. Flint*, 88 Mass. 54, six years in *Gregory v. Patchett*, 33 Beav. 595, seven years in *Ashurst's Appeal*, 60 Pa. St. 290, and three years and eight months in *Dimpfell v. Ohio*, etc. R. Co., 110 U. S. 209.

⁹⁷ *G. W. Field* in 13 Am. L. Rev. 661; *Zabriskie v. Cleveland*, etc. R. Co. (1859), 23 How. 381; *Cary v. Cleveland*, etc. R. Co., 29 Barb. 39; *Argenti v. San Francisco*, 16 Cal. 255; *McClure v. Manchester*, etc. R. Co., 13 Gray, 424; *Chapman v. Mad River*, etc. R. Co. (1856), 6 Ohio St. 137; *Hale v. Mutual*, etc. Co., 22 N. H. 297; *Railroad v. Howard*, 7 Wall. 413. The injustice of allowing such a plea as a defense to a claim on a contract, in case such stockholders have with knowledge of the facts received the benefits and the fruit of such contract, as where they have received dividends the whole or part of which were derived from such contract, will be apparent. Such action on the part of the stockholders would undoubt-

edly be treated as an affirmation of the *ultra vires* act, and estop them from pleading *ultra vires* as a defense to a claim on such contract, either against them as stockholders, or against the corporation. The remedy of the stockholder or creditor is, as we have seen, ample in the first instance, and they may enjoin an *ultra vires* act, on the part of the corporation or its directors, or other officers or agents; but if they remain indifferent and passive, and permit a contract *ultra vires* to be made, and especially where they receive the benefits of such contract without objection, they should not be permitted to enjoin the corporation from executing the contract on its part. Certainly it would be more consonant with principles of justice and equity to require the stockholders to restrain the officers and agents of a corporation from *ultra vires* contracts than to allow them to remain indifferent and take the benefits of such contracts, and then allow the plea of *ultra vires* in defense of an action on them. The officers and agents of the cor-

position that the existing state of things is legal and proper.⁸⁸ Though purchasing, owning and voting stock in one railroad company, by another railroad company, may be *ultra vires*, so far as the public is concerned, still a stockholder, who has acquiesced therein for fifteen years and received money from the corporation by reason of the illegal act, is not allowed to raise that question. His acquiescence does not render valid the illegal act, but prevents him from taking advantage of its illegality. The public or the State is not thus bound.⁸⁹ Where the summary interference of the court is invoked, in cases of this nature, it must be invoked promptly. Parties who have lain by, and permitted a large expenditure to be made, in contravention of the rights for which they contend, can not call upon the court for its summary interference;¹ because there is an adequate means open, both to stockholders and to creditors, for preventing the commission of acts in excess of the corporate powers. It is the privilege, if not the duty, of those interested, to prevent *ultra vires* acts by injunction.² Stockholders, by acquiescence, are estopped to question a corporate act, where third parties have dealt with the corporation in reliance upon its authority to do the act, and where, if it were held invalid, harm would come to such third person. Acquiescence or tacit assent, means the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss. This is the doctrine of equitable estoppel, which applies to members of corporated or associated bodies, as well as to persons acting in a natural capacity.^{2a}

Laches.—Any stockholder, complaining, must do so in good faith, and with reasonable diligence, or he will forfeit his right to equitable relief.³

poration are the officers and agents of the stockholders, as well as their trustees; and it would be far more reasonable that they should suffer loss by reason of *ultra vires* acts, which they might with due diligence have prevented, than to allow them or the corporation to set up such a defense where they have received the benefits of the acts. G. W. Field in 13 Am. L. Rev. 661.

⁸⁸ Terry v. Eagle Lock Co., 47 Conn. 141, 161.

⁸⁹ Alexander v. Searcy (1889), 81 Ga. 536.

¹ Houldsworth v. Evans, L. R. 3 H. L. 263.

² G. W. Field in 13 Am. L. Rev. 660.

^{2a} Kent v. Quicksilver M. Co. (1879), 78 N. Y. 159.

³ Alexander v. Searcy, 81 Ga. 536, 12 Am. St. Rep. 337.

Estoppel. Ratification.—Any stockholder will be estopped to complain of an illegal or *ultra vires* transaction, who, with knowledge, participates in it, as stockholder, or officer, or acquiesces in it, or subsequently ratifies it.⁴ He will not be estopped, because of his participation or acquiescence in other like acts.⁵ Where a cashier was duly appointed, and acted as such for a long time, under sanction of the directors, it was not necessary that they should accept his bond as satisfactory, according to the terms of the charter, or to make him to enter legally upon his duties, or to make his sureties responsible for the non-performance of those duties.⁶ A stockholder, seeking protection against acts which are merely in excess of corporate power, but which are not prohibited by law, must be diligent, and act promptly. He cannot lie by, sanctioning, or by his silence at least, acquiescing in an *ultra vires* act of the corporation, watching the result, to abide by it, if profitable to himself, or, if it prove otherwise, to institute proceedings, to set it aside. He cannot thus speculate upon the chances. If he wants protection against the consequences of an *ultra vires* act, he must ask for it promptly, and before the act of which he complains, has become the foundation of rights, or of equities, which must be destroyed, or greatly impaired, if the act be nullified or undone. He must ask for it with sufficient promptness, to enable the court to do justice to him, without doing injustice to others.^{6a}

§ 907. *Ratification of ultra vires acts.*—A ratification of *ultra vires* acts is sufficient, if made with a full knowledge of all the material facts,⁷ to estop the shareholders from afterwards setting up the want of corporate power; and this rule includes, not only those having actual knowledge, but also one, who purposely shuts his eyes, to means of information within his own possession and control and ratifies an act deliberately, having all the knowledge in respect to it, which he cares to have.⁸ Ratification is implied by acceptance of benefits of the transaction, with knowledge of the facts, but a transaction that could not have been

⁴ *Fredericks v. Pennsylvania Canal Co.*, 109 Pa. St. 50; *Dimpfell v. Ohio, etc. Co.*, 110 U. S. 209; *Memphis, etc. Ry. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69.

⁵ *Coquard, etc. v. National, etc. Co.*, 171 Ill. 480.

⁶ *Bank of U. S. v. Dandridge* (1827), 12 Wheaton, 64.

^{6a} *Rabe v. Dunlap* (1893), 51

N. J. Eq. 40, 25 Atl. 929; *Kent v. Quicksilver M. Co.* (1879), 78 N. Y. 159.

⁷ *Kelley v. Newburyport, etc. R. Co.* (1886), 141 Mass. 498.

⁸ *Kelley v. Newburyport, etc. R. Co.* (1886), 141 Mass. 499; *Combs v. Scott*, 12 Allen, 493, 497; *Phosphate, etc. Co. v. Green*, L. R. 7 C. P. 43, 57.

authorized, can not be ratified.⁹ No ratification of an act unauthorized, can render it any the less *ultra vires*.¹⁰ A corporation is capable of exceeding its powers, but it can not escape liability upon an *ultra vires* contract, and whether or not it was ratified, by setting up that it was beyond the corporate powers. It may be ratified impliedly, by acting upon it, or by retaining benefits under it,¹¹ or by acquiescence in it.¹²

Knowledge—of the material facts, or facts from which knowledge is presumed, is necessary to show, in charging ratification of an *ultra vires* corporate act. If an unauthorized action appears upon the corporate books, subject to the stockholder's inspection, his knowledge is presumed.¹³ In accordance with the rule, a settlement, effected by the directors of a railway company, by giving notes for a road built and afterward used, should be regarded as ratified by the company, where for a number of years it has not disputed its liability on the notes, has paid interest on them, has continued to use the road, and has accepted reports which mentioned them amongst the outstanding obligations.¹⁴ When the stockholders of a corporation have acknowledged the liability of the company for a particular debt, they can not afterwards repudiate it, on the ground that it was in excess of the indebtedness which the corporation was authorized by law to contract.¹⁵ A purchase of shares in a railway corporation, by one who knows that the company is investing in the stock of railway corporations without the State which created it, operates as an implied recognition of its power to do so.¹⁶ And, where a corporation acted for several years under a contract of consolidation, made mortgages, and sold bonds to *bona fide* purchasers, both it, and its stockholders, were estopped to assert that the contract was *ultra vires*.¹⁷ Torts are among the acts that can be ratified by acquiescence in the course of action leading to them, as, where a railway corporation, running a steamboat beyond its powers, is estopped from setting up the defense of *ultra vires* in an action for

⁹ *Miner v. Mechanics' Bank, etc.*, 1 Pet. (U. S.) 46.

¹⁰ *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

¹¹ *Jacksonville, etc. Co. v. Hooper*, 160 U. S. 514; *Lake St. etc. Co. v. Carmichael*, 184 Ill. 348.

¹² *Union, etc. Co. v. Chicago, etc. Co.*, 163 U. S. 564.

¹³ *Bi-spool, etc. Co. v. Acme Manuf. Co.*, 153 Mass. 404.

¹⁴ *Kelley v. Newburyport, etc. R. Co.* (1886), 141 Mass. 496.

¹⁵ *Poole v. West Point, etc. Assn.*, 30 Fed. Rep. 513.

¹⁶ *Venner v. Atchison, etc. R. Co.*, 28 Fed. Rep. 581.

¹⁷ *Dimpfel v. Ohio & Mississippi Ry. Co.*, 9 Biss. C. Ct. 127.

an injury sustained through the negligence of an officer of the steamboat.¹⁸ A ratification, to be binding on a corporation, must be the act or acquiescence of some corporate agency which itself would have the power to do, or authorize the act, committed; for a ratification can not arise from the action, either of the officers who did the unauthorized acts, or of those who would have had no authority to do them.¹⁹ "The general rule, as to the effect of a ratification by one, of the unauthorized act of another, respecting the property of the former, is well settled. The ratification operates upon the act ratified, precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. In other words, it is essential, that the party ratifying, should be able, not merely to do the act ratified, at the time the act was done, but also at the time the ratification was made."²⁰ "An act which is in excess of the charter of a corporation, involves an unauthorized exercise of corporate power on the part of the company; and this objection can not be obviated by any subsequent ratification, either by the agents, or by the shareholders of the corporation. So it is clear that, if an act, performed by an agent on behalf of a corporation, is prohibited by statute, or by the charter of the company, or by some general rule of the common law, no ratification, by either agents or the shareholders of the corporation, can cure the illegality of the act. Ratification of an act has no greater effect than a previous grant of authority to do the act; it merely obviates the objection that the principal did not authorize the act to be done."²¹

§ 908. **Estoppel; effect of knowledge and laches.**—Any single stockholder, though entitled to sue for relief, will be estopped, in case of an *ultra vires* transaction, either by his consent to it, or ratification of it; or by reason of his laches, or other acquiescence in the act. A stockholder of a corporation will not be allowed, after an unreasonable time, to disturb and rescind a contract made by his corporation, after the same has been fully executed,—on the ground of *ultra vires*.²²

Effect of laches.—By neglect, or delay, to disaffirm an *ultra vires* transaction, within reasonable time, the right to have it set

¹⁸ Central R. etc. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353.

²¹ Morawetz, Private Corporations, § 619.

¹⁹ Taylor, Private Corporations, § 211. *Vide supra*, § 779.

²² Taylor v. South, etc. R. Co., 4 Woods, 575, 13 Fed. 152. *Vide*,

²⁰ Mr. Justice Field in Cook v. Tullis, 18 Wall. 332.

20 L. R. A. 765.

aside, will be lost.²³ What is reasonable time, whether days or years, within which disaffirmance of the act must take place, depends, in every case, upon its circumstances.²⁴ "These are generally the presence, or absence of the parties, at the place of transaction; their knowledge or ignorance of the sale, and of the facts which render it voidable; the permanent or fluctuating character of the subject matter of the transaction, as affecting its value; and the actual rise or fall of the property in value, during the period within which this option might have been exercised."²⁵ The stockholder is chargeable with laches, as defense to his action, only after he has full knowledge of the *ultra vires* character of the transaction, and has then unreasonably delayed bringing suit. The essential elements of the defense of laches, are knowledge and delay.²⁶ But where the means of knowledge are open to the stockholder, he is chargeable with knowledge from the time when he ought to have inquired into the facts and ascertained them.²⁷ If stockholders or creditors permit a corporation to enter into an *ultra vires* contract, or, with knowledge that it has done so, accept the benefits thereof without objection, they should not be allowed to object to the contract, on the ground that it is *ultra vires*.²⁸ For a court of equity may refuse to interfere with a corporation at the instance of a stockholder, in respect to an unauthorized contract which has been fully executed, when, if he had applied in season for an order to restrain the execution of it, equity might have felt bound to grant that relief.²⁹ The fact that acts complained of, were *ultra vires* the company, does not diminish the force and effect of the laches. If stockholders lie by, sanctioning, or seeming by their silence to sanction, such unwarrantable acts of the company, they will be bound by them. In order to set them aside, they must take timely steps to have them vacated. They can not wait to see if such acts will prove beneficial or not, and thus take their chances on the result. And this same rule holds, as between a minority of the shareholders and the acts of the

²³ Warren v. Para, etc. Co., 166 Mass. 97.

²⁴ Jesup v. Illinois Central Ry. Co. (1890), 43 Fed. 483.

²⁵ Twin Lick Oil Co. v. Marbery, 91 U. S. 587.

²⁶ Cumberland Coal Co. v. Sherman (1859), 30 Barb. 553; Hoffman, etc. Co. v. Cumberland, etc. Co. (1860), 16 Md. 456, 77 Am.

Dec. 311; Bank of China v. Morse (1901), 168 N. Y. 458, 56 L. R. A. 139, 85 Am. St. Rep. 676.

²⁷ Jesup v. Ill. Central R. R. (1890), 43 Fed. 483; Loomis v. Missouri, etc. Ry. (1901), 165 Mo. 469.

²⁸ Field on Corp., § 265.

²⁹ Terry v. Eagle Lock Co., 47 Conn. 141, 161.

majority. *Supineness*, in such cases, will be construed as acquiescence of the minority in the acts of the majority.³⁰ And so, every stockholder of a corporation, who participates in the fruits of an *ultra vires* act, is estopped from setting up the corporation's want of authority to perform it.³¹ In these cases, the plaintiff's recovery rests on the circumstance that all the persons who would have been entitled to object to the contract, allowed him to go on and perform his part thereof, under the reasonable assumption of their general acquiescence therein.³² Thus, in New Jersey, it has been decided, in accordance with these principles, that a railway company will be estopped from setting up, as a defense to an action for rent on a lease of a branch road, the plea of *ultra vires*, when the branch was constructed upon the company's promise to lease it for a long term of years, and when it has actually operated it for a time without objection.³³ The corporation is estopped to deny its liability under a contract, on the ground that its officers were not technically authorized to make it, when it was, nevertheless, within the scope of its powers, and has been recognized by corporate acts.³⁴

§ 909. **Illegal corporate acts.**—*Ultra vires* acts, in addition to being beyond the powers of the corporation, may be illegal because the corporation is expressly forbidden to do them, or because they are *mala in se* by common law or by statute, or because they are against public policy.³⁵ Of course, if a corporate contract is illegal in itself, it can no more be enforced by either party, than any other illegal contract. It is thus, in case of an

³⁰ *Burgess v. St. Louis County R. Co.* (Mo. 1890), 7 Ry. & Corp. L. J. 299. In this case it was said that the fact of the statute of limitations not having run does not help the matter. Laches is as good a bar to the enforcement of a stale claim as ever it was. Here eleven years had elapsed since a trust deed and seven years since a compromise under it, which were alleged to be *ultra vires*, had taken place.

³¹ *Branch v. Jessup*, 106 U. S. 468; *Zabriskie v. Cleveland, etc. R. Co.*, 23 How. 381; *Taylor v. South & North Alabama R. Co.*, 13 Fed. Rep. 152; *Tyrell v. Cairo, etc. R.*

Co., 7 Mo. App. 294; *Peoria, etc. R. Co. v. Thompson*, 103 Ill. 187.

³² *Taylor on Corporations*, §§ 279, 280, reviewing *Bissell v. Michigan, etc. R. Cos.*, 22 N. Y. 258; *Bradley v. Ballard*, 55 Ill. 413, 7 Am. Rep. 656; *Durst v. Gale*, 83 Ill. 136.

³³ *Camden, etc. R. Co. v. May's Landng, etc. R. Co.*, 48 N. J. 530.

³⁴ *Salem Nat. Bank v. Almy*, 117 Mass. 476; *Whitney v. Wyman*, 101 U. S. 392; *Upton v. Hansborough*, 3 Biss. (U. S.) 417.

³⁵ *Taylor on Corporations*, §§ 292-3; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 68, 20 Am. Rep. 504; *Bissell v. Michigan, etc. R. Co.*, 22 N. Y. 264.

agreement to pay for lobbying,³⁶ for procurement of a government contract.³⁷ The illegality should, however, inhere in the very act or contract itself that is sought to be declared illegal.³⁸ In regard to statutory prohibitions of corporate acts, the rule is thus stated by an eminent text-writer: "If a statute expressly forbids a corporation to make a certain contract, the contract is void, even though not expressly declared to be so, and is incapable of ratification; and that the contract is void as unlawful, may be pleaded by any one to an action founded directly and exclusively on the contract;³⁹ unless (1) the statute expressly states what the consequences of violating it shall be, and those consequences are other than that the contract shall be void;⁴⁰ (2) unless the statutory prohibition was evidently imposed, for the protection of a certain class of persons who alone may take advantage of it;⁴¹ or (3) unless to adjudge the contract void and in-

³⁶ *Marshall v. Baltimore, etc. Ry. Co.*, 16 How. 314. Promoting a bill in parliament for additional powers seems to be regarded in the same way. *Maunsell v. Midland, etc. Ry. Co.*, 32 L. J. Ch. 513; *Stevens v. South Devon Ry. Co.*, 20 L. J. Ch. 491; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775; *Munt v. Shrewsbury, etc. Ry. Co.*, 20 L. J. Ch. 169; *Caledonian Ry. Co. v. Solway, etc. Ry. Co.*, 49 L. T. 526, 13 Beav. 1; *Wood's Ry. Law*, 483. And it has even been held that an agreement to pay the expenses of an application to parliament for enlarged powers is not merely *ultra vires*, but also illegal as being against public policy. *MacGregor v. Dover, etc. Ry. Co.*, 18 Q. B. 618, 632. But *Browne & Theobald's Ry. Law*, 96, holds that apart from any question of the application of its funds, a company may promote or oppose a bill in parliament, and cites *In re London, etc. Ry. Co.* (1869), L. R. 5 Ch. App. 671; *Steele v. N. Met. Ry. Co.*, 2 Ch. 237; *Telford v. Metropolitan Board of Works*, 13 Eq. 514; *Heathcote v. North Staffordshire Ry. Co.*, 2 Macn. & G. 109, 20 L. J. Ch. 82; *Attorney General*

v. Manchester, etc. Ry. Co., 1 R. C. 436; *Lancaster, etc. Ry. Co. v. North Western Ry. Co.*, 2 Kay & F. 293. The English cases seem to hold also, however, that a company may devote its funds to oppose a bill, the passing of which would endanger its prosperity. *Attorney-General v. Brecon*, 10 Ch. Div. 204; *Attorney-General v. Eastlake*, 11 H. 205; *Attorney-General v. Norwich*, 2 Mylne & C. 406; *Bright v. North*, 2 Phill. Ch. 216; *Attorney-General v. Andrews*, 2 Macn. & G. 225. See *Regina v. White*, 14 Q. B. Div. 358; *Browne & Theobald's Ry. Law*, 95.

³⁷ *Tool Co. v. Norris*, 2 Wall. 45.

³⁸ *Orchards v. Hughes*, 1 Wall. 73; *Atlas National Bank v. Savery*, 127 Mass. 75. See *Taylor on Corporations*, § 293.

³⁹ *Taylor on Corporations*, § 297; *In re Jaycox*, 12 Blatchf. 209; *New York, etc. Co. v. Helmer*, 77 N. Y. 64; *Utica Ins. Co. v. Scott*, 19 Johns. 1.

⁴⁰ *Taylor on Corporations*, § 299; *Pratt v. Short*, 79 N. Y. 437, 445, 35 Am. Rep. 531; *Lester v. Howard Bank*, 33 Md. 558; *Robinson v. Bland*, 2 Burr. 1077.

⁴¹ *Taylor on Corporations*, § 300, citing *Beecher v. Marquette, etc.*

capable of forming the basis of a right of action, would clearly frustrate the evident purposes of the prohibition itself."⁴² A corporation contract prohibited, is not only *ultra vires*, but it is also illegal, and therefore void.⁴³ As, the issue by a bank of a promissory note to repay a deposit of money, at a future day, which was forbidden by statute,—the note was held void.⁴⁴ But equity will restore the money, in an action on implied contract for the money deposited.⁴⁵ When acts of a corporation, are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation can not perform, but merely those that are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed, and the funds applied solely, for carrying out the objects for which the corporation was created; and that, whether a contract, as originally made, was *ultra vires*, is not a very important inquiry.⁴⁶

§ 910. **Contracts mala in se.**—Distinction is drawn between corporate acts and contracts which are merely *ultra vires*, and other acts, which, besides being *ultra vires*, are also, for some reason, unlawful. Such illegal acts are of three classes: (1) acts *mala in se*, immoral in themselves, *contra bonos mores*; (2) acts, forbidden by some statutory prohibition; (3) acts contrary to public policy of the State.

Contracts mala in se.—As in the case of natural persons, so it is with a corporation, that its contract, when founded upon an immoral consideration, or contrary to good public morals, it is *malum in se*, can support no action to enforce it, and is ab-

Co., 45 Mich. 103, 108; Green v. Kemp, 13 Mass. 515, 7 Am. Dec. 169. Cf. Johnson v. Underhill, 52 N. Y. 203; Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328.

⁴² Taylor on Corporations, § 301, citing Gold Mining Co. v. National Bank, 96 U. S. 640; Duncomb v. New York, etc. R. Co., 84 N. Y. 190; Union, etc. Manuf. Co. v. Rocky Mountains National Bank, 2 Colo. 248; Allen v. First National Bank, 23 Ohio St. 97; Farmington Savings Bank v. Fall, 71 Me. 49; Lester v. Howard Bank, 33 Md. 558; Richmond Bank v. Robinson, 42 Me. 589.

⁴³ White v. Franklin Bank, 22 Pick. (39 Mass.) 181; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302; *In re Assignment, etc. Co.*, 107 Iowa, 143, 70 Am. St. Rep. 149; Bath, etc. v. Claffy, 151 N. Y. 24, 36 L. R. A. 664.

⁴⁴ *In re Jaycox*, 12 Blatchf. 209; New York, etc. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100.

⁴⁵ White v. Franklin Bank, 22 Pick. (39 Mass.) 181.

⁴⁶ Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504.

solutely void.⁴⁷ The law will not aid or relieve either party to such contract, or undertake to require restoration of money or property received by either, or otherwise to adjust the equities between them.

§ 911. **Contracts contrary to public policy.**—To determine what is public policy, is the province of the legislature.⁴⁸ An act which a State permits its own corporations to do, can not be considered as contrary to public policy of the State.⁴⁹ In order to discover the public policy of a State as to the powers allowed to be exercised by corporations, it is necessary to examine its constitution, laws, and judicial decisions.⁵⁰ A contract of a corporation, as of any individual, is illegal, if contrary to public policy;⁵¹ as, a contract in unreasonable restraint of trade, or tending to create a monopoly, and prevent competition,⁵² or an unlawful agreement to withdraw opposition to the passage of a bill pending before the legislature.⁵³ As, to the contracts of a *quasi*-public corporation owing special duties to the public, as, a railroad, gaslight, or waterworks company, it can not enter into any contract which tends to prevent the performance of those duties to the public. Whether or not such contract is foreign to the lawful business of the corporation, it is illegal, and contrary to public policy, and therefore void. For example, a gaslight corporation, organized to furnish gas to the people of a city, can not transfer its rights to another company, to furnish gas to a particular part of the city.⁵⁴ "The principle is, that, where a corporation, like a railroad company, has granted to it by charter, a franchise intended in large measure to be exercised for the public good, the due performance of those functions being, the consideration of the public grant, any contract which disables the corporation from performing those functions, is void. Any contract, by which it undertakes, without the consent of the State, to

⁴⁷ Bath, etc. Co. v. Claffy, 151 N. Y. 24, 36 L. R. A. 664.

⁴⁸ License Tax Cases, 5 Wall. (U. S.) 462.

⁴⁹ American Union v. Yount, 101 U. S. 352.

⁵⁰ Girard Will Case, 2 How. 127; Lancaster v. Amsterdam, etc. Co., 140 N. Y. 576, 24 L. R. A. 322.

⁵¹ Ohio, etc. Co. v. McArthur, 96 U. S. 267; West v. Averill, etc. Co., 109 Iowa, 488.

⁵² Harding v. American Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189; Diamond Match Co. v. Roeder, 106 N. Y. 473, 60 Am. Rep. 464.

⁵³ Scottish, etc. Ry. Co. v. Stewart, 3 Macq. H. L. Cas. 382.

⁵⁴ Chicago, etc. Co. v. People's, etc. Co., 121 Ill. 530, 2 Am. St. Rep. 124.

transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void, as against public policy."⁵⁵ Any such contracts, the same as those of individuals, are illegal and void, if contrary to public policy; as, a contract in restraint of trade, or to stifle competition and create a monopoly;⁵⁶ or, a lease by a transportation company which renders it unable to perform its corporate duties to the public.⁵⁷ The rule applies, according to the author, Mr. Taylor, where a statutory prohibition is not express, but arises only by implication from the charter, or enabling statute of the corporation; the contract will not be held void, when such a construction would defeat the intention of the statute.⁵⁸ An act, done by a corporation with public duties to perform, which is plainly unauthorized by its charter, may readily be held by the courts to be illegal, as against public policy. Among such acts are the consolidation, lease and sale of transportation, gas, and other *quasi*-public companies. These, especially, as well as all illegal acts, seem frequently to differ but in degree from *ultra vires* acts. One of the chief grounds for declaring them to be *ultra vires*, is the injury to the public occasioned thereby.⁵⁹

§ 912. **Prohibited acts; contracts mala prohibita.**—A contract of a corporation, which is prohibited by its charter, or by-laws under which it is created, expressly or by necessary implication, is considered illegal and void. As to such prohibited contracts, the courts construe as synonymous the words "illegal" and "*ultra vires*." "The word 'unlawful,' as applied to corporations, is not used exclusively in the sense *malum in se*, or *malum prohibitum*. It is also used to designate powers which they are not authorized to make, or acts which they are not authorized to do,

⁵⁵ *Thomas v. West Jersey Ry. Co.*, 101 U. S. 71; *Commonwealth v. Smith*, 10 Allen (Mass.), 448, 87 Am. Dec. 682; *West Virginia, etc. Co. v. Ohio, etc. Co.*, 22 W. Va. 600, 46 Am. Rep. 527.

⁵⁶ *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302.

⁵⁷ *Thomas v. West Jersey Ry. Co.*, 101 U. S. 71.

⁵⁸ *Taylor on Corporations*, § 302; *National Bank v. Whitney*, 103 U.

S. 99, reversing *Crocker v. Whitney*, 71 N. Y. 161; *National Bank v. Matthews*, 98 U. S. 621, 626, *et seq.*; *Oldham v. First National Bank*, 85 N. C. 240; *Thornton v. National Exchange Bank*, 71 Mo. 221; *Graham v. National Bank*, 32 N. J. Eq. 804; *Winton v. Little*, 94 Pa. St. 64.

⁵⁹ *Taylor on Corporations*, § 305; *Burbank v. Jefferson City, etc. Co.*, 35 La. Ann. 444; *New Haven, etc. Co. v. Hayden*, 107 Mass. 525.

or, in other words, such acts, powers, and contracts as are *ultra vires*.”⁶⁰ The acts of a corporation, to be unlawful, need not necessarily be *mala prohibita*, or *mala in se*, although such acts are illegal in all cases; but every act of a corporation, which by the terms of its charter, it is not authorized to do, is in excess of its charter, and therefore unlawful.⁶¹ Where the agreement of the corporation was to pay for stock for which a trustee of a bank had subscribed, and to take the stock and hold it as the security, the court said: “We thus see that, by the terms of the agreement, the money was to be applied to a specific purpose, and that purpose was an illegal one. We use the word “illegal,” not in the sense of *maliim in se* nor *mala prohibitum*, but in the sense in which it is used, to describe the unauthorized acts of corporations, acts and contracts *ultra vires*.”⁶² A contract in violation of a statutory prohibition, is illegal and void, and will support no action to enforce it, if such appears to have been the legislative intent; but, otherwise, if it appears by the other provisions of the statute, that it was not the intent of the prohibition, to make the contract void.⁶³ A prohibitory statute may be merely declaratory of the common law, as was held, where an enabling statute provided, that the assets of the corporation should be used for no other purposes than those of its corporation creation, and some of the assets were loaned *ultra vires*.⁶⁴ “In declaring the effect of a statute, prohibitory in form, courts will have only one object in view,—the real purposes of the statute; the real purposes of the legislature in its enactment.”⁶⁵ In this the courts agree. Where such forbidden act is illegal only because it is prohibited, but not because of any inherent wrong, then, where the circumstances of the case, in equity and justice, require the return of the property or money received by either party under the contract, a court of equity may interpose, to grant relief by implying a promise to pay, and an action *quasi ex contractu* may be maintained.⁶⁶ If the statute prohibits the corporation from making certain contracts, but, instead of declaring them void, contemplates some

⁶⁰ *People v. Chicago G. T. Co.*, 130 Ill. 286; *Pittsburg, etc. Ry. v. Keokuk Bridge Co.*, 131 U. S. 371.

⁶¹ *State v. Nebraska D. Co.*, 29 Neb. 700.

⁶² *Franklin Co. v. Lewiston Inst.* (1877), 68 Me. 43.

⁶³ *White v. Franklin Bank*, 22 Pick. (39 Mass) 181; *In re As-*

signment, etc. Co., 107 Iowa, 143, 70 Am. St. Rep. 149.

⁶⁴ *Bond v. Terrell, etc. Co.*, 82 Tex 309, 18 S. W. 691; *Butterworth, etc. v. Kritzer, etc. Co.*, 115 Mich. 1.

⁶⁵ *Union National Bank, etc. v. Mathews*, 98 U. S. 621.

⁶⁶ *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531.

other penalty, the contract will not be held void;⁶⁷ as, where a prohibition against discounting or lending money on certain securities, expressly declares they shall be void when taken in violation of the statute, no action can be maintained upon them.⁶⁸ The mere fact of prohibition, where the statute does not declare that the prohibited securities shall be void if taken, will not render them void and unenforceable. The State may forfeit the corporate charter for the violation of the statute, but the borrower can not defeat enforcement by the corporation, of the security, by reason of such misuse of the corporate powers.⁶⁹

§ 913. Limitation of corporate indebtedness.—The decisions of the courts are in conflict, as to whether limitation by the charter or other statute, of the amount of indebtedness that a corporation may incur, will render absolutely void its contract, involving increase of indebtedness beyond the limit; or, whether the limitation is to be construed merely as directory, and the corporation receiving benefits of the contract, held estopped to set up its violation of the statute, in defense of an action to enforce such contract.⁷⁰

§ 914. Prohibited loans to officers.—"A statute prohibiting a corporation from making loans to its officers, does not render void the promise of the borrower. Such a statute is designed to forbid officers, who are charged with the duty of investing the funds of the corporation, from borrowing of themselves, and thus to prevent the risk of the funds being invested by them, under the promptings of self-interest, upon insufficient security. In other words, the purpose is to protect the corporation and the policy-holders from the dishonesty or self-interest of the officers. It is intended as a shield to the corporation. To construe it, as making the promises of the officers, who borrow money in violation of its provisions, void, would defeat the main purpose of its enactment, and would visit the consequences of the unlawful act of the officers, not upon themselves, but upon the corporation, for whose protection the statute was made. It would require a plain expression of legislative intention to lead us to such a construction."⁷¹ It was so held, where a savings bank, in violation of the statute, loaned its funds upon the security of names alone;

⁶⁷ Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544.

⁶⁸ Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531.

⁶⁹ National Bank, etc. v. Whitney, 103 U. S. 99.

⁷⁰ Weber v. Spokane Nat. Bank, 29 U. S. App. 97, 64 Fed. 208.

⁷¹ Bowditch v. New England, etc. Co., 141 Mass. 292, 55 Am. Rep. 474.

and it was so held, under the national banking act,⁷² in case of a loan made in excess of ten per cent. of its capital stock;⁷³ and (under the same act), in case of loan by a national bank, of money on real estate security, in violation of implied prohibition by the act. "We can not believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished, and the borrower rewarded, by giving success to this defense, whenever the offensive fact shall occur. The impending danger, of a judgment of ouster and dissolution, was, we think, the check, and none other contemplated by congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow, whenever the proper public authority shall see fit to invoke its application. A private person can not, directly or indirectly, usurp this function of the government."⁷⁴

§ 915. Ultra vires corporate conveyance or purchase.—Unless prohibited, a corporation may acquire, hold and transfer real and personal property, and the title thereto, subject to objection only by the State. The title is defeasible only upon "office found."⁷⁵ "No one can be heard to question the right of a corporation to acquire and hold real estate, except the State by which the corporation was created, or that State, within whose limits, and by whose permission or authority, express or implied, it does business, and it must so attack, by a direct proceeding instituted for that purpose."⁷⁶ A corporation, taking prohibited conveyance of land, may hold and sell it, and recover the price, and convey good title. The only remedy of the State for violation of the prohibition, is in a declaration of forfeiture of the corporate charter.⁷⁷

§ 916. Escheat of lands to the State.—In the absence of an, statutory authority, the State can not confiscate the land of a corporation, on the ground that it has no power to hold it. In that case, the only remedy of the State is in proceedings to forfeit the charter.⁷⁸

§ 917. Acts of confiscation of stock during the Rebellion.—Each government, during the rebellion, passed acts, confiscating

⁷² Farmington, etc. v. Fall, 71 Me. 49.

⁷³ Union, etc. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640.

⁷⁴ Union Nat. Bank, etc. v. Mathews, 98 U. S. 621.

⁷⁵ Long v. Georgia, etc. Co., 91 Ala. 519, 24 Am. St. Rep. 931.

⁷⁶ Fayette Land Co. v. Louis-

ville, etc. Co., 93 Va. 274, 24 S. E. 1016.

⁷⁷ Lancaster v. Amsterdam, etc. Co., 140 N. Y. 576; Mallett v. Simpson, 94 N. C. 37.

⁷⁸ Commonwealth v. New York, etc. Co., 132 Pa. St. 591, 7 L. R. A. 634.

shares of stock held by owners domiciled in the other section. Upon the failure of the Confederate government, its acts of confiscation, and all transfers of stock in pursuance thereof, became null and void, and the stock restored to its owners.⁷⁹ Where voluntary payments of dividends by a corporation, were made to the illegal holders of the stock so confiscated, the dividends were held to be payable, nevertheless, to the real owner.⁸⁰ Under the confiscation acts of the United States of 1861 and 1862, stock, held by owners who were in the rebellion, was seized and effectively confiscated, where the proceedings were regular.⁸¹

§ 918. **Who may object to ultra vires acts.**—Either the State, or a stockholder, or the corporation itself, or anyone contracting with it, may object. The State may object, and by *quo warranto* proceedings may obtain decree of ouster from the exercise of any particular *ultra vires* act, or decree of forfeiture of the charter. A stockholder may maintain a suit in equity, to enjoin payment of an illegal income tax to the federal government,⁸² or to enjoin public sale of a solvent corporation, though dissolved under a statute, when he shows the intent to be to freeze out the minority and reorganize under the laws of another State.⁸³ The charter is a contract between the corporation and each one of its stockholders.⁸⁴ Any *ultra vires* act is a breach of that contract, of which any of the parties to the contract may complain.⁸⁵ Although a corporation's power to acquire real estate is limited by the charter, if it transcends its power in that respect, a conveyance to it is not void; only the State can object. It is valid until assailed in a direct proceeding, instituted by the State for that purpose.⁸⁶ Whether or not the property taken for the corporate purposes, is necessary, is a matter between the State and the corporation. "It would lead to infinite inconvenience and embarrassments, if, in the suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incor-

⁷⁹ *Dewing v. Perdicaris* (1877), 96 U. S. 193; *Central R. R. etc. Co. v. Ward* (1868), 37 Ga. 515.

⁸⁰ *Keppel v. Petersburg R. R.*, Chase's Dec. 167, 14 Fed. Cas. 357.

⁸¹ *Miller v. United States* (1870), 11 Wall. 268; *Chapman v. Phoenix Nat. Bank*, 85 N. Y. Super. Ct. 340.

⁸² *Pollock v. Farmers' L. & T. Co.* (1895), 157 U. S. 429.

⁸³ *Treadwell v. United, etc. Co.* (1900), 47 N. Y. App. Div. 613.

⁸⁴ *Livingston v. Lynch*, 4 Johns. Ch. 573; *Hartford & New Haven R. R. v. Croswell* (1843), 5 Hill, 383, 40 Am. Dec. 354.

⁸⁵ *Harding v. American, etc. Co.* (1899), 182 Ill. 551, 74 Am. St. Rep. 189.

⁸⁶ *Mallett v. Simpson*, 94 N. C. 37.

poration, and the title made to rest upon the existence of that necessity."⁸⁷

§ 919. **Other acts and contracts by the corporation which, without express authority, are ultra vires.**—Corporations created for a specific object, have no power to take and hold real estate for purposes wholly foreign to that object.⁸⁸ In New York corporations are held to be incapable of taking lands by devise.⁸⁹ A public corporation can not alienate its property, where it is necessary to its efficient service to the public. A corporation can not be a trustee, unless the objects which the trust is intended to accomplish, are within the general scope of the corporate purposes.⁹⁰ A corporation has no power to loan money, unless there is a special clause to that effect, in its charter.⁹¹ A bank, empowered to discount negotiable notes, has no power to purchase such notes.⁹² A corporation can not increase or decrease its capital stock, without express legislative authority,⁹³ and the law must be accepted, or acquiesced in, by the stockholders.⁹⁴ A national bank can not increase its capital stock, without the approval of the Comptroller, as the representative of the government.⁹⁵ A corporation can not issue preferred stock, without express authority in its charter, or by the law under which the corporation is organized.⁹⁶ A corporation can not purchase its own stock, in exchange for money or other property, and hold, re-issue or retire the same, unless the purchase be in entire good faith, in an exchange for equal value, and free from all fraud, actual or constructive, and the corporation be not insolvent or in process of dissolution, and the rights of creditors be not injuriously affected.⁹⁷ A corporation can not invest its corporate funds, in the purchase of stock of another corporation.⁹⁸ A foreign corporation can not purchase stock in a domestic corpora-

⁸⁷ Mr. Justice Field in *Natoma, etc. Co. v. Clarkson*, 14 Cal. 552; *Hough v. Cook County L. Co.*, 73 Ill. 23; *Fritts v. Palmer*, 132 U. S. 293.

⁸⁸ *Inhabitants, etc. v. Cole*, 3 Pick. (Mass.) 232.

⁸⁹ *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290.

⁹⁰ *Trustees v. Peaslee*, 15 N. H. 317.

⁹¹ *Chambers v. Falkner*, 65 Ala. 448.

⁹² *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519.

⁹³ *Scovill v. Thayer*, 105 U. S. 143; *Thomp. Liab. Stock.*, § 115.

⁹⁴ *Eidman v. Bowman*, 58 Ill. 144.

⁹⁵ *Winters v. Armstrong*, 37 Fed. 508.

⁹⁶ *Thomas v. Railway*, 101 U. S. 71; *Warren v. King*, 108 U. S. 389.

⁹⁷ *Chapin v. Greenlee*, 38 Ohio St. 275.

⁹⁸ *People v. Chicago G. T. Co.*, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319; *Hill v. Nesbit*, 100 Ind. 341.

tion, for the purpose of controlling it.⁹⁹ A corporation can not discriminate between its stockholders, in the declaration or payment of a dividend.¹ A pooling contract between common carriers, to prevent competition, is *ultra vires*, illegal, and void.² A railroad corporation has no authority to guarantee the bonds of, or lend its credit to, another corporation.³ It can not make a long lease of its road and appurtenances, and for the exercise of its powers.⁴ It can not mortgage or transfer its franchises.⁵ It can not consolidate with another corporation, without express authority of the legislature.⁶

§ 920. **Test to distinguish the acts of directors from corporate acts.**—"To distinguish unauthorized acts of directors from those of the corporation, the test is, whether the acts performed on the contracts entered into are for purposes which are reasonably incidental to the carrying on of the business of the company. To arrive at this determination, the charter, which is the constitution of the corporation, and the law under which it is organized, must be consulted. *Bona fides* can not be the sole test; otherwise, it is truly said, you might have a lunatic conducting the affairs of the company, and paying away its money with both hands, in a manner perfectly *bona fide*, yet perfectly irrational. The test must be, what is reasonably incidental, and within the reasonable scope of carrying on the business of the company."⁷

§ 921. **Ultra vires acts of directors and agents.**—Directors of an insolvent corporation, can not, as creditors of such corporation, secure to themselves a preference.⁸ They can not declare a dividend, with knowledge that there are no profits.⁹ A bank president can not dispose of the cash and credits of the banks, for the purpose of settling the demands of its creditors,¹⁰ nor can he surrender or release a claim of the bank against any one.¹¹

⁹⁹ Buckeye Marble Co. v. Harvey, 92 Tenn. 115.

¹ Kent v. Quicksilver Min. Co., 78 N. Y. 159; Reese v. Bank, 31 Pa. St. 78, 72 Am. Dec. 726.

² Cleveland, etc. R. Co. v. Closser, 126 Ind. 348, 9 L. R. A. 794; Denver, etc. Co. v. Atchison, etc. R. Co., 110 U. S. 667; Interstate Commerce Act, 24 U. S. Stat. at L. 380.

³ Penn. R. Co. v. St. Louis, etc. Co., 118 U. S. 290; Davis v. Old Colony R. R. Co., 131 Mass. 258, 41 Am. Rep. 221.

⁴ Oregon Ry. Co. v. Oregonian

Ry. Co., 130 U. S. 1; Central T. Co. v. Pullman Co., 139 U. S. 24.

⁵ *Supra*, § 831.

⁶ Pearce v. Madison R. Co. 21 How (U. S.) 441.

⁷ Pickering v. Stephenson, L. R. 14 Eq. 340.

⁸ Smith v. Putnam, 61 N. H. 632.

⁹ Slayden v. Seip, 25 Mo. App. 439.

¹⁰ Hoyt v. Thompson, 5 N. Y. 320; Holt v. Winfield Bank, 25 Fed. 812.

¹¹ Olney v. Chadsey, 7 R. I. 224.

CHAPTER XXXVI.

LEGISLATIVE CONTROL.

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| <p>§ 922. Visitation. Visitorial power over charitable and other public institutions.</p> <p>923. State and federal control over corporations generally.</p> <p>924. Control over public corporations. What are public uses.</p> <p>925. Control of fares and rates of railroads and other public corporations.</p> <p>926. Limitations of the power to regulate rates.</p> | <p>§ 927. Requirement of annual or quarterly reports.</p> <p>928. Police power of the state.</p> <p>929. (a) Power to regulate rates and service by railroads, etc.</p> <p>930. (b) Power in abatement of nuisance.</p> <p>931. (c) Power to regulate manufacture and sale of liquor.</p> <p>932. (d) Power to suppress lotteries.</p> |
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References:

Legislative regulation of rates and charges by railroads, etc.

Sections 1034, 1035.

"Trusts" and monopolies. Sections 933-957s.

Charitable associations. Sections 922-932.

§ 922. Visitation. Visitorial power over charitable and other public institutions.—To assure and enforce obedience to the charters or constitutions, ordinances and by-laws of corporations, and generally to maintain their peace and good government, these bodies are subject to visitation, or in other words, to the inspection and control of tribunals recognized by the laws of the land.¹ Although the rule, that in the absence of any appointment

¹ Angell & Ames on Corporations, § 684. Thus in *American Printing House v. Trustees*, 104 U. S. 711, the plaintiff corporation was organized in Kentucky for the purpose of printing books for the blind, and provided in its charter that the presidents of the state's boards of trustees contributing to the general scheme should constitute a board of visitors with the right to visit the

printing-house, examine its books, investigate the proceedings of its trustees, and to appoint new ones in case of mismanagement. With this provision in view a board of trustees was organized in Louisiana and received contributions from the Kentucky corporation. Subsequently the charter of the latter corporation was altered by the legislature so that the right of visitation was no longer left

of visitors by the founder, the visitorial power rests in his heirs, seems always to have been recognized as law in this country, yet the difference between the condition of heirs in England, where the inheritance descends to the eldest son or brother, and in this country, where it vests in all the children, male and female, indifferently, is such as would render the rule extremely difficult of application in practice, especially after a considerable lapse of time, and many descents cast.² Accordingly, while the internal affairs of ecclesiastical and eleemosynary corporations, are, in some instances, still inspected and controlled by private visitors,³ public corporations are visited by the government itself, generally through the medium of the courts of justice,⁴ but sometimes through boards of visitors appointed by the State.⁵ Thus, the Medical College of Virginia, incorporated in 1854, is a public corporation, the visitorial authority is in the State, the power of removing and appointing the visitors is reserved in the charter to the legislature, and the governor has authority only to fill vacancies caused by death, resignation, or otherwise; he may not remove and so create a vacancy, in order to fill it.⁶

to the presidents of the state boards of trustees. The contributors thereupon demanded a return of their money, and the Kentucky corporation brought suit against the Louisiana board to recover the same, and it was held that the change in the charter was such as to excuse defendant from making payment to plaintiff, especially since the original contributors insisted on a return of their money.

² Angell & Ames on Corporations, § 687.

³ Angell & Ames on Corporations, § 684; Maryland Univ. v. Williams, 9 Gill & J. 401; "Powers of Visitation in Eleemosynary Corporations," 19 L. Mag. 1; "*Mandamus* in Ecclesiastical Cases in America," 18 L. Rep. 421.

⁴ Angell & Ames on Corporations, § 684; Kyd on Corporations, 174; 2 Kent's Commentaries, 300, 301; Burney's Case, 2 Bland, Ch. 141. See, generally, State v. Rail-

way Co., 45 Wis. 592; "Police Powers and Boards of Health," 6 N. J. L. J. 135; "Subjection of Private Rights to Police Powers of the State," by W. P. Wade, 6 So. L. Rev. N. S. 59; "Public Policy & Police Powers of the State," by Alfred Orendorff, 5 Ill. St. Bar. Assn. Rep. 72; "The Brooklyn Bridge Case—*Mandamus*," 20 Alb. L. J. 44; "*Mandamus* in United States Courts," by Glendower Evans, 19 Am. L. Rev. 505; "*Mandamus* in Ohio," by H. L. Peeke, 13 W. L. Bul. 507; "*Mandamus* in Ohio," by W. H. Pope, 15 W. L. Bul. 47; "Legislative & Judicial Control over Charters of Incorporation," by C. J. Ingersoll, 5 Dem. Rev. 99; "Corporate Duties," 1 L. J. 480; "Indictment of Corporations," by Adelbert Hamilton, 6 Crim. L. Mag. 317.

⁵ As, for example, boards of railway commissioners.

⁶ Lewis v. Whittle, 77 Va. 415.

§ 923. **State and federal control over corporations, generally.**—A State creating a corporation has no visitorial power over it to correct corporate abuses, except where municipal charitable or religious corporations abuse their franchises, pervert the purpose of their organization, or misappropriate their funds, or where private corporations, chartered for limited purposes, exceed their powers, and are restrained from further violations.⁷ The United States, though creator of the Pacific Railroad, can not exercise visitorial power over it, respecting frauds in its management.⁸ It is questioned, whether the State can enjoin a merely *ultra vires* act of a corporation. Its remedy is by *quo warranto*.⁹ But it may enjoin a criminal act, as prize fighting;¹⁰ or the abuse or misuse of corporate franchises;¹¹ or the United States may enjoin the violation of a federal charter.¹² But visitation, strictly speaking, is now of little practical importance, as compared with the subject of State and federal control of civil corporations. This governmental control of corporations seems to be founded quite as much upon the broad basis of public policy, as upon the idea that the sovereign, or State, has succeeded to the rights of prehistoric founders; for we find it declared that this power over corporations is co-extensive with the State's control of individuals,¹³ the inference being that the exercise thereof does not depend upon the technical system of law, peculiar to corporate bodies.

§ 924. **Control over public corporations. What are public uses.**—An important distinction between private corporations and *quasi*-public corporations is, with respect to legislative control. *Quasi*-public corporations are subject to governmental visitation and control, as creatures or instrumentalities of the State, whereas strictly private corporations are not subject to

⁷ *Attorney General v. Tudor Ice Co.* (1870), 104 Mass. 239, 6 Am. Rep. 227.

⁸ *United States v. Union Pacific R. Co.* (1870), 98 U. S. 569.

⁹ *Stockton v. American, etc. Co.* (1897), 55 N. J. Eq. 352, 36 Atl. 971.; *People v. Ballard* (1892), 134 N. Y. 269, 17 L. R. A. 737.

¹⁰ *Columbian Athletic Club v. State* (1895), 143 Ind. 98.

¹¹ *State v. American, etc. Assn.* (1896), 64 Minn. 349, 67 N. W. 1; *State v. Schlitz, etc. Co.* (1900),

104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

¹² *United States v. Western Union T. Co.* (1892), 50 Fed. 281, 160 U. S. (1895).

¹³ *Bank of the Republic v. Hamilton*, 21 Ill. 53. Such general rights and powers of corporations as are not intended to be secured to them as property, are subject to legislative control in the same manner as individuals. *Bank of the Republic v. Hamilton*, 21 Ill. 53.

visitation or control by the State, except in its exercise of the police power, their charters being contracts, which the State is prohibited from impairing. A bank is a public corporation, where its stock belongs exclusively to the State, and is subject to legislative control.¹⁴ A canal is a private corporation.¹⁵ An association of mutual insurance companies for their mutual benefit, is a private corporation.¹⁶ School districts are public corporations.¹⁷ A county is a public corporation, and may be abolished by the State.¹⁸ The principle, that there is no peculiar sanctity attaching to the rights and property of artificial persons as distinguished from natural persons, that both are equally protected by the constitution and both equally subject to legislative control, finds a further application in the regulation of property dedicated to a public use. Whenever any person pursues a public calling, and sustains such relations to the public that the people must, of necessity deal with him, and are under a moral duress to submit to his terms if he is unrestrained by law, then, in order to prevent extortion, and an abuse of his position, the price he may charge for his services may be regulated by law.¹⁹ When private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than three hundred years ago, in his treatise *De Portibus Maris*,²⁰ and has been accepted without objection, as an essential element in the law of property ever since. Property does become clothed with a public interest, when used in a manner to make it of public consequence and affect the community at large.²¹ "It has been customary in England, from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, *et cetera*, and in so doing, to fix a maximum of charge to be made for services

¹⁴ *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Mobile, etc. Bank v. Collins*, 7 Ala. 95.

¹⁵ *Hooker v. New Haven*, 15 Conn. 312.

¹⁶ *Newcomb v. Boston, etc. Dept.*, 151 Mass. 215.

¹⁷ *In re Farm*, 51 N. H. 376.

¹⁸ *Mills v. Williams*, 33 N. C. 558.

¹⁹ *Commonwealth v. Duane*, 98 Mass. 1; *State v. Perry*, 5 Jones (N. C.), L. 252; *State v. Nixon*, 5

Jones (N. C.), L. 258; *Bac. Abr. tit. "Carriers" D.*; *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How. 272; *Kirkham v. Shawcross*, 6 T. R. 17; 2 *Peake N. P. C.* 185; 10 *M. & W.* 415; *Ogden v. Saunders*, 12 Wheat. 259; *Mills v. County Commissioners*, 4 Ill. 53; *Trustees of Schools v. Tatman*, 13 Ill. 37.

²⁰ *Harg. Law Tracts*, 78.

²¹ *Munn v. Illinois* (1876), 94 U. S. 113, 126.

rendered, accommodations furnished and articles sold.”²² “A railroad company, particularly, is a carrier for hire, incorporated with extraordinary powers and privileges, in order that it may better serve the public in that capacity, and being engaged in public employment affecting the public interest, the company is subject to legislative control, as to its rates of fare and freight.”²³ Under the charter, it fixes the rates, or authorizes the corporation to fix them.²⁴ “To this day statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.”²⁵ “When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control.”²⁶ If the charter, without reservation, gives such a company the right to fix its rates, and charges, this is a contract between the State and the corporation, which the legislature can not subsequently impair, by reducing or limiting its charges,²⁷ but otherwise, if the legislature reserved the

²² *Munn v. Illinois*, 94 U. S. 113, 125.

²³ *Chicago R. Co. v. Iowa*, 94 U. S. 155.

²⁴ *Stone v. Farmers', etc. Co.*, 116 U. S. 307; *Lake Shore, etc. Co. v. Smith*, 173 U. S. 684; *City of Danville v. Danville Water Co.*, 180 Ill. 235; *City of Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337; *Railway Co. v. Fuller*, 17 Wall. 560; *Covington Bridge Co. v. Kentucky*, 154 U. S. 204; *Peik v. Chicago, etc. Co.*, 92 U. S. 164; *People v. Wabash, etc. Co.*, 104 Ill. 476.

²⁵ “With the fifth amendment in force, congress in 1820 conferred power upon the city of Washington ‘to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rate of fees therefor . . . and the weight and quality of bread.’ 3 Stat. 587,

§ 7; and in 1848, ‘to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen and draymen, and the rates of commission of auctioneers.’ 9 Stat. 224, § 2.” *Munn v. Illinois*, 94 U. S. 113, 125.

²⁶ *Munn v. Illinois*, 94 U. S. 113, 126. In *Buffalo E. S. R. Co. v. Buffalo St. R. Co.* (1889), 111 N. Y. 132, it was held that although a contract between two street railway companies respecting rates, was terminated by N. Y. Act of 1875, requiring a reduction in charges, yet, the matter being within the police power of the state, the statute was not unconstitutional as impairing the obligation of contracts.

²⁷ *Los Angeles v. Los Angeles, etc. Co.*, 177 U. S. 558; *Lake Shore, etc. Co. v. Smith*, 173 U. S. 684;

power to alter, or amend, or repeal, the charter, it may fix any reasonable limitations upon the rate of charges.²⁸ In the absence of statutory regulations as to charges, it is implied in every charter of such a corporation, as railway, etc., that the compensation for carriage, or other public service, shall be reasonable.²⁹ And the power of the State to limit and regulate charges within its borders, extends to corporations created by the United States.³⁰ but the railroad must be given opportunity for judicial hearing.³¹ The principle enunciated in *Munn v. Illinois*,³² with respect to the regulation of grain elevators, has been applied again in the line of decisions known as the "Granger Cases," and in the "Railroad Commission Cases." The Granger Cases "decided that railroads are subject to the supervision and control of the legislature, like all carriers at common law, being engaged in a public employment affecting the public interest, and therefore, under the decision of *Munn v. Illinois*, subject to legislation as to the rates of fare and freight, unless protected by their charters; that in the absence of charter contracts, the charges by railroad companies for services within the State, may be limited by the legislature, and a maximum of charges prescribed; that, where the State constitution reserves a right of amendment or repeal, the legislature may prescribe a maximum, although the charter authorizes such charges as are reasonable; that more than the maximum fixed by the legislature can not be recovered by the company by showing that the amount charged was no more than reasonable for the services."³³

Pingree v. Mich. Cent. R. Co., 118 Mich. 314, 53 L. R. A. 274; *Skaneateles, etc. Co. v. Village of Skaneateles*, 161 N. Y. 154, 46 L. R. A. 687; *Covington, etc. Co. v. Sanford*, 164 U. S. 578.

²⁸ *Shield v. Ohio*, 94 U. S. 319; *Parker v. Metro R. Co.*, 109 Mass. 506; *Smith v. Lake Shore, etc. Co.*, 114 Mich. 460, 173 U. S. 684.

²⁹ *Ruggles v. Illinois*, 108 U. S. 537.

³⁰ *Smyth v. Ames*, 169 U. S. 466.

³¹ *Chicago, etc. Co. v. Minnesota*, 134 U. S. 418.

³² *Mum v. Illinois*, 94 U. S. 113.

³³ "The Dartmouth College Case and Private Corporations," by William P. Wells (1886), 9 Am. Bar Assn. Rep. 229, 247, citing *Chicago, B. & Q. R. Co. v. Iowa* (1876), 94 U. S. 155; *Peik v. Chi-*

cago & N. R. Co. (1876), 94 U. S. 164, 178, where Chief Justice Waite said, "As to the claim that the courts must decide what is reasonable and not the legislature. This is not new to this case. It has been fully considered in *Munn v. Illinois*, 94 U. S. 113. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180; *Stone v. Wisconsin*, 94 U. S. 181; *Ruggles v. Illinois*, 108 U. S. 562.

"The 'Railroad Commission Cases' affirm the 'Granger Cases,' and go beyond them, sustaining the validity of a statute regulating rates of transportation and creating a State board of commissioners to supervise and enforce the same."³⁴ "The power of a State to regulate the charges of railway companies for the transportation of persons and property within her limits, is governmental, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt, it is to be resolved in favor of the existence of the power. A surrender of such powers 'ought not to be presumed unless the purpose appears to have been deliberately entertained and is distinctly expressed.'"³⁵ Upon the same principle, the State may regulate telephone charges. The fact that telephones are patented is immaterial; nor does such regulation "take" property so as to unlawfully interfere with vested rights.³⁶ Telegraph and telephone companies are subject to legislative control, the same as are other common carriers, and their rates of charge may be fixed by statute.³⁷ A corporation organized to telegraph stock quotations, must serve all who offer to pay for the service.³⁸ But every corporation need not deal with the whole community—as, a Board of Trade may determine to what class of outside persons, its telegraphic reports shall be furnished.³⁹ Upon a like principle, telegraph and telephone companies, whose wires have become a nuisance in the streets of cities, have been subjected to the control of the police power.⁴⁰ And gas companies have been required to make, at their own cost,

³⁴ "The Dartmouth College Case and Private Corporations," by William P. Wells (1886), 9 Am. Bar. Assn. Rep. 229, 248, citing Railroad Commission Cases, 116 U. S. 307.

³⁵ Hare's American Constitutional Law, 667, citing Providence Bank v. Billings, 4 Peters, 514, 561; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 325; Railroad Company v. Maryland, 21 Wall. 456; Chicago, B. & Q. R. Co. v. Iowa (1876), 94 U. S. 155; Ruggles v. Illinois, 108 U. S. 526, 531.

³⁶ Hockett v. State, 105 Ind. 250, 55 Am. Rep. 201.

³⁷ Central Union, etc. Co. v. Bradbury, 106 Ind. 1; State v. Nebraska, etc. Co., 17 Neb. 126, 52 Am. Rep. 404; American, etc. Co. v. Connecticut, etc. Co., 49 Conn. 352, 44 Am. Rep. 237, 59 Am. Rep. 172. Hockett v. State, 105 Ind. 250, 55 Am. Rep. 201.

³⁸ Friedman v. Gold, etc. Co., 32 Hun (N. Y.), 4.

³⁹ Marine, etc. Exch. v. Western Union, etc. Co., 22 Fed. 23, 17 Fed. 23, note; Metropolitan, etc. Exch. v. Chicago B. of T., 15 Fed. 847.

⁴⁰ Western U. T. Co. v. Adams, 87 Ind. 598, 44 Am. St. Rep. 776; Western U. T. Co. v. Meek, 49 Ind. 53.

such changes as public convenience or security requires.⁴¹ The manufacture of gas, and its distribution by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business, in which every one may engage, as of common right, upon terms of equality; but it is a franchise, relating to matters of which the State may exercise control. Accordingly, an agreement between a city and a gas company, for the supply of gas for a period longer than that authorized by law, will not affect the right of the city to fix the price after the expiration of the legal time.⁴² And in California it is held, that water companies, formed under the act of 1858, have no right, which the State is prohibited by the constitution of the United States from impairing or taking away. Their charges may be fixed by a commission made of persons selected as required by that act.⁴³ A water company may be enjoined from cutting off the water supply from any person without reasonable cause, and may be compelled to furnish water at reasonable rates to all persons, without partiality to any.⁴⁴ And the legislature may exercise like control over other *quasi*-public corporations.⁴⁵ A gas company can not refuse to furnish gas to the occupant of certain premises, because he has failed to pay for gas furnished to him in other premises.⁴⁶ When the exigency properly calls for exercise of the police power, it is for the legislature to determine; but what are the subjects for exercise of the power, is a judicial

⁴¹ *Western U. T. Co. v. Meek*, 49 Ind. 53; *Water Works v. Schottler*, 110 U. S. 347, *Wilgus' Cas.*

⁴² *Ernst v. New Orleans, etc. Co.*, 29 La. Ann. 550, 2 South. 415; *McCrary v. Baudry*, 67 Cal. 120; *Silkman v. Yonkers Water Commissioners*, 152 N. Y. 327, 37 L. R. A. 287; *Sickles v. Manhattan, etc. Co.*, 66 How. (N. Y.) 305; *Coy v. Indianapolis, etc. Co.*, 146 Ind. 665, 36 L. R. A. 535; *Portland, etc. Co. v. State*, 135 Ind. 54, 21 L. R. A. 639; *State v. Ironton Gas. Co.*, 37 Ohio St. 45.

⁴³ *Spring Valley Water Works v. Schottler* (1883), 110 U. S. 347, 350, 351, *Field, J.*, dissenting.

⁴⁴ *Commonwealth v. Eastern, etc. Co.*, 103 Mass. 254, 4 Am. Rep. 555; *Albany, etc. R. Co. v. Brownell*, 24 N. Y. 345.

⁴⁵ *Vide infra*, §§ 1034, 1035, *RAILROADS*; *Mayor v. Norwich R. Co.*, 109 Mass. 103; *Union, etc. Co. v. United States*, 99 U. S. 700; *Cross v. Railway Co.*, 35 W. Va. 172; *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281; *People v. O'Brien*, 11 N. Y. 1, 52 N. Y. Supp. Ct. 519; *Chicago, etc. Co. v. Iowa*, 94 U. S. 155; *Stone v. Farmers', etc. Co.*, 116 U. S. 307; *Illinois Central R. R. v. People*, 95 Ill. 313; *Lake Shore, etc. Co. v. Smith*, 173 U. S. 684; *Ruggles v. Illinois*, 91 Ill. 256; *Rogers, etc. Co. v. Fergus*, 178 Ill. 571; *City of Danville v. Danville Water Co.*, 180 Ill. 235; *City of Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337.

⁴⁶ *Lloyd v. Wash. etc. Co.*, 1 Mack. D. C. 331.

question.⁴⁷ The appropriate regulation of the use of property, is not a "taking" of property, within the meaning of the federal constitution.⁴⁸ The legislature may prohibit payment of rebate, or other discrimination, as, to rates of charge for service.⁴⁹ It may compel a railway company to fence its road;⁵⁰ may impose payment of double damage, for injury to stock killed on unfenced railway;⁵¹ may impose penalty for delay in forwarding freight;⁵² may forbid the running of freight trains on Sunday;⁵³ may regulate the grade and crossing of railways;⁵⁴ may prohibit running rail cars by steam within certain city limits;⁵⁵ may regulate liability of railway for injuries to its employes;⁵⁶ may require payment in cash, instead of merchandise, of orders given in payment of wages;⁵⁷ may make the corporation liable for damages by fire along its route, when started by sparks from its engines;⁵⁸ may require the ringing of bells, or sounding of whistle, before crossing a road;⁵⁹ may require construction of bridges at turnpike crossings;⁶⁰ may regulate the speed of trains through towns and cities,⁶¹ and may compel the stoppage of passenger trains at stations. "The legislative control may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precautions by way of safety-beams, in case of the breaking of axle trees, regulating the number of brake-

⁴⁷ *Lake View v. Rosehill C. Co.*, 70 Ill. 191, 22 Am. Rep. 71; *Toledo, etc. Co. v. City of Jacksonville*, 67 Ill. 37; *Jamison v. Indiana, etc. Co.*, 128 Ind. 555.

⁴⁸ *Railway Co. v. Richmond*, 96 U. S. 521.

⁴⁹ *Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 680.

⁵⁰ *Thorpe v. Rutland, etc. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Gorman v. Pac. Ry. Co.*, 26 Mo. 441; *Kan. Pac. Ry. Co. v. Mower*, 16 Kan. 573; *New Albany, etc. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *Ohio & Miss. R. Co. v. McClellan*, 25 Ill. 140.

⁵¹ *Minn. etc. Co. v. Emmonds*, 149 U. S. 364; *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512; *Humes v. Mo. Pac. Ry. Co.*, 82 Mo. 231.

⁵² *McGowan v. Wilmington, etc. Ry. Co.*, 95 N. C. 417.

⁵³ *Hennington v. Georgia*, 163 U. S. 299.

⁵⁴ *Fitchburg, etc. Co. v. Grand, etc. Co.*, 1 Allen, 552; *Pittsburgh, etc. Ry. Co. v. Southwest, etc. Co.*, 77 Pa. St. 173; *Chicago, etc. Co. v. Milwaukee*, 97 Wis. 418.

⁵⁵ *Railway Co. v. Richmond*, 96 U. S. 521.

⁵⁶ *Tullis v. Lake Erie, etc. Ry. Co.*, 175 U. S. 348.

⁵⁷ *Knoxville Iron Co. v. Harbison*, 183 U. S. 13.

⁵⁸ *St. Louis, etc. Ry. Co. v. Mathews*, 165 U. S. 1; *Baltimore & Ohio Ry. Co. v. Kreger*, 61 Ohio St. 212.

⁵⁹ *Galena, etc. Ry. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471.

⁶⁰ *People v. Boston, etc. Ry. Co.*, 70 N. Y. 569.

⁶¹ *Mobile & Ohio Ry. Co. v. State*, 51 Miss. 137.

men upon a train with reference to the number of cars; restraining employment of intemperate or incompetent engineers, running beyond a given rate of speed; and may regulate a thousand similar things, most of which have been made the subject of legislation, or judicial determination, and all of which may be."⁶² The State can not impose restrictions which render their franchises less beneficial to the corporation.⁶³

§ 925. Control of fares and rates of railroads and other public corporations.—The legislative control is extensive over private corporations, such as railways and other common carriers, and gas, water, telegraph, telephone, etc., companies, which have assumed duties to perform to the public, although a legislature, in its exercise of police power, may not revoke its grant of corporate franchises, given with exclusive privileges, for example, to a company to furnish gas or water to a municipality. After performance of all conditions precedent, it may, nevertheless, regulate the use of the franchise to the extent of protecting the public health and morals.⁶⁴ A water company may be compelled to supply water to all, impartially, at reasonable rates, and may be enjoined from reducing or cutting off the supply, without sufficient cause.⁶⁵ And like control is exercised over gas companies.⁶⁶ From strictly private corporations, the *quasi*-public corporation also differs, in being prohibited from making discriminations, as to rates of charge. They must serve all persons alike, who apply and tender the rate of charge, and the rates must be equal for like service. There are other grounds upon which the State assumes peculiar control over certain kinds of corporation, to wit, that they are, and were, created to be governmental agents; that they are employed and partake in the administration of the public

⁶² Per Chief Justice Redfield in *Thorpe v. Rutland, etc. Ry. Co.*, 27 Vt. 141, 62 Am. Dec. 625.

⁶³ In *City of Erie v. Erie Canal Co.*, 59 Pa. St. 174, the charter of a company gave them the right to a canal which had been constructed by the state, and it was held that they could not be compelled to build bridges over the canal at the points where it intersected the public highways.

⁶⁴ *Boyd v. Alabama*, — U. S. 695; *Northwestern, etc. v. Hyde*, etc., 97 U. S. 659.

⁶⁵ *Munn v. Illinois* (1876), 94 U. S. 113.

⁶⁶ *Sickles v. Manhattan, etc. Co.*, 66 How. (N. Y.) 305; *Coy v. Indianapolis, etc. Co.*, 146 Ind. 655, 36 L. R. A. 535; *Portland, etc. Co. v. State*, 135 Ind. 54, 21 L. R. A. 639; *Lloyd v. Wash. etc. Co.*, 1 Mackey, D. C. 331; *Ernest v. New Orleans, etc. Co.*, 39 La. Ann. 550, — So. 415; *McCrary v. Baudry*, 67 Cal. 120; *Solkman v. Yonkers, etc.*, 152 N. Y. 327, 37 L. R. A. 827; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519.

affairs;⁶⁷ that they have control of funds belonging to the State or federal government;⁶⁸ or, that they conduct a business in which the public has an interest,⁶⁹ extraordinary powers, and exclusive privileges, having been granted them for these purposes.⁷⁰ Thus, *mandamus* will issue to the trustees and faculty of a public university endowed by congress, and supported by State appropriations, to compel the admission of a person improperly rejected.⁷¹ Although an institution may have been founded originally, by private donations, the State has a right to follow its own contributions thereto, and to ascertain how they are being applied.⁷² The sovereign has always assumed peculiar control over common carriers, as conducting a business in which the public has an

⁶⁷ It is upon this ground that the federal and state governments exercise peculiar control of banks. "Legislation on Banking," 5 Am. Jur. 73. A corporation authorized to establish a public exchange for receiving deposits of and transferring earnest moneys, stocks, bonds, and other securities, procuring and making loans thereon, and guarantying the payment of bonds and other obligations, is a "loan, mortgage, security, guaranty and indemnity company," and a corporation "having the power of receiving money on deposit," within N. Y. Acts 1874, ch. 324, requiring reports from such corporations to the superintendent of the banking department. *People v. Mutual Trust Co.*, 96 N. Y. 10. An action against a national bank for a penalty for exacting usurious interest, under Rev. Stat. U. S., § 5198, may be brought in any county or district court of the county in which the bank is located which has jurisdiction of the amount involved. *Bank v. Overman* (Neb. 1887), 34 N. W. Rep. 107; *Schuyler Nat. Bank v. Bollong* (Neb. 1890), 45 N. W. Rep. 164. The forfeiture of the rights, privileges and franchises of a bank authorized by Rev. Stat. U. S., § 5239, for violation by its directors of the provisions of the banking act, comes within section

1047, limiting suits for any penalty or forfeiture, accruing under the laws of the United States, to five years. *Welles v. Graves*, 41 Fed. Rep. 459.

⁶⁸ *State v. White*, 82 Ind. 278, 43 Am. Rep. 496.

⁶⁹ Such as the carriage of persons and property by rail. *Vide infra*, § 1034. So also warehouses and grain elevators are subject to governmental control. *Munn v. Illinois*, discussed *supra*, § 924.

⁷⁰ *Vide supra*, § 876. But a contract, whereby a company binds itself, in consideration of certain privileges, to allow the state to use a certain amount of power in a canal to be constructed, does not give the state the right to compel the company to construct the canal. *State v. Folsom Water Co.* (Cal. 1886), 12 Pac. Rep. 388.

⁷¹ *State v. White*, 82 Ind. 278, 43 Am. Rep. 496, holding that a university so endowed and maintained can not refuse admission to one otherwise entitled, because of his refusal to sign a pledge to disconnect himself during his college course from a secret society.

⁷² "Relation of Bloomingdale Asylum to the state," a Report by Prof. Ordronaux, State Commissioner of Lunacy (1878), 17 Alb. L. J. 403. *Cf.* *Kyd on Corporations*, 51.

interest,⁷³ and in the case of railway carriers, an additional basis of governmental control is grounded in the extraordinary franchise of eminent domain conferred upon these companies.⁷⁴ For, corporations engaged in carrying goods for hire as common carriers, have no right to discriminate in freight rates in favor of one shipper, even when necessary to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.⁷⁵ The visitation of railways in England is vested in the Board of Trade,⁷⁶ and in America in the several State Railroad Commissions and the Interstate Commerce Commission. These commissions are invested with general supervision of all railroads, and are authorized to inquire into any neglect of their public duties, or violation of the State or federal laws.⁷⁷ And in many matters no appeal lies from them to the regular tribunals.⁷⁸

⁷³ *Vide supra*, § 1413.

⁷⁴ *Vide supra*, § 1034. In *Burgett v. City of New Haven*, 42 Conn. 174, it is declared that the charters of corporations which confer exclusive privileges for the particular advantage of the grantees, are to be construed liberally for the benefit of the public, and strictly as against the corporations, and that the duty of a railroad company, under its charter, to restore a highway to its former usefulness was not discharged when it restored it to a proper condition at the time the railroad was constructed, but the duty was a continuing one. "The duty to maintain the usefulness of streets, under charters which did not in express terms impose the obligation to repair, was enforced in two Minnesota cases—one reported in 36 N. W. Rep. 870 (*State v. St. Paul, etc. R. Co.*, Minn. 1888), and the other in 39 N. W. Rep. 154 (*State v. Minneapolis, etc. Ry. Co.*, Minn. 1888)." *Memphis, P. P. & B. R. Co. v. State* (1889), 6 Ry. & Corp. L. J. 389, holding upon the same ground that a street railway company is bound to keep its entire road-bed to the end of its ties, and its crossings, in repair,

so as not to obstruct travel across its road or longitudinally upon it, and this duty is a continuing one whether the charter so expressly requires or not. A street railway company failing to so repair, and thereby obstructing travel, is indictable for maintaining a nuisance, and upon failure to abate the nuisance, the obstructions may be removed by order of the court.

⁷⁵ *State v. Cincinnati, W. & B. Ry. Co.* (Ohio, 1890), 23 N. E. Rep. 928, holding that where a railroad company fixes a rate of freight per hundred pounds, for carrying petroleum oil in iron tank cars, substantially lower than its rate for transporting it in barrels in car-load lots, it is exercising "a franchise, privilege, or right in contravention of law," within the meaning of the fourth clause of section 6761, Ohio Rev. Stat.

⁷⁶ *Beach on Railways*, § 939.

⁷⁷ *Minneapolis & St. L. R. Co. v. Board of Railroad Commissioners* (Minn. 1890), 46 N. W. Rep. 559; *State v. Missouri Pac. Ry. Co.* (Neb. 1890), 45 N. W. Rep. 785; *Beach on Railways*, §§ 939, 1020 *et seq.*

⁷⁸ No appeal lies to the district court from an order of the rail-

The powers have been principally exercised in the regulation of rates, requiring the rates to be reasonable in themselves, and in attempting to prevent discrimination between shippers of the same class of goods, either in charges or in terminal facilities.⁷⁹ Carriers are not at liberty to classify property as a basis of transportation rates, and impose charges for its carriage with exclusive regard to their own interests, but they must respect the interests of those who may have occasion to employ their services, and conform their charges to the rules of relative equality and justice which the Interstate Commerce Act prescribes.⁸⁰ It is not the

road and warehouse commission appointed under Minn. Laws 1887, ch. 10, relating to the mode of operating a railway so as to promote the safety and convenience of the public. Objections to such an order can only be made by way of defense to an action brought to enforce it. *Minneapolis & St. L. R. Co. v. Board of Railway Commissioners* (Minn. 1890), 46 N. W. Rep. 559. *Cf.* *Spring Valley Water Works v. City and County of San Francisco* (Cal. 1890), 7 Ry. & Corp. L. J. 208.

⁷⁹ Under a statute forbidding any discrimination in receiving and forwarding freight, and giving the board of transportation authority to investigate any alleged violations of the act, and make necessary orders, and enforce them, the board of transportation may institute an action, in a proper case, to require a railway company to furnish like facilities to erect an elevator at one of its stations to any person engaged, or who desires in good faith to engage, in the business of receiving, handling, and shipping grain over the railway. *State v. Missouri Pac. Ry. Co.* (Neb. 1890), 45 N. W. Rep. 785, construing Neb. Act of July 1, 1887, and holding that while a railway company may impose reasonable conditions upon persons who erect, or are about to erect, elevators at stations on its line, the conditions and terms must be the same to all.

But the refusal of a railway company to transport cattle for a shipper in cars of a special construction supplied by him, where it supplies cars for the same purpose, which it can use more profitably and conveniently by reason of their being likewise adapted for ordinary coal traffic when not in use for carrying cattle, is not an unjust discrimination under the Act of Congress to Regulate Interstate Commerce. (*U. S. C. Ct.* 1889), 6 Ry. & Corp. L. J. 364.

⁸⁰ *Thurber v. The Railroads* (Inters. Com. Com. 1890), 7 Ry. & Corp. L. J. 269, holding that the classification of freight for transportation purposes is in terms recognized by the Act to Regulate Commerce, and is therefore lawful. It is also a valuable convenience both to shipper and carriers. A classification of freight designating different classes for car-load quantities and for less than car-load quantities for transportation at a lower rate in car-loads than in less than car-loads is not in contravention of the Act to Regulate Commerce. The circumstances and conditions of the transportation in respect to the work done by the carrier and the revenue earned, are dissimilar, and may justify a reasonable difference in rate. The public interests are subserved by car-load classifications of property that on account of the volume transported to reach markets or supply the de-

province of carriers to regulate business, or to build up or destroy markets, but it is their duty to serve business interests equitably and impartially. The public is far more largely interested in miscellaneous shipments than in solid car-load shipments of one kind of traffic. While this condition exists, the carriers have a duty to perform, to make their service equitable, and as reasonable as just compensation for their work will permit. All rates must be reasonable and just.⁸¹

§ 926. **Limitations of the power to regulate rates.**—The legislature is not the final judge, in fixing, what it may consider, as reasonable rates. Its action in fixing rates, is subject to review by the courts.⁸² Courts have the power and duty "to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable and such as to work a practical

mands of trade throughout the country, legitimately or usually moves in such quantities. Cost of service is an important element in fixing transportation charges and entitled to fair consideration, but it is not alone controlling nor so applied in practice by carriers, and the value of the service to the property carried is an essential factor to be recognized in connection with other considerations. The public interests are not to be subordinated to those of carriers, and require proper regard for the value of the service in the apportionment of all charges upon

⁸¹ *The Car-Load-Lot Cases*" (Inters. Com. Com. 1890), 7 Ry. & Corp. L. J. 269, where the commission continued: "Differences ranging from forty per cent. to upwards of a hundred per cent. upon the same goods to the same destination, in substantially like quantities as well as in less, in the same kind of cars, and perhaps hauled in the same train, are manifestly neither reasonable nor just, and work undue prejudice and disadvantage to shippers and consignees of miscellaneous freight, both in full car-loads and in smaller quantities. The circumstance of many consignors to many con-

signees of a full car-load to the same destination is too unimportant in the item of cost of handling to demand a difference in the rate. Fractional differences exist in all business, as they do under all laws imposing burdens, and in business are supposed to be equalized by average charges. For illustration, in the passenger service quantity is not considered, and passengers weighing three times as much, and with the full limit of baggage, are charged the same rate for the same journey as the lighter passenger without baggage; and a few passengers in a car pay no higher rate than the passengers in a full car, though the earning of the two cars and the cost of service per passenger differs widely. In the case of smaller shipments to many consignees at many destinations, there is such material difference in the cost of service, in the earnings of cars, and in car detention as to justify a higher charge. A reasonable amount of difference is difficult to adjust, but it should not be prohibitory upon the business, nor unjustly disproportionate."

⁸² *Regan v. Farmers' Loan & Trust Co.*, 154 U. S. 362.

destruction to rights of property, and if found so to be, to restrain its operation.”⁸³ And, if the rates established by the legislature, are so unreasonable as to threaten destruction of the value of the carrying company's property, courts may treat the question of reasonableness of rates, as a judicial question, involving the constitutional right of equal protection of the laws, and of privation of property without due process of law.⁸⁴ The police power does not extend so far as to destroy or impair a franchise, or a power necessary to its exercise.⁸⁵ A charter of a railroad corporation expressly empowering it to fix the rate of fares within certain limits, is a contract between the State and the corporation. It is a part of the corporate franchise, and passes, upon sale, to another corporation purchasing the property and franchises of the railroad company,⁸⁶ but, as held in Ohio, without right to charge any higher rates than authorized by general law, to be charged by railways.⁸⁷ Charter restrictions, as to rates chargeable by the corporation, attach to the corporate franchise, in the hands of any successor purchasing them.⁸⁸ The rates and contracts of these corporations are subject to State control, generally exercised through a board of visitors, or Interstate Commerce Commission,⁸⁹ whose extensive powers of discretion are sometimes held to be beyond appeal.⁹⁰ It is not to be inferred that this power of limitation or regulation is itself without limit. The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation.

⁸³ *Smyth v. Ames*, 169 U. S. 466; *Chicago, etc. Ry. Co. v. Tompkins*, 176 U. S. 167; *Lake Shore, etc. Co. v. Smith*, 173 U. S. 684.

⁸⁴ *Smyth v. Ames*, 169 U. S. 466; *Railway Co. v. Gill*, 156 U. S. 649; *Covington v. Sanford*, 164 U. S. 578; *Chicago, etc. Co. v. Tompkins*, 176 U. S. 167; *Louisville & N. Ry. Co. v. Kentucky*, 183 U. S. 503; *Lake Shore, etc. Co. v. Smith*, 173 U. S. 684; *Purdy v. Erie R. Co.*, 162 N. Y. 42; *Cotting v. Kansas City, etc. Co.*, 183 U. S. 79; *San Diego, etc. Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460.

⁸⁵ *Beekman v. Saratoga, etc. Co.*, 3 Paige, 73; *Ten Eyck v. Blood-*

good v. Mohawk, etc. Co., 18 Wend. 9, 31 Am. Dec. 313; *Edgewood R. Co.'s Appeal*, 79 Pa. St. 257.

⁸⁶ *Ball v. Rutland R. Co.*, 93 Fed. 513.

⁸⁷ *Pittsburgh, etc. Co. v. Moore*, 33 Ohio St. 384.

⁸⁸ *Campbell v. Marietta, etc. Co.*, 23 Ohio St. 168.

⁸⁹ *State v. Cincinnati, etc. Co.*, 47 Ohio St. 130, 23 N. E. 928; *Minn. etc. Co. v. Railroad Comm's*, 44 Minn. 336, 46 N. W. 559; *State v. Mo. Pac. R. Co.*, 29 Neb. 550, 45 N. W. 785; *Central, etc. R. Co. v. State (Ga.)*, 42 L. R. A. 518.

⁹⁰ *Minn. etc. Co. v. Railroad Comm's*, 44 Minn. 336, 46 N. W. 559.

Under pretense of regulating fares and freights, the State can not require a railroad corporation to carry persons or property without reward; neither can it do that, which, in law, amounts to a taking of private property for public use, without just compensation or without due process of law.⁹¹ The legislature has unrestrained power over such corporations only as may be characterized as agents of the government.⁹² While private charters are protected under the rule in the Dartmouth College Case, private corporations are, nevertheless, subject, like natural persons, to those regulations which the State may prescribe for the good government of the community.⁹³ The State, however, does not possess unrestricted power over private corporations not invested with political power, nor created to be employed and partake in the administration of government, nor to control funds belonging to the State, nor to conduct transactions in which the State is interested.⁹⁴ A court of equity has no power, either at common law, or under the Interstate Commerce Act, to compel a railroad company to enter into a contract with another company for a joint through rate or joint through routing of freight and passengers.⁹⁵ The common law imposes no obligation on railroad companies to enter into such contracts. "At common law a carrier is not bound to carry, except on his own line; and we think it quite clear that if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ."⁹⁶ Neither has the

⁹¹ *Smith v. Ames* (1898), 169 U. S. 466; *Chicago, etc. Co. v. Tompkins* (1900), 176 U. S. 167; *Reagan v. Farmers', etc. Co.* (1894), 154 U. S. 362; *St. Louis, etc. Ry. v. Gill* (1895), 156 U. S. 649; *Waite, C. J., in Stone v. Trust Co.*, 116 U. S. 331.

⁹² *Louisville v. President, etc. of University*, 15 B. Mon. 642, holding that a university is not included.

⁹³ *Gorman v. Pacific Railroad*, 26 Mo. 441.

⁹⁴ *Louisville v. President, etc. of University*, 15 B. Mon. 642.

⁹⁵ *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.* (U. S. Ct. 1890), 7 Ry. & Corp. L. J. 285.

⁹⁶ *Atchison, Topeka & Santa Fe R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667-680. Making contracts for parties "is not within the scope of judicial power." *Express Cases*, 117 U. S. 1-26. In the case last cited the court, speaking of the decree of the court below fixing and regulating the terms upon which the railroad company and the express company should do business, said: "In this way, as it seems to us, the court has made an arrangement for the business intercourse of these companies, such as in its opinion they ought to have made for themselves, and that we said in *Atchison, Topeka & Santa Fe Railroad*

power been conferred, as yet, upon the Interstate Commerce Commission.⁹⁷ "The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt."⁹⁸ A statute requiring a railroad to issue mileage books at certain rates, is invalid.⁹⁹ A statute so framed as to apply to only one corporation, is invalid.¹ Some examples of exercise of legislative power in regulation of the business and charges of railway corporations, are as follows: A statute regulating charges upon interstate transportation, held void;² a statute requiring every railroad to stop three trains a day, if as many are run, at places having 3,000 inhabitants, held not repugnant to the United States Constitution, as applied to interstate trains, unregulated by any Act of Congress;³ a requirement that every train shall stop a certain length of time at

Co. v. Denver & New Orleans Railroad Co., 110 U. S. 667, followed at this term in Pullman's Palace Car Co. v. Missouri Pacific Railway Co., 115 U. S. 587, could not be done."

⁹⁷ Little Rock, etc. R. Co. v. St. Louis, etc. Ry. Co. (U. S. C. Ct. 1890), 7 Ry. & Corp. L. J. 285, 288, where the court said: "Has the jurisdiction been conferred by the Act of Congress? Complainant maintains that it has by the third section of the Interstate Commerce Act. It would serve no useful purpose for the court to engage in an extended discussion of this question. It has been discussed and decided by the Interstate Commerce Commission in the Little Rock & Memphis Railroad Co. v. East Tenn., V. & Ga. R. Co. and the St. Louis, I. M. & S. Ry. Co., 3 I. C. C. Rep. 1. In that case the present plaintiff was seeking the same relief that it seeks in this case, and its petition was dismissed on the distinct ground that the Act of Congress does not, as does the present English statute, invest the Commis-

sion or the courts with the power to compel companies to enter into through routing and through rate contracts. The case of Chicago & A. R. Co. v. Pennsylvania Co., 1 I. C. C. Rep. 9, and 360, and the opinion of Judge Jackson in Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co., 2 I. C. C. Rep. 351, 37 Fed. Rep. 567, are to the same effect."

⁹⁸ Little Rock, etc. R. Co. v. St. Louis, etc. Ry. Co. (U. S. C. Ct. 1890), 7 Ry. & Corp. L. J. 285, quoting the Express Cases, 117 U. S. 1, 29. See to the same effect Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co., 2 I. C. C. Rep. 351, 37 Fed. Rep. 567.

⁹⁹ Lake Shore, etc. Co. v. Smith, 173 U. S. 684; Beardsley v. N. Y. etc. Co., 163 N. Y. 230. See Purdy v. Erie R. Co., 162 N. Y. 42.

¹ Cotting v. Kansas City Stockyards Co., 183 U. S. 79.

² Wabash, etc. Co. v. Illinois, 118 U. S. 557; Railway Co. v. Hefley, 158 U. S. 98; Louisville & N. Ry. Co. v. Eubank, 184 U. S. 27.

³ Lake Shore, etc. Co. v. Ohio, 173 U. S. 285.

any county seat, held invalid as to a through express, where four other trains a day stopped;⁴ and requiring at intersections of different railways, facilities for transfer of cars, was held not to be regulation of interstate commerce.⁵

§ 927. **Requirement of annual reports.**—In New York all corporations are required to report annually the amount of their capital, the proportion actually paid in and the amount of existing debts. And non-compliance with the statute renders the directors personally liable, jointly and severally, for the corporate debts.⁶ There are similar statutes in other States.⁷ Non-compliance, however, is not a ground of forfeiture of charter.⁸ The report, under the New York act, must be filed within twenty days "from" the 1st of January in each year, and it is held that this means "after" that date, so that a report, published in the preceding year, within twenty days before the 1st of January, is of no avail, although made in good faith.⁹ But, if before the time for filing a report, the object fails, for which the corporation was organized, it need not be made.¹⁰ The Illinois statute of May 10, 1901, requiring that corporations, other than railroad, etc., companies, shall annually report to the Secretary of State the location of their principal offices, and whether or not it is engaged in active business, applies to corporations not for pecuniary profit, as well as to strictly business corporations; the term, "active business," as used in the statute, meaning the exercise of corporate powers.¹¹

⁴ *Cleveland, etc. Ry. Co. v. Illinois*, 177 U. S. 514.

⁵ *Wisconsin, etc. Co. v. Jacobson*, 179 U. S. 287.

⁶ N. Y. Laws of 1848, ch. 40, § 12, as amended by Laws of 1875, ch. 510. In an action against a director for the debt of a corporation, upon the ground of failure to file an annual report, it was not prejudicial error to admit the judgment roll of a judgment against the corporation for the same debt, for the purpose only of proving the costs in that action, which plaintiff claimed a right to recover, when the finding was against the claim. *Post-Express Printing Co. v. Coursey* (1890), 10 N. Y. Supp. 497. A report which stated the amount of capital at \$50,000, the amount of capital paid

in at \$50,000, "all paid cash, patent-rights, merchandise, machinery, accounts, etc., necessary to the business," and further gave the existing indebtedness at \$38,500, was in compliance with the statute, no statement of the proportion paid in cash being required. *Whitaker v. Masterton*, 12 N. E. Rep. 604 (N. Y. 1887).

⁷ *E. g.* Ind. Rev. Stat. 1881, § 3641.

⁸ *State v. Brownstown & R. V. Gravel-Road Co.* (Ind. 1889), 22 N. E. Rep. 316.

⁹ *Cincinnati Cooperage Co. v. O'Kieffe* (N. Y. 1890), 24 N. E. Rep. 993.

¹⁰ *Kirkland v. Kille*, 99 N. Y. 390.

¹¹ *People v. Rose* (1904), 207 Ill. 352.

§ 928. **Police power of the State.**—In the exercise of the police power of the State, the legislature has as full power to control and regulate the conduct of a corporation, as it has in the case of a natural person. "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature can not, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects, which demand the application of the maxim *salus populi suprema lex*; and they are to be attained and provided for, by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."¹² Whenever the public welfare demands it, the police power of the State may be exercised in the sound discretion of the legislature. The power extends to all classes of corporations. Thus, a council may regulate the speed of trains,¹³ even though a federal receiver is in charge of the railroad.¹⁴ The prohibition in the federal constitution against the passage of State laws impairing the obligation of contracts, has no peculiar application to the rights of artificial persons distinguishing them from natural persons. The vested rights of both are equally sacred; and both are equally subject to legislative control.¹⁵ All that was decided by the Dartmouth College case, and the line of cases following it, was, that the charter of a private corporation is, or rather, *may con-*

¹² *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Boyd v. Alabama*, 94 U. S. 645.

¹³ *Pearsall v. Great Northern Ry. Co.* (1896), 161 U. S. 646.

¹⁴ *Erb v. Morasch* (1900), 177 U. S. 584.

¹⁵ *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 32. "The general rule is, undoubtedly, as stated above, that the charter of a corporation is a contract, and that a state cannot alter or revoke it without the consent of the corporation; but there is a certain class of legislation which applies, the courts have held, to corporations no less than to natural

persons, in spite of the constitutional prohibition," . . . viz.: "that which the states have passed in the exercise of their police power. The very nature of this power; the fact that it is exercised 'to regulate unwholesome trades, slaughter-houses, operations offensive to the senses;' that it is for the protection of the public health, morals and safety, make it necessary that the government should never bargain away this power, or part with it, if it is to properly perform the duties it owes to its citizens." *Smith on Private Corporations*, 23.

tain,¹⁶ one or more of those contracts which the State shall not impair.¹⁷ Subject to this and other "constitutional limitations, the rights of all persons, whether natural or artificial, are under such legislative control as the legislature may deem necessary for the general welfare, and it is a fundamental error, to suppose there is any difference in this respect between the rights of natural and artificial persons. They both stand upon precisely the same footing. While personal liberty is guaranteed, by the constitution, to every citizen, yet, by disregarding the rights of others, one may forfeit not only liberty, but even life itself. So, a corporation, by refusing to conform to the laws of its creation, or, by so conducting its business affairs as to defeat the objects and purposes of its promoters, and the design of the legislature in creating it, may forfeit its right to further carry on its business, and also its existence as an artificial being."¹⁸ "The sovereign police power which the State possesses, is to be exercised only for the general public welfare, but it reaches to every person, to every kind of business, to every species of property within the commonwealth."¹⁹ Subject only to federal and State constitutional restraints, the legislative power of control over corporations, is as unlimited as is its lawmaking power for the government of natural persons, within its territorial jurisdiction.²⁰ These political powers of the federal and State governments over corporations, may be classed, first, as police power to regulate the use of property, and second, the power to tax, and incidentally to take private property without direct compensation, and third, the power of eminent domain, to take private property for public purpose, making just compensation. The power is necessarily inherent in the State to control and modify a corporation, and regulate the use of its property by virtue of its police power.²¹ A State can compel an

¹⁶ *Stone v. Mississippi*, 101 U. S. 816.

¹⁷ In *Long's Appeal*, 87 Pa. St. 114, the court said that the rights of artificial persons were not more sacred than those of natural persons, and that while the legislature could not impair either, it might regulate both and provide the mode in which they should be enforced.

¹⁸ *Ward v. Farwell*, 97 Ill. 593; *Smith on Private Corporations*, 26, 27.

¹⁹ *People v. Salem*, 20 Mich. 452,

4 Am. Rep. 400; *Mugler v. Kansas*, 122 U. S. 623; *Cincinnati, etc. R. Co. v. Chicago*, 166 U. S. 22.

²⁰ *Chicago, etc. Co. v. Needles*, 113 U. S. 574; *New York, etc. Ry. Co. v. Bristol*, 151 U. S. 556; *Eagle, etc. Co. v. Ohio*, 153 U. S. 446; *State v. Goodwill*, 25 Am. St. Rep. 870, note; *Thorpe v. Rutland, etc. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625.

²¹ *Chicago, etc. Co. v. Needles*, 113 U. S. 574; *Lakeview v. Rosehill C. Co.*, 70 Ill. 191, 22 Am. Rep. 71.

insurance company to make detailed returns.²² The State not only possesses the power, but it is its duty also, to provide for the protection of the lives, health and property of its citizens, and to preserve the public order and morals. These are the ends of all government, to which both natural and charter rights are subject, and no legislature can contract against the performance of these obligations of the State to its citizens.²³ Any charter, therefore, by which the legislature may attempt to restrict itself or future legislatures in the exercise of these essential attributes of sovereignty, is, to that extent, void.²⁴

§ 929. (a) **Police power to regulate rates and service by railroads, etc.**—Where a city has authority to make rules for the sanitary protection of its water supply, a rule, prohibiting riparian proprietors from polluting the stream used for such supply, is a proper exercise of the State's police power.²⁵ The leading case on police power of the State to control and regulate charges for the use of property devoted to public use, is *Munn v. Illinois*.²⁶ The term "police power," is illy chosen and misleading, because "police is in general the system of precaution for the prevention

²² *Eagle, etc. Co. v. Ohio*, 153 U. S. 446.

²³ *Butchers' Union, etc. Co. v. Crescent City, etc. Co.*, 111 U. S. 746; *Stone v. Mississippi*, 101 U. S. 814; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25. "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*, and they are to be attained and provided for by such appropriate means as the legislative dis-

cretion may devise. That discretion can no more be bargained away than the power itself." *Hare's American Constitutional Law*, 615; *Bartemeyer v. Iowa*, 18 Wall. 129; *Boyd v. Alabama*, 94 U. S. 645.

²⁴ *Tiedeman's Limitations of the Police Power*, 580. The legislature "cannot bargain away the public health or public morals," and authority granted by statute to corporations or individuals to engage in particular private business detrimental to the public, does not constitute a contract preventing the withdrawal of such authority. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Boyd v. Alabama*, 94 U. S. 645; *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746.

²⁵ *Sprague v. Dorr* (Mass. 1903), 69 N. E. 344.

²⁶ *Munn v. Illinois*, 94 U. S. 113.

of crimes and calamities."²⁷ Beyond the scope of these ordinary police regulations, is the "police power," as applied to the legislative control over so-called *quasi*-corporations, such as railroads and other common carriers, water and gas companies, etc., which, though private corporations for pecuniary profit, their undertakings and property are devoted to public use, and to serve the necessities of the public generally.

§ 930. (b) Police power in abatement of nuisance.—Neither is the exercise of the police power with respect to nuisances, within the constitutional prohibition. This power belonged to the States prior to their ratification of the federal compact. "They did not surrender it then, and they all have it now."²⁸ Thus, a charter authorizing the manufacture of animal matter into a fertilizer is not a contract guarantying exemption from the exercise of the police power of the State, when the business becomes a nuisance by reason of the growth of population around the locality originally selected.²⁹ Upon a like principle telegraph and telephone companies, whose wires have become a nuisance in the streets of cities, have been subjected to the control of the police power.³⁰ And gas companies have been required to make, at

²⁷ *Kansas Pac. R. Co. v. Mower*, 16 Kan. 571.

²⁸ *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667. This power "extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions." *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667.

²⁹ *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659. "Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws and other regular remedies for the suppression of nuisances. In such cases prescription, whatever the length of time, has no application. Every day's continuance is a new offense, and it is no justification that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it." *Coates v. Mayor of New York*, 7 Cowen, 585; *Brick Presbyterian Church v. Mayor of New York*, 5 Cowen, 538, 542; *Hare's American Constitutional Law*, 617.

³⁰ *Central Union, etc. Co. v. Bradbury*, 106 Ind. 1; *State v. Nebraska, etc. Co.*, 17 Neb. 126, 52 Am. Rep. 404; *American, etc. Co. v. Connecticut, etc. Co.*, 49 Conn. 352, 44 Am. Rep. 237, 24 Am. L.

their own cost, such changes as public convenience or security requires.³¹ In addition to this subjection to the police power, corporations are liable also in damages to private persons for injuries in the nature of private nuisance, although resulting directly from the exercise of powers and privileges granted by the State.³²

§ 931. (c) **Police power to regulate manufacture and sale of liquor.**—A legislative act prohibiting generally the sale of intoxicating liquors, is not unconstitutional. Although a private corporation was expressly chartered to manufacture, and impliedly to sell, malt liquors of all kinds, a subsequent act of the legislature prohibiting generally the sale of intoxicating liquors, was not unconstitutional, "although the right or capacity was granted in the most unqualified form. The charter conferred no greater or more sacred right upon the corporation, than any citizen had to manufacture malt liquor, nor as exempting the corporation from any control therein, to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance. All rights are held subject to the police power of the State."³³ The charter of a company for the

Reg. (N. S.) 573, 59 Am. Rep. 172, 44 Am. Rep. 241, 38 Am. Rep. 589.

³¹ Although telegraph lines are instruments of commerce, a city has the right to determine how, in what manner, and upon what condition a telegraph company shall enter the city and pass through it for the purpose of communication, or allowing the citizens of the country to communicate by telegraph one with another. But where a telegraph company erects poles and strings wires within a city, under authority of an ordinance of the city council, which provides that such authority or privilege shall expire on and after a certain day named therein, the mayor of such city has no right of his own motion, and without any express direction from the city council and without notice to the company, to cut and remove the wires after the expiration of the time limited

in the ordinance, and he will be liable as a trespasser for so doing; but an injunction will not be granted to restrain the city authorities from interfering with the company in replacing the wires, because this would enable it to do what it has no legal right to do under the ordinance. *Mutual Union Telegraph Co. v. Chicago*, 16 Fed. Rep. 309. New York Acts 1848, ch. 37, § 18, authorizing them to lay their pipes through city streets, does not imply the contrary. Such expenses cannot be included in an assessment for regulating and grading a street. *In re Deering*, 93 N. Y. 361.

³² *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317.

³³ *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 2 Smith Cas. 692, 1 Cum. Cas. 533. See *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153; *Boyd v. Alabama*, 94 U. S. 645; *Vide supra*, § 52.

“purpose of manufacturing malt liquors,” is not a contract against future regulations or suppression of traffic in intoxicating liquors.³⁴

§ 932. (d) **Power to suppress lotteries.**—In accordance with the principles explained in the foregoing section, it is held that the legislature of the State can not, by the charter of a lottery company, make a contract against future regulation or suppression of lotteries. The legislature of Mississippi, in 1867, granted a special charter for twenty-five years to a corporation having all the powers incident to a lottery corporation. In 1868, the newly adopted constitution prohibited the drawing of a lottery, or sale of lottery tickets. The lottery corporation claimed vested rights in its charter and protection, under the federal constitution, against the prohibition of the new constitution of Mississippi. On appeal to the United States Supreme Court, it held, that lotteries, as a species of gambling, may properly be prohibited under the police power of the State, though formerly they were authorized, in many or all of the States, and in the District of Columbia, to raise money; among other things, for public improvements, and for educational and religious purposes. The legislature of a State can not, by the charter of a lottery company, defeat the will of the people in relation to the further continuance of such business.³⁵ “The legislature can not bargain away the public health, or the public morals. The people themselves can not do it, much less can their servants. Government is organized with a view to their preservation, and can not divest itself of the power to provide for them.” No legislature can curtail the power of its successors, to make such laws as they may deem proper in matters of police.³⁶ The common forms of gambling are confined to a few persons

³⁴ *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 32, where it was said, “the plaintiff in error was incorporated ‘for the purpose of manufacturing malt liquors in all their varieties,’ it is true; and the right to manufacture undoubtedly, as the plaintiff’s counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor, nor as exempting the cor-

poration from any control therein to which a citizen would be subject if the interest of the community should require it.” The charter of the Boston Beer Company, however, was granted after the enactment of a general statute subjecting all charters to amendment or repeal.

³⁵ *Stone v. Mississippi* (1879), 101 U. S. 814.

³⁶ *Metropolitan Board, etc. v. Barrie*, 34 N. Y. 657; *Boyd v. Alabama*, 94 U. S. 645; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Patterson v. Kentucky*, 97 U. S. 501.

and places, in contrast with the wide-spread pestilence of lotteries, reaching every class, preying upon the hard earnings of the poor, and plundering the ignorant and simple.³⁷

³⁷ *Phalen v. Virginia*, 8 How. 163. The Indiana Const., art xv, § 8, provides that "no lottery shall be authorized, nor shall the sale of lottery tickets be allowed;" and it is held, that this provision is not a mere check upon future legislation, but is prohibitive of lotteries and the sale of lottery tickets. *State v. Woodward*, 89 Ind. 110. By virtue of this constitutional provision, and of Indiana Rev. St. 1881, § 2077, passed in accordance therewith, the sale of tickets by a lottery corporation chartered by the territory of Indiana in 1807 is illegal. The obligation of the contract with the corporation is not impaired, for the constitutional and legislative prohibition is within the exercise of the police power, and in the interest of public morals. *State v. Woodward*, 89 Ind. 110, 46 Am. Rep. 160, following *Stone v. Mississippi*, 101 U. S. 814, and over-

ruling *Kellum v. State*, 66 Ind. 588. The Nevada statute of 1881, ch. 116, to aid the Nevada Benevolent Association in providing means for the care and maintenance of the insane in that state, and providing that it shall be lawful for it to give public entertainments, to sell tickets of admission, to distribute among the ticket-holders personal property, etc., and to regulate the distribution by raffle or other schemes of like character was held unconstitutional, the scheme or enterprise in which the association is engaged being a lottery. *State v. Overton*, 10 Nev. 136; *Douglas v. Kentucky*, 168 U. S. 488; *State v. Morris*, 77 N. C. 512; *Butchers' etc. Co. v. Crescent City Co.*, 111 U. S. 746; *Crescent City, etc. Co. v. Illinois*, 33 La. Ann. 934; *Richmond, etc. R. R. Co. v. Richmond*, 26 Gratt. (Va.) 83; *Chicago, etc. R. R. Co. v. Haggerty*, 67 Ill. 113.

CHAPTER XXXVII.

"TRUSTS" AND MONOPOLIES.

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| <p>§ 933. Generally. Definitions and nature.</p> <p>934. Anti-trust laws and their enforcement. The three "crusades" against trusts; Standard Oil trust; Pipe lines.</p> <p>935. Exclusive privileges, monopoly under special charter.</p> <p>936. The common law as to combinations in restraint of trade.</p> <p>937. Contracts in partial restraint of trade.</p> <p>938. Combinations to destroy competition.</p> <p>939. Combinations distinguished, as to their legality or illegality.</p> <p>940. Agreements that are not unlawful.</p> <p>941. Unlawful agreements to fix prices.</p> <p>942. Trusts formed by consolidation of corporations. Corporations require express authority to consolidate.</p> <p>943. Acquiring stock in another corporation for purpose of monopoly.</p> <p>944. Right of one corporation to subscribe for stock in another.</p> <p>945. Anti-trust statutes of states.</p> <p>946. Wrongful acts of shareholders, how far imputable to the corporation.</p> <p>947. Examples of unlawful monopolies.</p> <p>948. Standard Oil Trust.</p> <p>949. The Sugar Trust.</p> <p>950. The Cotton Seed Oil Trust.</p> | <p>§ 951. The Diamond Match Trust.</p> <p>952. The Chicago Gas Trust.</p> <p>953. The Cattle Trust.</p> <p>954. The Alcohol Trust.</p> <p>955. The power of congress over "trusts." Anti-trust Act of July 21, 1890. Combinations not in violation of the statutes.</p> <p>956. Interstate commerce.</p> <p>957. Legislation in aid of enforcement of the anti-trust act. Application of these laws.</p> <p>957a. Federal incorporation or license of interstate commerce corporations, proposed.</p> <p>957b. "Holding" corporations, organized to deal in the stock of other corporations. Dealing by way of mortgage. Competing manufacturing corporation may not so hold.</p> <p>957c. The Northern Securities Company.</p> <p>957d. "Community of Interest." "Gentlemen's agreement."</p> <p>957e. Liability for damage resulting from unlawful combination.</p> <p>957f. Chicago Beef and Cattle Trust.</p> <p>957g. The Tobacco Trust.</p> <p>957h. The Paper Trust.</p> <p>957j. Traffic contracts between connecting railroads are not contrary to the anti-trust laws.</p> <p>957k. "Pools," combinations between competing parallel railroads. Interstate commerce law.</p> |
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§ 957l. Rebates. Discrimination in rates.

957m. Methods of evasion of the law against rebates. "Drawbacks." Special rates.

§ 657n. Industrial railroad. Private car lines. Refrigerator cars.

957p. Payment of fictitious damage claims.

957r. "The midnight schedule."

957s. Bibliography of trusts.

References:

Special and exclusive privileges. Sections 45a, 62.

Liability of directors and other officers. Sections 746-767a.

Liability of the corporation for acts of officers and agents. Sections 768-791.

Ultra vires acts and contracts. Sections 887-921.

Legislative control of corporations. Sections 922-932.

Suits and defenses by and against corporations. Sections 982-1014.

Railroad traffic contracts. Section 1054.

"Pools," pooling contracts. Section 1056.

Rebates, discrimination in rates. Section 1036.

Forfeiture of the charter. Sections 1292-1305.

Power to hold stock in another corporation. Sections 855, 1053.

"Holding" corporations. Section 704f.

§ 933. **Generally. Definitions, and Nature.**—The total capital stock of the four hundred and forty large industrial and transportation "trusts" now in this country is estimated to be twenty billions of dollars, or one-fifth of the national wealth, which in 1903 was estimated at one hundred billions of dollars—or \$1,250 per capita of a population of eighty millions. How much of this twenty billion dollars capital stock is "fully-paid up," and how much of it is "watered stock" is matter of conjecture. Most important of questions concerning the law of corporations, is whether the government shall control the business of the unlawful trusts, or, otherwise, allow them to control the government. Upon this subject Judge Grosscup of the United States Circuit Court of Chicago has written: "Is it much wonder that, in the eyes of those who look upon the corporation as an interloper, it has come to be regarded as a usurper also—the usurper of what the labor of individual men has created; or that in the eyes of those who, with clearer vision, look upon it as an indispensable phase of industrial evolution, the way in which the corporation shall hereafter be organized, and the bounds given to its dominion, are coming to be the paramount political problems of our time? The industries are now dominated by the corporation, and proprietorship in the corporation has come to be

for those only who are experienced in corporate ways, or who are willing to take a chance at the corporate wheel. And thus it happens that just at this moment we are in the midst of a sweep of events, that unless arrested and turned to a different account, will transform this country from a nation whose property is within the proprietorship of the people at large, to a nation whose industrial property, so far as active proprietorship goes, will be largely in the hands of a few skilled, or fortunate, so-called captains of industry and their lieutenants. Corporations owned widely by the people might, perhaps, become monopolies; though I know of no actual instance of a monopoly widely owned. But the antidote of monopoly is competition; and let it come about that corporations be made reasonably safe, and therefore desirable investments—let it come about that the corporation shall no longer be regarded as a mere financial sinkhole, except for those skilled in its ways—and there will be abundance of capital at hand, as the bank deposits show, to put in the field a competitive corporation, whenever in that field monopoly seems to have established itself. "Indeed, the chief reason why any monopoly can now maintain itself is, that besides having a grasp on all the physical sources of productivity within a given field, it has a large grasp also on all the financial resources that would otherwise go into the building up of competitors."¹

Definitions and nature.—A "trust" as the term is used, is a union of two or more corporations, partnerships or other business associations, centralizing the control of all, in the hands of trustees; they wield the power of wealth, indefinite, usurping the places of, and absorbing the formerly independent producers, manufacturers, and dealers, who generally, under menace of ruin to their separate business, are coerced to surrender their holdings to the trustees, and take, in return, trust certificates *pro rata* to the assumed value of the interest so surrendered by the former holders; they electing the trustees, with power to select directors, and control the united interests, and declare dividends upon the profits, payable to the holders of the trust certificates. The Standard Oil Trust, and Sugar Trust, are prominent examples. The articles of agreement entered into by the members of the latter, appear, at length, in *People v. North River Refining Co.*, 121 N. Y. 582.^{1a} The purpose of the trust is to crush competition, re-

¹ Judge Grosseup in McClure's Magazine, February, 1905.

^{1a} *People v. North River, etc. Co.*, 121 N. Y. 582, 9 L. R. A. 33.

duce the cost, control the supply, and maintain or increase the price of the necessities of life to the consumer. The processes of combination have not only put practically the entire business of manufacturing into the hands of corporations, but have enabled the latter to put an end to competition among themselves, by the creation of trusts. On the other hand, labor is gradually consolidating, with the avowed purpose of dictating the terms upon which the productive and transportation industry of the country shall be carried on. The reconciliation of this strife, between capital and labor, if possible, is the great social problem of the present century.

Purposes and methods of trusts.—The purposes, methods, and effect, are similar whether they be of capital trusts or of labor trusts, the power to lessen or control supply, and increase the price. Either trust is the logical outcome of the other, and the natural rights of the people are disregarded by both, to the extent that they are not protected by enforcement of the laws. The purpose of the "trust," is to secure, to lessen the cost of, to economize in products, their manufacture, handling and transportation, to destroy or lessen competition, and to control and maintain, or increase prices, of such products, and manufactures, whereby to realize as a profit, for the "trust," the difference between the minimum cost to the producer, and the maximum price to the consumer. And this extends to all the products and service which are the necessities of life. What is said, is of capital "trusts," but applies equally to labor trusts, in their control of, to lessen the supply of labor, to control and increase its remuneration. Either trust is the logical result of the other, and the natural rights of the people are at the mercy of both, so long as uncontrolled by law.²

"*Monopoly*" signifies the sole power of dealing in a particular thing, or doing a particular thing, either generally or in a particular place, and in fixing on it a price at one's pleasure.³ The definition of monopolies given by the early English cases, and by text writers, as meaning an exclusive right or privilege, granted to an individual by the sovereign or parliament, obviously throws no light on the nature of a monopoly created by the agreement, combination or contract between private persons, but applies only

² Mr. Justice Brown, of the United States supreme court, address in Forum of August, 1895.

³ San Diego Water Co. v. San Diego, etc. Co. (1895), 108 Cal. 549, 29 L. R. A. 839.

when the limitation upon the powers of congress, or legislatures, to grant such exclusive franchises or privileges, is in question.⁴

Patents are lawful monopolies. Legislature may grant a monopoly.—Not all monopolies are unlawful. Under the United States patent and copyright laws, exclusive monopoly is, in effect, protected in the manufacture and sale of the article patented or copyrighted, for a limited period, but only for what the patentee has produced. Though this is, in effect, in restraint of trade, it is not contrary to public policy, but in furtherance of it, which is to encourage invention and discovery, in the useful arts, sciences and manufactures. Where patentees of several patents of similar inventions, transfer all their rights to one of their number, and the transferee grants licenses under all the patents, the grant in the transfer, requiring the transferee to prosecute all infringements, and limiting license to such persons as shall be agreed upon, and prohibiting their use of any other patents for similar purposes; *Held*, that the agreement is not contrary to public policy, or in violation of the Sherman anti-trust law.⁵ A monopoly may be authorized by the legislature, by grant of an exclusive right to construct a railroad between two points, where there is no reserved right to amend.⁶

§ 934. **Anti-trust laws and their enforcement. The three crusades against trusts. Standard Oil Trust; pipe lines.**—Clear understanding of the laws and decisions upon corporations as "trusts" and monopolies, necessitates, at least, a brief *resume* of what the legislatures and the courts have done, or undertaken—concerning them. The first crusade occurred in the early seventies a generation ago; the second, fifteen years later; and the third has come after approximately the same intervening period of fifteen years.

The first crusade. Rebates.—In 1872, the independent incorporators of Eastern Pennsylvania, were threatened with annihilation through the formation of a giant combine, called the Southern Improvement company, led by the, then young, Standard Oil Company; which had secured from the main trunk lines of railway leading into the oil district, contracts which provided for a rebate on the oil it shipped, and a drawback of the same amount,

⁴ Andrew's American Law, § 606, citing *Slaughter House Cases*, 16 Wall. 36; *United States v. Knight*, 156 U. S. 9.

⁵ *United States, etc. Co. v. Grif-*

fin (Cal. 1903), 126 Fed. 364 (U. S. C. C. A.).

⁶ *Boston, etc. R. R. v. Salem, etc. R. R.* (1854), 68 Mass. 1.

on all shipments of oil made by those outside the combine. On this becoming known, a tempest of popular wrath broke up the combination, annulled its contracts with the railroads, and cast back the Standard Oil Company into its original confines in Ohio. This storm was accompanied by the granger movement in the middle west, which in several States proceeded to enact the "granger laws,"—for the first time by statute subjecting the railroads to State legislative control.

Second Crusade.—Standard Oil Trust.—The next anti-trust epidemic was a decade and a half later. In 1887 the Standard Oil Company was inquired into by commissions appointed severally by the New York senate and by congress. Their investigations, for the first time made generally known the enormous power of the combination, and the unfailing certainty of ruin which followed every effort to compete with it. Proceedings were begun in the Ohio courts in 1888, which finally in 1892, drove the Standard Oil Company from its native State, to asylum under the liberal laws of New Jersey,—the Supreme Court of Ohio having declared the company an unlawful corporation, and having forfeited its charter.⁷ Then followed the Sherman Anti-trust Act of Congress of July 2, 1900.

Third crusade.—This anti-trust movement culminating in dramatic events, began in 1902, when President Roosevelt ordered prosecution of the Chicago Beef and Cattle Trust. Impetus was given by the fifty-seventh congress, in passing the Anti-Trust Acts of 1903, the first legislation of the kind then for ten years. Next followed, in 1904, the Northern Securities Case, the United States Supreme Court forbidding the merger of the two parallel competing railroads into one "holding" company. In 1904 came the Supreme Court's decision, in the legal battle against the Chicago Gas Trust, in which the city gained an important victory. The recommendation to congress by President Roosevelt, in his message of December, 1904, for enlargement of the powers of the Interstate Commerce Commission, to regulate railroad rates, brought response in passage by the House of the Esch-Townsend bill. The Interstate Commerce Commission, in the Santa Fe rebate case, recommended that the Department of Justice proceed against that company, for granting rebates to the Colorado Fuel Company. In February, 1905, the Supreme Court sustained the United States Circuit Court of Chicago, in its injunction against

⁷ *State v. Standard Oil Co.* (1902), 49 Ohio St. 137.

the Chicago Beef and Cattle Trust. The cause of the remarkable tide of anti-trust activity must be, not that the modern trust is any more oppressive than it has continued to be for a generation, but that, until now, the country was not ripe for this, its third crusade. The storm of 1905 broke forth in Kansas, and the epidemic rapidly spread to the other States of the middle west and beyond. Its immediate cause was the sudden withdrawal by the Standard Oil Company, of its patronage from the oil producers of the Kansas oil fields, and refusal to purchase any of their product; a timely and significant illustration of the coercive character of these modern combines, and of their menace to private and public weal,—an economic condition under which one man, by stroke of pen, may arbitrarily and oppressively bankrupt thousands. "There are sixty-four companies in the Kansas field, each capitalized at \$1,000,000 and over, or an aggregate of about \$74,000,000, with an aggregate production of 1,558 barrels per day, or about twenty-one barrels production per day to each \$1,000,000 of capital; with no refinery in the State except that of the Standard. The occasion for refusal of the Standard to handle Kansas oil came from appropriation by the legislature for establishment of a State refinery of oil, and proposition to make pipe lines common carriers, as a means of preventing the Standard from underselling the projected State refinery. Events have rapidly followed refusal of the Standard to deal in Kansas oil. The State of Kansas itself has passed a freight rate act, a railroad commission act, and a law creating a State oil refinery to be built at a cost of \$200,000. It has passed an act making pipe lines common carriers and thus placing the transportation of oil in pipes under the same regulation as its transportation by rail; and now the State oil can be piped through the Standard lines, otherwise, owing to the lack of pipe lines owned by the State, the refinery plan could not have been carried out. Bills to establish State oil refineries, and to make pipe lines common carriers, so as to control rates and prevent rebates, are pending in the legislatures of Colorado, Nebraska, Texas, Oklahoma, Illinois and Indiana.

Pipe lines. Federal control. The pipe line is the key-stone of the Standard Oil Company. Testifying before the Industrial Commission of Congress in January, 1905, Mr. John D. Rockefeller, head of the trust, stated: "The entire business of the Standard Oil Company is dependent upon the pipe line system.

Without it, every well would shut down, and every foreign market would be closed to us." In reply to question of the Commission, what legislation, if any, he would suggest, regarding industrial combinations, he replied: "First, federal legislation, under which corporations may be regulated, and second, in lieu thereof, State legislation as nearly uniform as possible, encouraging combinations of persons and capital, for the purpose of carrying on industries, but permitting State supervision, not of the character to hamper industries, but sufficient to prevent frauds upon the public." It is anticipated that at the next meeting of congress, Mr. Rockefeller's own testimony will be used as preamble to a bill to make pipe lines, engaged in interstate commerce, common carriers, and place them under control of the Interstate Commerce Commission, along with private car lines, terminal railroads, and other subsidiary corporations organized for the express purpose of evading federal control under existing laws. Then, any company transporting oil from one State to another in pipe lines, would have to do it under supervision of the Interstate Commerce Commission. And, if it does its refining in the State where oil fields are, it will be compelled to accept control by the State authority.

Interstate pipe lines are not now under federal control.—At present the interstate commerce law relates exclusively to railroads, the opening sentence being: "That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property, wholly by railroad, or partly by railroad and partly by water, when both are used, under common control, management or arrangement for the carriage or shipment from one State or territory of the United States, or the District of Columbia, or to any other State or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, etc." It is easy to see from this, that a pipe line system does not come under the control of the interstate commerce act. When a railroad hauls a tank car of oil, it is required by law to make public rates, which can not be varied from without penalty. When the oil goes by pipe line, it is absolutely free from federal supervision. Pipe lines receive oil throughout an entire district, but they run only to the refinery controlled by the trust. They may even be outside the jurisdiction of the anti-trust law, because there necessarily is no competition

with the pipe lines, and as they carry only oil belonging to the trust, and can not be used for carrying any other, they may be assumed to be merely a part of the corporation. Just at the present time, the pipe line is wholly beyond the control of the United States, and it also escapes State supervision, to a large extent, because it is engaged in interstate commerce. It uses this fact to defy the State courts, and yet there is nothing at all on the federal statute books which covers the pipe lines, except, in so far as they have become amenable to the anti-trust law.

Pipe line business explained by Rockefeller.—Mr. Rockefeller himself has given the best and briefest description of the oil pipe lines as they have developed into the controlling factor in disposing of the production of petroleum in every section of the country, whether the field is in Pennsylvania, Ohio, Kansas, Texas, or California. The power of the Standard Oil company comes wholly from its interstate and export business, and Mr. Rockefeller clearly recognized this fact in his testimony, when he said: "Our first combination was a partnership and afterward a corporation in Ohio. That was sufficient for the local refining business. But dependent solely upon local business we should have failed years ago. We were forced to extend our markets and seek for export trade. This latter made the seaboard cities the necessary place of business, and we soon discovered that manufacturing for export could be economically carried on at the seaboard, hence the refineries at Brooklyn, at Bayonne, at Philadelphia, and the necessary corporations in New York, New Jersey, and Philadelphia." Mr. Rockefeller was under oath when he made these statements, and in his revised testimony he explained the pipe line business and the necessary part it plays in the mechanism of the Standard Oil company, when he said: "We soon discovered, as the business grew, that the primary methods of transporting in barrels could not last. The package often cost more than the contents, and the forests of the country were not sufficient to supply the necessary material for an extended length of time. Hence we devoted our attention to other methods of transportation, adopted the pipe line system, and found the capital for pipe line construction equal to the necessity of the business. To operate the pipe lines required franchises from the State in which they were located, and consequently corporations in those States, just as the railroads running through different States, are forced to

operate under separate State charters. To perfect a pipe line system of transportation required in the neighborhood of \$50,000,000 capital. This could not be obtained or maintained without an industrial combination. The entire oil business is dependent upon this pipe line system. Without it, every well would shut down, and every foreign market would be closed to us. The pipe line system required other improvements, such as tank cars upon railways, and finally, tank steamers. Capital had to be furnished for them and corporations created to own and operate them."

Pipe line service is quasi-public.—A pipe line being a public service, the corporation is subject to legislative control.⁸ *Infra*, § 948.

§ 935. **Exclusive privileges. Monopoly under special charter.**—The exclusive or special privilege is the parent of many injurious "trusts." Where the rule prevails "equal rights to all, and special privileges to none," the unlawful "trust" is powerless for harm. The first duty of the legislature to the people is to refuse special privileges to the cunning few, doing injustice to the honest many. The government should know no favorites, but hold the door of opportunity open to all alike. Exclusive privileges were formerly granted to corporations, by special charters, but are now rarely granted, and are generally prohibited by State Constitutions, as they are also prohibited in the territories by act of congress. But, there are corporations which have been created by special charter, and which enjoy monopolies under the exclusive privileges granted therein, and which can not be revoked, without reserved power of repeal, being protected as they are, as vested rights, under the Federal Constitution, prohibiting the impairment of obligation of contracts. In the absence of reserved right of amendment, the legislature may grant a monopoly to a railroad, and prevent the State from chartering a parallel railroad.⁹ An exclusive right to establish a bridge, will not prevent the building of a railroad bridge, or the operation of a ferry.¹⁰ A railroad may grant extra facilities to an express company, exclusively, for doing business on its road.¹¹ An exclusive right by

⁸ West Virginia T. Co. v. Volcanic Oil Co. (1872), 5 W. Va. 382.

⁹ Penn. R. R. v. Baltimore, etc. R. R. (1883), 60 Md. 263; Boston, etc. R. R. v. Salem, etc. R. R. (1854), 68 Mass. 1.

¹⁰ Charles River Bridge v. War-

ren (1837), 11 Pet. 420; Mohawk R. Bridge Co. v. Utica, etc. (1837), 6 Paige, 554; Robinson v. Lamb

(1900), 126 N. C. 492, 36 S. E. 29.

¹¹ Express Cases (1885), 117 U. S. 1.

special charter to a street railroad, may be repealed under reserved right by the legislature to repeal, and it may grant the right to another company.¹² A turnpike company, whose charter provides that no other road shall be allowed to be opened near enough to prejudice its interests, may enjoin the county from opening such a road.¹³ A city has no inherent power to grant an exclusive privilege. A competing franchise may be granted to another water-works company.¹⁴ A railroad company may authorize a telegraph company to build its telegraph line upon the right-of-way of the railroad, with exclusive right in the telegraph company to use such telegraph line,¹⁵ but the railroad can not provide that no other telegraph company shall construct a telegraph line on the railroad right-of-way. Such a provision would violate the Post Road Act of Congress of 1866, and would be contrary to public policy.¹⁶

§ 936. **The common law as to combinations in restraint of trade.**—Under the common law, contracts and combinations, tending to create a monopoly in the necessities of life, were always prohibited as contrary to public policy. Such combinations are now generally characterized as "trusts." They include associations to corner the market, and to lower prices for a time, to the ruin of competitors in the same line of business, to the end of later monopolizing the trade, and controlling and raising prices by limiting production, or by other methods. An agreement providing for a combination of all interests engaged in a particular business, under absolute dominion of a number of trustees, is illegal and void.¹⁷ The doctrine of forfeiture for misuser or non-user of corporate franchises, has recently been declared to apply

¹² *Wilmington City Ry. v. Wilmington, etc. Ry.* (Del. 1900), 46 Atl. 12; *Wilmington City Ry. v. People's Ry.* (Del. 1900), 47 Atl. 245.

¹³ *Ratliffe v. Pulaski, etc. Co.* (1901), 69 Ark. 264, 63 S. W. 70; *Nashville, etc. Co. v. Davidson Co.* (Tenn. 1901), 61 S. W. 68.

¹⁴ *Syracuse Water Co. v. Syracuse* (1889), 116 N. Y. 167, 5 L. R. A. 546; *Town of Kirkwood v. Meramec, etc. Co.* (1902), 68 S. W. 761.

¹⁵ *Western U. T. Co. v. Chicago, etc. R. R.* (1877), 86 Ill. 246, 29 Am. Rep. 28.

¹⁶ *Pacific P. T. Co. v. Western U. T. Co.* (1892), 50 Fed. 493.

¹⁷ *Bishop v. American, etc. Co.* (1895), 157 Ill. 284; *Chapin v. Brown*, 83 Iowa, 156; *Moore v. Bennett*, 140 Ill. 69; *Urnston v. Whitelegg*, 63 L. T. (N. S.) 455; *People v. Sheldon* (1893), 139 N. Y. 251; *Nestor v. Brewing Co.*, 161 Pa. St. 473; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Anderson v. Jett*, 89 Ky. 375; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; *Jackson v. Akron, etc. Co.*, 51 Ohio St. 303.

to companies whose shareholders have entered into agreements tending to deprive the public of the benefit of competition between them, which is the purpose and effect of the modern combinations commonly called "trusts."¹⁸ While contracts in partial

¹⁸ *People v. North River Sugar Refining Co.* (1890), 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, affirming (N. Y. Sup. Ct. 1889), 5 Ry. & Corp. L. J. 56; *Beach on Railways*, § 588. In Louisiana these combinations are illegal because they are of the nature of unincorporated joint-stock companies, which are not recognized by the laws of that state. *Louisiana v. American Cotton Oil Trust* (1887), 1 Ry. & Corp. L. J. 509. Under the English Companies Act of 1862, associations for the purpose of gain, consisting of more than twenty persons, are illegal, unless registered as a company under that act. "Unregistered Companies" (1883), 75 L. T. 198. See, also, "Associations Legal and Illegal" (1885), 79 L. T. 133, and cases there cited. The general literature of this subject will be found in the following articles, reviews and publications: "Trusts according to Official Investigations," by E. Benjamin Andrews, *Quarterly Journal of Economics*, January, 1889; "The Legality of Trusts," by Prof. Theodore W. Dwight, *Political Science Quarterly*, December, 1888; "Trusts," by F. J. Stimson, *Harvard Law Review*, October, 1887; "Trusts:" an Address by S. C. T. Dodd, Esq., before the Merchants' Association of Boston, January 8, 1889; Argument of Hon. Granville P. Hawes before Committee of the New York Senate, 1888; "Combinations: their Uses and Abuses, with a history of the Standard Oil Trust," by S. C. T. Dodd, Esq., 1888; "A Statement of Pending Legislation and its Consequences," by S. C. T. Dodd, Esq., 1888; *Winter's Bibliography of "Trusts,"* 7 Ry. & Corp. L. J. 236; Address by John H.

Flagler, President, etc., before the Commercial Club of Providence, Rhode Island, December 15, 1888; Argument of Thomas J. Semmes, Esq. on behalf of the Cotton Oil Trust, New Orleans, March 12, 1889; Argument of General Roger A. Pryor before Committee of the New York Senate, 1888; "Trust Combinations," by General Roger A. Pryor, 1888; "Illegality of Trust Monopolies," by General Roger A. Pryor, 1888; Arguments of John E. Parsons, Charles P. Daly, and James C. Carter, on behalf of the Sugar Refineries' Company, New York, 1889; "Illegality of Trust Combinations, a Cause of Corporate Forfeiture," by General Roger A. Pryor, an argument in the Sugar Trust Case, New York, 1889; "Economic and Social Aspect of Trusts," by George Gunton, *Political Science Quarterly*, September, 1888; "Concerning Trusts," by Prof. Robert Ellis Thompson, a paper read before the Philadelphia Social Science Association, February 21, 1889; "Trusts, their Cause and Effect," by Charles F. Beach, Jr. (March, 1888), 3 Ry. & Corp. L. J. 217; "The Proposed Railway Trust," by Charles F. Beach, Jr. (July, 1889), 5 Ry. & Corp. L. J. 61; "Facts about Trusts," by Charles F. Beach, Jr., *The Forum*, September, 1889. See also the reports and printed testimony of the official investigations of "Trusts," respectively by a Committee of the Legislature of the state of New York (Albany, March, 1888); the Congress of the United States (Washington, March to September, 1888, also the minority report), and the Canadian Parliament (Ottawa, May, 1888). Professor Theodore W. Dwight, in

restraint of trade are undoubtedly legal,¹⁹ it was the policy of the ancient common law to discourage transactions and combinations which, by reason of the restricted means of transportation then employed, threatened to control in any locality the market price of those commodities known as the "necessaries of life,"²⁰ and

his erudite article in the *Political Science Quarterly* for December, 1888, considers the questions whether the objects sought to be accomplished by a "trust" are legal at common law; and how far it will be possible for a state legislature or the federal congress to prohibit it, if it be legal at common law.

¹⁹ "Partial Restrictions on Business Freedom," by Elisha Greenwood, 19 *Cent. L. J.* 202; "Restraint of Trade," 10 *Alb. L. J.* 41. In *Diamond Match Co. v. Roeber*, 106 *N. Y.* 473, it was held that "a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties." It was also held that a restraint of trade was not general, but partial, though covering the whole country with the exception of Nevada and Montana. Indeed, excessive competition may sometimes result in actual injury to the public, and anti-competitive contracts to avert personal ruin may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable and are condemned as against public policy. *Horner v. Graves*, 7 *Bing.* 735. But "the cases where anti-competitive agreements were upheld had none of the distinguishing characteristics of monopoly, but were plainly fair contracts entered into for mutual protection, and were not injurious to the public." *People v. North River Sugar Refining Co.* (*N. Y. Sup. Ct.* 1889) (1890), 121 *N. Y.*

582, 9 *L. R. A.* 33, 18 *Am. St. Rep.* 843, 5 *Ry. & Corp. L. J.* 56, citing *Ontario Salt Co. v. Merchants' Salt Co.*, 18 *Grant's Chancery, U. C.* 540; *Wickens v. Evans*, 3 *Y. & J.* 318; *Mogul S. S. Co. v. McGregor*, 15 *Queen's Bench*, 476, 4 *Ry. & Corp. L. J.* 611; *Schraink v. Scharinghausen*, 8 *Miss. App.* 522. In *Ontario Salt Co. v. Merchants' Salt Co.*, 18 *Grant's Ch. U. C.* 540, the learned Vice-Chancellor declared that "it was out of the question to say that the agreement had for its object the creation of a monopoly, as the parties were not the only persons engaged in the production of salt in the province," and after examining the particular facts of that case, he adds: "What is this, more than two persons carrying on the same trade, binding themselves not to undersell each other?" *Wickens v. Evans*, 3 *Y. & J.* 318, was still freer from the element of monopoly. The agreement was confined to three trunk-makers, who divided England into three districts, each taking one and limiting himself to one. The court said that the restraint of trade was but partial, and that there was no monopoly except as between the three parties, "because every other man may come into their districts and vend his goods." *Of. "Covenantants in Restraint of Trade,"* 5 *L. T.* 522.

²⁰ Lord Coke expresses the opinion that forestalling and kindred acts to enhance the price of victuals of necessary and common use, constitute a crime at common law; but that such acts with respect to articles of pleasure rather than necessity, were not criminal. *Coke's Institutes*, ch. 89. See also

this policy has been extended to secure, it is claimed, the free operation of the natural law of supply and demand in other trades and industries beyond the purview of the earlier statutes and decisions.²¹ But an exception is made in favor of the combination

Pettamberdass v. Thackoorseydass (1850), 7 Moore P. C. Cas, 239, 263, to the point that the offense of engrossing was confined, at common law, to transactions in the necessities of life. See Professor Dwight's article on Trusts in the *Political Science Quarterly* for December, 1888. The statute of 5 & 6 Edward VI., c. 14, imposed severe penalties upon persons endeavoring to enhance the common price of merchandise, whom it classified as "forestallers," "regrators," and "engrossers." And Hawkins (*Pleas of the Crown*, ch. 80, London ed., 1739), declares such acts to have been criminal offenses at common law, and cites as authority, *King v. Maynard*, 4 Croke, 231. After the repeal of 5 & 6 Edward VI., c. 14, by the act of 12 Geo. III., c. 71 (1772), Lord Kenyon, in the case of *Rex v. Waddington* (1801), 1 East, 143, held that the offenses of forestalling, etc., related only to the necessities of life, and that there must be a clear intent on the part of the alleged offender to enhance the price of the article; and that this intent might be inferred from his acts.

²¹ It is said with sweeping generality that "Competition is the life of trade, and whatever destroys or even relaxes competition in trade is injurious, if not fatal, to it." *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387; *Arnot v. Pittston & El. Coal Co.*, 68 N. Y. 558; *People v. Fisher*, 14 Wend. 9, 19; *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 46 Am. Rep. 527; *Stanton v. Allen*, 5 Denio, 434, 441; *Hooker v. Vanderwater*, 4 Denio, 349, 353; *Peo-*

ple v. Fisher, 14 Wend. 9; *Craft v. McConoughy*, 79 Ill. 346, 350; *People v. Stephens*, 71 N. Y. 545; *Marsh v. Russell*, 56 N. Y. 292; *Hartford, etc. R. Co. v. New York & N. H. R. Co.*, 3 Robt. 415; *Brisbane v. Adams*, 3 N. Y. 129; *Livermore v. Poor*, 5 Hun, 285; *Wright v. Rider*, 36 Cal. 242; *Western Union Tel. Co. v. Baltimore & O. Tel. Co.* (1885), 23 Fed. Rep. 12; *Baltimore & O. Tel. Co. v. Western Union Tel. Co.* (1884), 24 Fed. Rep. 319; *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; *Western Union Tel. Co. v. Chicago & Paducah R. Co.*, 86 Ill. 246, 29 Am. Rep. 531; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* (1883), 15 Fed. Rep. 650; *Crawford v. Wick*, 18 Ohio St. 190; *Parker, J., in Mitchell v. Reynolds*, 1 P. Williams, 181; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 86 Ill. 246, 46 Am. Rep. 527; *Dunlap v. Gregory*, 10 N. Y. 244; *Lawrence v. Kidder*, 10 Barb. 642; *Chappel v. Brockway*, 21 Wend. 163. See *Leslie v. Lorillard*, 110 N. Y. 519; *Darcy v. Allien* (*The Case of Monopolies*), 11 Coke, 85, where it was declared that a patent from Queen Elizabeth conferring upon Darcy the sole right of making and importing playing-cards was a monopoly, and as such void both at common law and under the statute, and as against public policy. In *Hoffman v. Brooks*, 11 Week. L. Bul. 358, the combination was between sellers of tobacco for the purpose of destroying competition among themselves. It was held to be unlawful, the court saying: "The presumption is always against the validity of such agreements." And they will not be enforced "when they include all

of individuals for the formation of joint-stock companies and corporations, by reason of the advantage to the public resulting from the aggregation of small amounts of capital for the accomplishment of enterprises too great to be profitably conducted by individuals or by the machinery of the ordinary partnership.²² It was with caution, however, that these concessions were made, and in the face of much opposition on the part of the people;²³ and popular opinion is still apprehensive lest the advantages,

those engaged in any business in a large city or district, are unlimited in duration, and are manifestly intended, by the surrender of individual discretion, by the arbitrary fixing of prices, or by any of the methods of which the hope of gain makes human ingenuity so fruitful, to strangle competition outright and breed monopolies." In the *Central R. Co. v. Collins*, 40 Ga. 583, the court observed: "It is a part of the public policy of the state to secure a reasonable competition between its railroads, and it is contrary to that policy for one of said roads to attempt to secure a controlling interest in another by the purchase of its stock; and any contract made with that view is illegal." In *Hooper v. Vanderwater*, 4 Denio, 349, it was held that an agreement between the proprietors of five lines of boats, engaged in the business of forwarders on the Erie and Oswego canals, to run for the remainder of the season at certain rates for freight and passage then agreed upon, and to divide the net earning among themselves in certain proportions, was a conspiracy to commit an act injurious to trade and consequently void. The object expressed in the agreement was the "establishing and maintaining fair and uniform rates of freight and equalizing the business among themselves, and to avoid all unnecessary expense in doing the same." Of this, Jewett, J., observed: "The object of the

agreement, as expressed in the written contract, was plausible enough, but it was impossible to conceal the real intention." He adds, that "the great, if not the sole, object of the agreement was to destroy rivalry and keep up the price to certain rates fixed by themselves." *Stanton v. Allen*, 5 Denio, 434, was a very similar case, where the court, without considering the conspiracy statute, held that the agreement was void at common law, as contravening public policy and injurious to the interest of the state.

²² 21 Jac. I., c. 3, § 9 (1623), which, declaring the law in regard to monopolies, made an exception in favor of "any companies or societies of merchants." See also *East India Company v. Sandys* (1683, *The Great Case of Monopolies*), 10 How. St. Tr. 1071, where the exclusive privileges of the company were sustained.

²³ The "Bubble Act" (6 Geo. I., ch. 18), declared the practice of making subscriptions for commercial undertakings without an act of incorporation and making the certificates of subscription transferable, to be a common nuisance. In Louisiana, joint-stock companies are still illegal. *Louisiana v. American Cotton Oil Trust* (1887), 1 Ry. & Corp. L. J. 509. The public hostility to corporations has manifested itself in a striking manner in the "Granger" legislation of some of our Northwestern states. See also popular prejudice against exclusive corpo-

which would, no doubt, result from more extensive combinations, may be offset by a tendency toward monopoly, with which large combinations in trade menace the public safety.²⁴ Steam transportation, however, and the electric telegraph, having done away with the reason of the ancient rule, by rendering "forestalling" and "engrossing" and kindred mischiefs impossible, it remains to be considered whether a policy which fosters a further aggregation of capital, may not better conserve the public welfare, than one which forces the industries of the country into ruinous competition.²⁵ The New York Court of Appeals carefully avoided committing itself by *dicta* of sweeping generality against the inevitable aggregation of capital, and in the Sugar Trust Case rendered judgment upon the narrowest and most conservative grounds.²⁶

rate privileges, as manifested by a resolution of the House of Commons declaring that "all subjects of England have equal right to trade in the East Indies unless prohibited by Parliament" (5 Parl. Hist. 828), thereby setting aside the privileges granted to the East India Company.

²⁴ "Combinations that were pigmies in comparison with the present have been repeatedly denounced by the courts and pronounced to be unlawful, as tending to breed monopolies." *People v. North River Sugar Refining Co.* (1890), 121 N. Y. 583, 9 L. R. A. 33, 18 Am. St. Rep. 843, 5 Ry. & Corp. L. J. 56, citing *Hooper v. Vanderwater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 186; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672; *Croft v. McConoughy*, 79 Ill. 339; *Hoffman v. Brooks*, 11 Weekly Law Bulletin, 358. In *Leslie v. Lorrillard*, 110 N. Y. 519, Gray, J., speaking of agreements in restraint of trade, observed: "In later times the danger in such agreements seems only readily to exist when corporations are parties to them, for their means and strength would better enable them to buy off riv-

alry and create monopolies." And again, speaking of corporations, "If allowed to engage, without supervision, in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to monopolize the avenues to that industry in which they are engaged, they become a public menace, against which public policy and statutes design protection."

²⁵ In *Palmer v. Stebbins* (1825), 20 Mass. 188, the supreme court of Massachusetts expressed the opinion that "more evil than good is to be apprehended from encouragement to competition among rival tradesmen, the tendency being to overdo trade." And in *Leslie v. Lorrillard*, 110 N. Y. 519, it was said: "I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to become a general evil." See "Authorities on Combinations," by S. C. T. Dodd, Esq.

²⁶ "And so we have reached our conclusion, and it appears to us to have been established that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having

§ 937. **Contracts in partial restraint of trade.**—"The tendency of recent adjudications is marked, in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade, are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England.²⁷ When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other?

reached that result it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this state there can be no partnerships of separate and independent corporations, whether directly or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints; but that manufacturing corporations must be and remain several as they were created, or one under the statute." Finch, J., in *People v. North River Sugar Refining Co.* (1890), 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, 8 Ry. & Corp. L. J. 22.

²⁷ *Match Co. v. Roeber* (1887), 106 N. Y. 473, citing *Hitchcock v. Coker*, 6 Adol. & E. 438, where Chief Justice Tindal said: "We agree in the general principle adopted by the court that, where a restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made

can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." "That passage was adopted by Lord Wensleydale, when a baron of the court of exchequer, in delivering judgment in *Ward v. Byrne*, 5 Mees. & W. 548, 561, and therefore the rule so expressed is the authority of the courts of Queen's Bench, Exchequer, and Exchequer Chamber. If, therefore, the extent of the restraint is not greater than can possibly be required for the protection of the plaintiff, it is not unreasonable. . . . But then it is said that over and above the rule that the contract shall be reasonable there exists another rule, namely, that the contract shall be limited as to space, and that this contract, being in its terms unlimited as to space, and therefore extending to the whole of England and Wales, must be void. Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local." *Match Co. v. Roeber*, 106 N. Y. 473.

It is an encouragement to industry and to enterprise, in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells?"²⁸ Mr. Justice Bradley, speaking upon this point, has said: "It is a well-settled rule of law, that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. . . . This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular State."²⁹ The court held as valid a contract between a manufacturing corporation, whose business extends throughout the United States and Canada, and one of its traveling salesmen, who had been in its employ for several years, whereby he agreed not to enter the service of any business competitor of the corporation for three years after leaving its service.³⁰

§ 938. **Combinations to destroy competition.**—Whatever other implied powers a corporation may have, it can have no such

²⁸ *Match Co. v. Roeber* (1887), 106 N. Y. 473. In this case the defendant, who was a manufacturer of friction matches in the state of New York, with a large business throughout the United States and territories, sold his business and good will to the complainant corporation, with a covenant that he would not at any time within ninety-nine years engage in the manufacture or sale of friction matches, except as an employee of complainant, within any of the states or territories of the United States except Nevada and Montana. He subsequently entered into the employment of a rival company to manufacture matches in the state of New Jersey, and on

suit being brought by the complainant to obtain an injunction restraining his employment with a competitor, it was urged, among other things, that the covenant was void as against public policy because it was in restraint of trade. The injunction, however, was awarded.

²⁹ *Navigation Co. v. Winsor*, 20 Wall. 64.

³⁰ *Carter v. Alling* (U. S. C. Ct. 1890), 8 Ry. & Corp. L. J. 428, citing and reviewing *Whittaker v. Howe*, 3 Beav. 383; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Match Co. v. Roeber* (1887), 106 N. Y. 473; *Navigation Co. v. Winsor*, 20 Wall. 64.

power to enter into any agreement which is opposed to the common weal, or otherwise contrary to public policy. Nor is it in the power of the legislature to grant any such authority by express charter or statute, to a corporation to work injury to the public. Where authority to do what is opposed to public policy is inserted in the articles of incorporation, courts will refuse to maintain such authority. A corporation can not bind itself by any agreement to do anything prejudicial to public interest. Such an agreement is void.³¹

Illustrations.—An agreement between publishers and dealers in books, whereby they agree not to sell books of any kind to dealers, who shall be suspected of selling copyrighted books at less than the net price fixed by publishers, or supply books to dealers suspected of making such sales, violates the New York statute declaring to be "void as against public policy, every contract whereby a monopoly is, or may be created in the sale of any commodity of common use, or whereby competition in the supply or price of any such article is restrained or prevented, or whereby for the purpose of establishing or maintaining a monopoly, the free prosecution of any lawful business is, or may be restricted." A combination creating a monopoly of the sale of books not protected by copyright, offends against the statute as much as if it related to any other commodity.³² The ordinary trust agreement is contrary to public policy and void, being a contract to eliminate competition and restrain trade. Any alliance between rival corporations engaged in similar business, whereby to curtail competition, by means of purchase by one corporation of stock in the other for purpose of control, will be restrained by a court of equity, and the corporations be subject to forfeiture of charter.³³ Though such agreement be entered into between stockholders or directors, and the trustees of the organization, and not by the board of directors, nevertheless their acts will be imputed to the corporation; and for entry into such partnership to crush competition, the corporation may forfeit its charter.³⁴

§ 939. Combinations distinguished, as to their legality, or illegality.—The cases upon this subject seem naturally to separate into two classes. In one, the question is, whether the contracting party has, to a greater extent than fairly required for the

³¹ Gibbs v. Standard Oil Co., 49 Ohio St. 137.

130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319.

³² Strauss v. Pub. Assn. (1904), 177 N. Y. 143, 64 L. R. A. 701.

³⁴ People v. N. River, etc., 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843.

³³ People v. Chicago, etc. Co.,

protection of his private interests, disabled himself from carrying on his trade or business, and so not only deprived society of a useful member, but created a strong probability of adding to its burdens by reason of idleness or crime. The public in this class of cases is affected only indirectly through the individual contracting.³⁵ In the other class, the question arising upon agreements creating combinations of persons engaged or interested in the same kind of business, is whether their object and effect are to directly affect the public "by preventing competition and enhancing prices," or "by exposing it to the evils of monopoly."³⁶ The law, as well said by Jessel, M. R., will not lightly interfere with the citizen's liberty to contract as he will, but the interests of the public have led to unquestionable limitations of such liberty.³⁷ In the first class of cases just named, the interest of the public and those of the party, are, to a great extent, the same. Both forbid any restriction of his earning power without an equivalent, and this is the reason, why only a partial restriction is permitted, and that only for a valuable consideration. In the second class of cases, the immediate interests of the public, and those of the contracting parties, are in conflict. The former desire lower, the latter higher prices. Any prevention of competition injures the public in this regard. But when competition becomes so great that those engaged in a business can not carry it on without loss, the public becomes exposed to the same danger as in the first class. The law, therefore, applies an analogous rule. Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition and so increasing prices. Just the extent to which this may be done, the courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud.³⁸

Similarity of the "trust" to an unincorporated joint-stock company.—Joint-stock companies were legal under English common law, and are common in this country, and often assume the powers and privileges of corporations. In Louisiana, however, they are

³⁵ *Hoffman v. Brooks*, 11 Week. L. Bul. 258, citing *Lange v. Werk*, 2 Ohio St. 519; *Thomas v. Wiley*, 3 Ohio St. 225. *Of. Anderson v. Jett* (1889), 11 Ky. L. Rep. 570. See generally upon monopolies, notes and articles in 3 Am. L. J. N. S. 283; by Robert Desty in 11

Fed. Rep. 632; 8 West. Jur. 511; by A. T. Harper in 1 Quart. J. Econ. 28.

³⁶ *Alger v. Thacker*, 19 Pick. 51.
³⁷ *In Printing Co. v. Lamson*, L. R. 19 Eq. 465.

³⁸ *Hoffman v. Brooks*, 11 Week. L. Bul. 258.

contrary to law. Accordingly the court there held in the case of the Cotton Seed Oil Trust, that it being a form of unincorporated joint-stock company, was therefore illegal and disqualified to do business within that State.³⁹ No such conclusion could have been reached elsewhere, where, as generally, the common law is the rule of practice and decision. But ground for exclusion would necessarily be the company's abuse of assumed corporate powers and privileges.⁴⁰

§ 940. **Agreements that are not unlawful combinations.** —It is not every combination among corporations that is illegal; neither is every combination for the purpose of obviating the evils of competition to be regarded as contrary to public policy. Thus, an agreement by a steamship company, to pay a certain sum monthly to the owner of a competing line, in consideration of his discontinuing running his vessels over that route, and agreeing not to sell or charter his vessels for use on it, nor to be in any way interested in steamships running over it, was held to be a contract not in restraint of trade.⁴¹ So, an agreement

³⁹ *Vide infra*, § 950, COTTON SEED OIL TRUST; *State of Louisiana v. American Cotton Oil Trust*, 40 La. Ann. 8.

⁴⁰ At common law an unincorporated joint-stock company is legal and valid. *Greene v. People* (Ill. 1889), 21 N. E. 605. It lies midway between a corporation and a partnership. It has no limited liability as has the corporation, and it is not dissolved by a transfer of stock as is a partnership. It is lawful for a joint-stock company to place all its stock in the hands of a trustee, to carry on the business in his name, and under his management. Such trusts may be created for any purposes which are not illegal. *Graff v. Bennett* (1865), 31 N. Y. 9. And some states, as Michigan, Wisconsin, Minnesota, California, Dakota, North Carolina, Georgia, Pennsylvania, Connecticut, Kentucky and Vermont by statute expressly specify the objects for which a trust may be created. *Stimson Amer. Statute Law*, § 1703.

⁴¹ *Leslie v. Lorillard* (1888), 110 N. Y. 519. In this case the complaint alleged that one of the defendants, for the purpose of extorting money, threatened to have the company of which he was president run steamships in opposition to the Old Dominion Co., and thereby induced the latter to agree to make him monthly payments in consideration of an agreement to withdraw the opposition; that the Old Dominion Co. had been succeeded by a new company, of which plaintiff was a stockholder, and that this company had made a new contract modifying the former one; that plaintiff has requested the directors of his company to pay no more money under it and to bring an action for its cancellation, which they have refused to do. But the court held that, as the complainant does not allege any fraud to which the officers of the Old Dominion Co. were parties, nor any deception or collusion as to the second contract, it does not show any right in plaintiff to sue for cancellation.

between railway companies for the division of territory, to obviate the evils of parallel construction of branch lines, has been considered by the court upon the question at issue between the parties without deciding upon questions of public policy.⁴⁴ And a like silence was preserved by the federal circuit court in a modern case, holding that mere disuse of a manufacturing plant under an agreement with other manufacturers to restrict production, although attended with the decay and dilapidation inseparable from disuse, is not such destruction or waste as to entitle a mortgagee to ask for a receiver.⁴⁵ The reason for the arrangement with the other company, as stated in the case, was that the latter had such facilities that it could produce the manufactured article at a cheaper cost; and it was claimed that it was better for the defendant to pay what it did for thus furnishing its proportion, than to furnish it from its own mills. "The defendant's mills and works," said the court, "have therefore remained idle, and have suffered from the decay and dilapidation incident to all such works when disused. The *prima facie* showing of gross neglect and despoiling of the property, made in support of the motion, is fairly refuted by the answer of the defendant and the affidavits of others supporting the answer, and the result of all the evidence is that no such destruction or waste of the property as would on that account warrant the appointment of a receiver, is shown. To justify such an appointment the waste must be serious, and the danger of destruction or impairment of the security imminent."⁴⁶ Although a combination be illegal, a corporation may be estopped from setting up its illegality as against a receiver appointed to take charge of the property of the com-

⁴⁴ *Ives v. Smith* (1890), 8 N. Y. Supp. 46. In this case two railroad companies entered into a contract by which certain territory was preserved to each, in which it should prosecute the work of extending its branch lines. After the directors of one of the contracting companies had passed resolutions to construct branch lines in violation of the contract, a meeting of the stockholders passed a resolution ratifying all the acts of the directors during a period covering the dates of the resolutions referred to, but it did not appear that those reso-

lutions were read at the meeting, or the attention of the stockholders called to them, and there was evidence that some of the assenting stockholders were misled. The court held that there was no such ratification of the directors' resolutions as would preclude the stockholders from insisting that the contract be performed.

⁴⁵ *Union Mutual Ins. Co. v. Continental Ins. Co.* (1889), 37 Fed. Rep. 286.

⁴⁶ *Union Mutual L. Ins. Co. v. Union Mills Plaster Co.* (1889), 37 Fed. Rep. 286, 290, 291.

bination.⁴⁷ So, a company having received the proceeds of sale of its property to a competitor, who bought to stifle competition, has been held to be estopped from pleading want of authority in its executive committee to enter into the contract.⁴⁸ It has been held that the owners of a majority of the shares of a corporation may agree to act as a unit for the purpose of controlling its management;⁴⁹ that an agreement to fix a minimum price is valid;⁵⁰ that one may legally purchase the trade or business of another, for the very purpose of preventing competition;⁵¹ that railroads may validly agree to divide their profits proportionally with a view to preventing competition;⁵² and that an arrangement between vessel owners to keep business to themselves and prevent competition by crowding out a competitor, is not invalid so long as no illegal means are resorted to.⁵³

§ 941. Unlawful agreements to fix prices.—Combinations between corporations which would otherwise be natural competitors in business, are *ultra vires* and illegal; courts will not aid in the enforcement of such agreements nor of contracts arising therefrom;⁵⁴ all their privileges and franchises are thereby sub-

⁴⁷ Pittsburgh Carbon Co. v. McMillin (1889), 6 N. Y. Supp. 433.

⁴⁸ Metropolitan Tel. & T. Co. v. Domestic Tel. & T. Co. (N. J. 1888), 14 Atl. Rep. 907.

⁴⁹ Barnes v. Brown, 80 N. Y. 327.

⁵⁰ Marsh v. Russell, 66 N. Y. 288.

⁵¹ Diamond Match Co. v. Roerber, 106 N. Y. 473. See further as to the legality of contracts in restraint of trade, the annotations of Callahan v. Donnolly, 13 Am. Rep. 173, 45 Cal. 152; Smalley v. Greene, 35 Am. Rep. 269, 52 Iowa, 241; Bergamini v. Bastian, 48 Am. Rep. 223, 35 La. Ann. 60; Tardy v. Creasy, 59 Am. Rep. 686, 81 Va. 553; Western Union Tel. Co. v. Burlington & S. Ry. Co., 11 Fed. Rep. 10.

⁵² Shrewsbury, etc. Ry. Co. v. London, etc. R. Co., 6 H. of L. Cas. 652, where it was held that such an agreement promotes the public interest; and that it is not to the interest of the public that railways should ruin one another. See brief of Messrs. Daly, Carter and Parsons for defendants in

People v. North River Sugar Refining Co. (N. Y. Sup. Ct. 1889), 5 Ry. & Corp. L. J. 56, citing the cases above and Leslie v. Lorillard, 110 N. Y. 519; Wickins v. Evans, 3 Y. & J. 318; and Collins v. Locke, L. R. 4 App. 674, 685.

⁵³ Mogul Steamship Co. v. McGregor, Gow & Co., 6 Ry. & Corp. L. J. 136.

⁵⁴ Beach on Railways, § 588. A corporation is not a "person" within the Louisiana statute authorizing the formation of a corporation by any number of "persons" not less than six. Factors' & Traders' Ins. Co. v. New Harbor Protection Co., 37 La. Ann. 233. "Corporations cannot consolidate their funds, or form a partnership, unless authorized by express grant or necessary implication." New York and Sharon Canal Co., etc. v. Fulton Bank, 7 Wend. 412; Angell & Ames on Corporations, § 272; Taylor on Corporations, §§ 305, 419, 420; Green's Brice's *Ultra Vires*, 416; Mallory v. Oil Works, 2 Pickle (Tenn.),

jected to forfeiture;⁵⁵ and criminal proceedings for conspiracy

588, 4 Ry. & Corp. L. J. 202; 1 Morawetz on Corporations, § 376; *People v. North River Sugar Refining Co.* (1890), 121 N. Y. 582, affirming (N. Y. Sup. Ct. 1889) 5 Ry. & Corp. L. J. 56, where Judge Barrett said: "It is well settled that corporations cannot consolidate their funds or form a partnership unless authorized by express grant or necessary implication; nor can they enter into any arrangement amounting to a practical consolidation or co-partnership," citing *Angell & Ames*, § 272; *Taylor on Corporations*, §§ 305, 419, 420; *Green's Brice's Ultra Vires*, 416; 1 *Morawetz on Corporations*, §§ 376-421; *New York & Sharon Canal Co. v. Fulton Bank*, 7 Wend. 412; *Whitten-ton Mills v. Upton*, 10 Gray, 582; *Marine Bank v. Ogden*, 29 Ill. 248; and adding that it was doubtless because of the recognition of this principle that statutes have been passed authorizing consolidations in a certain specified manner and under fixed conditions. "Transfers of power of one corporation to another, without the authority of the legislature, are against public policy." *Chicago Gas Light Co. v. Peoples' Gas Light Co.*, 121 Ill. 530, 2 Am. St. Rep. 124. In *Bradford*, etc. R. Co. v. New York, etc. R. Co., 48 Hun. 621, the case was this: The *Bradford Railroad Co.*, a tributary of the New York, Lake Erie & Western Railroad Co., desired the assistance of the latter company in the completion of its road, and to that end the *Bradford* company engaged "to cause to be deposited" with the Erie company "a majority of its capital stock," so as to give the Erie company "the right to vote upon the stock so deposited." Accordingly, "a majority of the owners of the *Bradford* company stock deposited it with the Erie company," but the court, per Dan-

iels, J., held the agreement illegal, because it transferred the control of the *Bradford* company to the Erie. *Hafer v. New York, L. E. & W. R. Co.* (1886), 19 Abb. N. Cas. 454; *Vanderbilt v. Bennett*, 19 Abb. N. Cas. 460, 2 Ry. & Corp. L. J. 409; *Thomas v. Railroad Co.*, 101 U. S. 83. Agreements tending to monopoly—i. e., "any combination among merchants to raise the price of merchandise, to the detriment of the public," are illegal. *Arnot v. Pittston & E. Coal Co.* (1877), 68 N. Y. 559; *Stanton v. Allen*, 5 Denio, 434; *Clancy v. Onondaga Salt Co.* (1862), 62 Barb. 395; *Hooper v. Vanderwater*, 4 Denio, 349; *Fisher v. People*, 14 Wend. 9, 19; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 182; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672; *Croft v. McConoughy*, 79 Ill. 339; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 38 Alb. L. J. 279; *Bank v. King*, 44 N. Y. 87; *Darcy v. Allein* (Case of Monopolies), 11 Coke, 84; *Raymond v. Leavitt*, 46 Mich. 447; *India Bag Co. v. Koch*, 14 La. Ann. 164; *Ray v. Mackin*, 100 Ill. 246; *People v. Stephens*, 71 N. Y. 545; *Marsh v. Russell*, 66 N. Y. 288; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* (1865), 3 Robt. (N. Y. Super. Ct.), 411; *Hilton v. Eckersley*, 6 Ell. & B. 47; *Central R., etc. Co. v. Collins*, 40 Ga. 646; *Charles River Bridge v. Warren Bridge*, 11 Pet. 567; 2 Kent, 271, marginal note c; *Stewart v. Erie & Western Transp. Co.* (1871), 17 Minn. 372; *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530; *City of St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 69, cited by Genl. Roger A. Pryor, for the people in *People v. North River Sugar Refining Co.*, *supra*.

⁵⁵ *People v. North River Sugar Refining Co.* (N. Y. Sup. Ct. 1889),

may be brought against them.⁵⁶ Under a statute, authorizing incorporation "for any lawful purpose," the corporation is, never-

5 Ry. & Corp. L. J. 56, affirmed (1890), 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843. The rule that an illegal or unauthorized act is sufficient ground of corporate forfeiture, is abundantly illustrated by adjudicated cases. *People v. Oakland County Bank*, Dougl. (Mich.) 282; *People v. Geneva College*, 5 Wend. 211; *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 432, 532; *State v. Seneca County Bank*, 5 Ohio St. 171; *Commonwealth v. Commercial Bank*, 28 Pa. St. 383; *State v. Commercial Bank*, 33 Wis. 474; *State v. Milwaukee, L. S. & W. Ry. Co.*, 45 Wis. 579, where keeping the corporate books and principal place of business beyond the jurisdiction of the state was considered a sufficient ground of forfeiture even though there be no statute expressly requiring them to be kept within the state; *People v. Dispensary*, 7 Lans. 304; *Bank of Vincennes & State Bank of Indiana v. State* (1823), 1 Blackf. (Ind.) 267; *Attorney-General v. Petersburg, etc. R. Co.*, 6 Ired. 456; *People v. Utica Ins. Co.*, 15 Johns. 358; *State v. Atchison & N. R. Co.* (1888), 24 Neb. 143, 4 Ry. & Corp. L. J. 86; *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 290; *Kyd on Corp.* 479 *et seq.*; *Angell & Ames on Corp.*, §§ 774-776; *Green's Brice's Ultra Vires*, 787; *People v. Bristol*, 23 Wend. 233-250.

⁵⁶ *Raymond v. Leavitt*, 46 Mich. 447; *Rex v. De Berenger*, 3 M. & S. 67; *Rex v. Hilhens*, 2 Chitty, 163; *Rex v. Waddington*, 1 East, 143, 167; *Rex v. Sterling*, 1 Keble, 650; *Anon.* 12 Modern, 248; *People v. Melvin*, 2 Wheeler's Cr. Cas. 262; *Commonwealth v. Carlisle, Brightley (Pa.)*, 36; 4 Blackstone's Commentaries, 158, 159; 1

Bishop on Criminal Law, § 969; 1 *Russell on Crimes*, 168; 3 *Coke's Institute*, 89. So in New York, by express provision of statute. N. Y. Penal Code, § 168, sub. 6; *People v. Fisher*, 14 Wend. 9; *Morris Run Co. v. Barclay*, 68 Pa. St. 174; *Hooker v. Vanderwater*, 4 Denio, 249; *Clancy v. Onondago Salt Co.* (1862), 62 Barb. 395. See "Law of Conspiracy as applied to Trade Competition," 30 Sol. J. & Rep. 197. In *Morris Run v. Barclay Coal Co.*, 68 Pa. St. 168, the combining mines were not the only ones in the region, much less in the country. It appeared that there was another mine in the region not within the combination, but that the product of that mine could only reach the market (sought to be controlled) by tide-water. It also appeared that there were other mines in two other counties of the state, though the quantities taken from them were small. Still the court held that the combination was not only illegal but a criminal offense. The common-law origin of this doctrine was dwelt upon—while an individual may do many things to oppress others, which though morally wrong are not subject of legal discipline, he cannot lawfully combine with another to do the same things. The wrong which, when done by the individual, cannot be redressed, becomes a conspiracy the moment it is effected by two or more in combination. As the learned Judge Agnew observed: "The combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influences."

theless, illegal, where the purpose is to create a monopoly.⁵⁷ An agreement of dealers, fixing prices and refusing to sell to other dealers, unless they sell at such fixed price, is illegal, and void.⁵⁸ A merchant may enjoin other merchants from combining to prevent others from selling goods to him, unless he will agree to sell at prices they fix.⁵⁹ Where several ice companies agree to sell ice to a single corporation only, this is in violation of the anti-trust law.⁶⁰ And the charter of a gas company, formed to combine all other gas and electric light companies of the city, was forfeited.⁶¹ The Texas anti-trust law was declared unconstitutional as violative of the right of contract guaranteed by the United States constitution.⁶² The Nebraska anti-trust law was also held unconstitutional, as violative of the right of contract.⁶³ Manufacturers combining to sell machines to a corporation which is to fix and collect prices guaranteed by another corporation in the combination, can not enforce payment of dividends upon stock received in payment for the machines.⁶⁴ Strikers enjoined at suit of a corporation from obstructing the streets, cannot, as

⁵⁷ *People v. Chicago Gas Co.* (1889), 130 Ill. 268; *Harding v. American, etc. Co.* (1899), 182 Ill. 551, 74 Am. St. Rep. 189; *Central Elevator v. People* (1898), 174 Ill. 203, 43 L. R. A. 658; *People v. Chicago, etc. Exchange*, 170 Ill. 556 (1897), 39 L. R. A. 373, 62 Am. St. Rep. 404; *Coquard v. National, etc. Co.* (1898), 171 Ill. 480; *People v. Milk Exchange* (1895), 145 N. Y. 267, 27 L. R. A. 437, 45 Am. St. Rep. 609; *Cummings v. Union, etc. Co.* (1900), 164 N. Y. 401, 52 L. R. A. 262, 79 Am. St. Rep. 655; *Matter of Davies* (1901), 168 N. Y. 89, 56 L. R. A. 855; *Beechley v. Mulville* (1897), 102 Iowa, 602, 63 Am. St. Rep. 479; *State v. Smiley* (Kan. 1902), 69 Pac. 199; *State v. Phipps* (1893), 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. Rep. 152; *Greenville v. Planters, etc. Co.* (1893), 70 Miss. 669, 13 So. 879, 35 Am. St. Rep. 681; *Kellogg v. Lehig, etc. R. R. Co.* (1901), 61 N. Y. App. Div. 35; *Drake v. Siebold* (1894), 81 Hun, 178; *State v. Buckeye, etc. Co.* (1900), 61 Ohio St. 520; *Nester v.*

Continental, etc. Co. (1894), 161 Pa. St. 473, 24 L. R. A. 247, 41 Am. St. Rep. 894; *State v. Schlitz, etc. Co.* (1900), 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; *Milwaukee, etc. Assn. v. Niezerowski* (1897), 95 Wis. 129, 37 L. R. A. 127, 60 Am. St. Rep. 97.

⁵⁸ *Cleland v. Anderson* (Neb. 1902), 92 N. W. 306.

⁵⁹ *Brown v. Jacobs, etc. Co.*, 41 S. E. 533 (Ga. 1902), 57 L. R. A. 547.

⁶⁰ *Crystal, etc. Co. v. State*, 23 Tex. Civ. App. 293 (1900), 56 S. W. 562.

⁶¹ *San Antonio, etc. Co. v. State* (1899), 22 Tex. Civ. App. 118, 39 S. W. 926, 35 L. R. A. 662, 59 Am. St. Rep. 834; *Texas Brewery Co. v. Templeman* (1896), 90 Tex. 277, 24 S. W. 1086; *Welch v. Phelps, etc. Co.* (1896), 89 Tex. 653, 36 S. W. 71; *Houck v. Anheuser, etc. Assn.* (1894), 88 Tex. 184, 30 S. W. 869.

⁶² *In re Grice* (1897), 79 Fed. 627.

⁶³ *Niagara, etc. Co. v. Cornell* (1901), 110 Fed. 816.

⁶⁴ *Cravens v. Carter Crume Co.*

defense set up that the corporation is an illegal trust.⁶⁵ The lease of a car-manufacturing corporation to another corporation, and agreement not to manufacture cars during the term of the lease, is void, as an unreasonable restraint of trade,⁶⁶ but rent may be collected upon such a lease.⁶⁷ An illegal combination can not enjoin infringement upon its patents,⁶⁸ but it is no defense to a suit for injunction, that the complainant has formed a monopoly of all like patents.⁶⁹ And an assignment of patents to such a corporation formed to control patents in a certain business, can not be revoked for breach of contract. Any such combination to lessen production, suppress competition, limit demand, or control prices, is contrary to public policy, and void.⁷⁰ So, also, held in the Sugar Trust, formed as a monopoly to raise the price of sugar; whose charter was forfeited. The company's property was afterwards transferred to a company organized in New Jersey.⁷¹

§ 942. **Trusts formed by consolidation of corporations. Corporations require express authority to consolidate.**—Trusts in their original form, have largely disappeared since the courts have established the doctrine that unions are unlawful between corporations, or other associations entered into to secure monopoly by destruction of competition; and since so many of the States have enacted anti-trust laws. That original form gave way to the plan of forming "trusts" by means of consolidation of corporations. Whereas, under the management of trustees, the trust was declared an outlaw, without protection by legislation, with no responsibility to its members, the consolidated company, on the other hand, is created under the law, and its directors and agents are responsible thereto. Thus are organized many companies, into one corporation with unlimited capital and interests, as broad and expansive as the continent.⁷²

(1899), 92 Fed. 479; Chesapeake, etc. Co. v. United States (1902), 115 Fed. 610.

⁶⁵ American Steel, etc. Co. v. Wire, etc. Unions (1898), 90 Fed. 608.

⁶⁶ Central, etc. Co. v. Pullman P. Co. (1891), 139 U. S. 24; Oliver v. Gilmore (1892), 52 Fed. 562.

⁶⁷ United States Chemical Co. v. Provident, etc. Co. (1894), 64 Fed. 946.

⁶⁸ National, etc. Co. v. Quick, 67 Fed. 130 (1895).

⁶⁹ National, etc. Co. v. Hench, 83 Fed. 36 (1897), 84 Fed. 226 (1898); Otis Elevator Co. v. Geiger (1901), 107 Fed. 131; Strait v. National Harrow Co. (1902), 51 Fed. 819.

⁷⁰ Bracher v. Hat Sweat, etc. Co. (1892), 49 Fed. 921.

⁷¹ People v. North River, etc. Co. (1890), 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843.

⁷² *Vide infra*, § 1265, CONSOLIDATION; *Vide* "POOLS," *infra*, § 946.

Corporations require express authority to consolidate.—Corporations, of whatever class, tending to stifle competition and create a monopoly in any branch of business, can in no way combine their properties and interests, except by means of regular consolidation under express legislative authority.⁷³ It was so held in the "Sugar Trust," and that it was immaterial how the improper combination was effected, whether by the formal corporate action of the several corporations, or by action of all the stockholders. There can be "no partnership of separate and independent corporations, whether directly, or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permission and restraints; . . . manufacturing corporations must be, and remain, several, as they were created, or one, under the statute."⁷⁴ In the "Standard Oil Trust" the same principles were decided, that, "an agreement by which all, or a majority, of the stockholders of a corporation, transfer their stock to certain trustees, in consideration of the agreement of the stockholders of other companies, and of members of limited partnerships, engaged in the same business, to do likewise; and by which all are to receive in lieu of their stocks and interests, so transferred, trust certificates to be issued by the trustees, equal at par to the value of their stocks and interests; and by which the trustees are empowered as apparent owners of the stock to elect directors of the several companies, and thereby control their affairs in the interests of the trust so created; and are to receive all dividends made by the several companies and limited partnerships, from which, as a common fund, dividends are to be made by the trustees to the holders of the trust certificates,—tends to the creation of a monopoly to control production as well as prices, and is against public policy."⁷⁵

§ 943. Acquiring stock in another corporation for purpose of monopoly.—The rule that one corporation may not acquire the shares of another, applies where the purpose is to control the business of the other in a way to remove competition. Such a purchase is *ultra vires*, and contrary to public policy. An insolvent construction company contracted to build a railway for a corporation, and received nearly all of the latter's stocks, bonds, and

⁷³ *Bailey v. Master Plumbers*, 103 Tenn. 99; *State ex rel. Firemen's Fund Ins. Co.*, 152 Mo. 1.

Co. (1890), 121 N. Y. 582, 18 Am. St. Rep. 843.

⁷⁴ *People v. North River, etc.*

⁷⁵ *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892).

assets as security for its outlay. Without beginning the work, the persons in control of the construction company transferred all the stock to the persons managing another railway already in operation, among whom were the president and many of its directors. The funds of the latter corporation were used in purchasing the stock of the construction company, and in this manner the said stock, and the stock and assets of the projected road, were controlled by the same management as the road then in operation. The latter began at the same point, and ran for nearly the same distance, and in the same general direction, as the projected line, which would be, when completed, a competing line. It was held that the evident purpose and effect of the transaction was to violate by indirection the constitution, rendering the purchase of the stock of one corporation by another, and any contract between them tending to lessen competition in their respective business or to encourage monopoly, illegal and void.⁷⁶ And equity will enjoin the carrying out of such an agreement, and will seize the assets of the insolvent construction company at the instance of persons who have lent money to its president and sole manager to use in building the road, on the faith of his pledge of a share of the profits derived from the work, the company occupying as to them the relationship of derelict trustees.⁷⁷ Where one corporation, having authority to acquire stock in another becomes the holder of shares, it has the same rights as any natural person to receive dividends, and is subject to like liabilities as any other stockholder, on account of the corporate debts.⁷⁸ While stock purchased without authority is held, dividends may be collected, but the company holding the stock has no right to vote upon it. An attempt so to vote will be enjoined at the instance of stockholders of the company whose stock is so held.⁷⁹ But, although a company's charter prohibits its purchasing stock in other companies, it can not, after the stock has been delivered, and as against an innocent holder for value, defend a suit on a note by showing it to have been given for the purchase of stock of another corporation.⁸⁰

⁷⁶ *Langdon v. Branch*, 37 Fed. Rep. 449; Const. Ga., art. 4, § 2, par. 4.

⁷⁷ *Langdon v. Branch*, 37 Fed. Rep. 449.

⁷⁸ *In re Asiatic Banking Corp.*, 4 Ch. App. 252.

⁷⁹ *Milbank v. New York, Lake Erie, etc. R. Co.*, 64 How. Pr. 20.

⁸⁰ *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701.

§ 944. **Right of one corporation to subscribe for stock in another.**—It is contrary to the policy of the common law, however,⁸¹ and to the spirit of modern legislation, that one corporation should participate in the management of another, except under restrictions which are deemed necessary to protect the public from dangers said to be incident to harmonious relations between persons controlling large aggregations of capital.⁸² Accordingly, a corporation can not become a stockholder in another corporation, unless that power be given it by its charter or be necessarily implied therein.⁸³ The corporation itself may not subscribe for its own stock;⁸⁴ either in its own name or in the name of others as agents or trustees for the corporation.⁸⁵ In such case, the trustee will be personally liable to corporate creditors.⁸⁶ And a corporation may not subscribe for stock in any other corporation without express authority of statute to do so, unless it be necessary, in pursuance of the purposes of its creation, for example: subscription by a construction company may be made for the stock of the railroad it is building.⁸⁷ But a bank may not subscribe for stock in a railroad corporation,⁸⁸ nor can one rail-

⁸¹ *Vide supra*, § 855.

⁸² Thus, under the recent codification of the law of corporations by the legislature of New York, it is enacted; "No corporation shall use any of its funds in the purchase of any stock of its own or any other corporation unless the same shall have been *bona fide* pledged, hypothecated or transferred to it, by way of security for, or in satisfaction or part satisfaction of a debt previously contracted in the course of its business, or shall be purchased by it at sale upon judgments, orders or decrees which shall be obtained for such debts, or in prosecution thereof. N. Y. Laws of 1890, ch. 564, § 40. "But, any domestic corporation transacting business in this state and also in other states or foreign countries, may invest its funds in the stocks, bonds or securities of other corporations, owning lands in this state or such states, if dividends have been paid on such stocks continuously for three years immediately before such loans are

made, or if the interest on such bonds or securities is not in default; and such stock, bonds or securities shall be continuously of a market value twenty per cent. greater than the amount loaned (sic.) or continued (sic.) thereon." N. Y. Laws of 1890, ch. 564, § 40.

⁸³ *Pearson v. Concord R. Co.* (1883), 62 N. H. 537, 13 Am. St. Rep. 590, citing *Franklin County v. Lewiston Bank*, 68 Me. 43, 28 Am. Rep. 9; *Mechanics', etc. Bank v. Meriden Agency Co.*, 24 Conn. 159; *Green's Brice's Ultra Vires*, 91; *Morawetz on Corporations*, § 229.

⁸⁴ *Preston v. Grand Collier, etc. Co.*, 11 Sim. 327.

⁸⁵ *Holladay v. Elliott*, 8 Oreg. 84; *Johnston v. Allis*, 71 Conn. 207.

⁸⁶ *Bircher v. Walther*, 163 Mo. 461.

⁸⁷ *Re Rochester, etc. Ry.*, 45 Hun, 126.

⁸⁸ *Nassau Bank v. Jones*, 95 N. Y. 115; *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122.

road company subscribe for shares in another.⁸⁹ Such a subscription is *ultra vires*, and not enforceable.⁹⁰ Especially is an acquisition of stock with a view to controlling or affecting the management of the other corporation, obnoxious to the spirit of the common and statutory law.⁹¹ Certain classes of corporations, such as those organized for religious and charitable and literary purposes, may legally invest their moneys in the stock of other corporations. The power, if not expressly mentioned in their charters, is necessarily implied, for the preservation of the funds with which institutions of that character are endowed, and to render their funds productive.⁹² So, an insurance company, or savings bank, may rightfully invest its capital or deposits in the stocks of railroad companies, banks, manufacturing companies and similar corporations. The power so to do is necessary to enable them to engage in the business for which they are organized, and, hence, is implied, if not expressly granted, in their charters.⁹³ On the other hand, manufacturing or railroad corporations, being incorporated for the purpose of manufacturing or transporting passengers and merchandise, investing their funds in that of other corporations is not in the line of their business.⁹⁴ Under extraordinary circumstances, it may become necessary for a national bank or a manufacturing or railway company to acquire stock in another corporation, as in satisfaction of a valid debt or by way of security, but with a view to its subsequent sale or conversion into money, so as to make good or redeem an anticipated loss.⁹⁵ This necessity is recognized in the New York

⁸⁹ Maunsell v. Midland, etc. Ry., 1 Hem. & M. 130.

⁹⁰ Logan v. Courtown, 13 Beav. 22.

⁹¹ Pearson v. Concord R. Co. (1883), 62 N. H. 537, 13 Am. St. Rep. 590, 603; Sumner v. Marcy, 3 Wood. & M. 105; Central R. Co. v. Collins, 40 Ga. 582; Hazelhurst v. Savannah, etc. R. Co., 43 Ga. 13; Great Northern Ry. Co. v. Eastern, etc. Ry. Co., 21 L. J. Ch. 837; Booth v. Robinson 55 Md. 419, 439. Dealing in stocks is not expressly prohibited in the act of congress providing for the organization of national banks (U. S. Rev. Stat. § 5136, subd. 7); but it is held that a prohibition is implied from failure to grant the power. First

National Bank v. National Ex. Bank, 92 U. S. 122, 128.

⁹² Smith, J., in Pearson v. Concord R. Co. (1883), 62 N. H. 537, 13 Am. St. Rep. 590, 603.

⁹³ Smith, J., in Pearson v. Concord R. Co. (1883), 62 N. H. 537, 13 Am. St. Rep. 590, 603, 604.

⁹⁴ Smith J., in Pearson v. Concord R. Co. (1883), 62 N. H. 537.

⁹⁵ First National Bank v. National Ex. Bank, 92 U. S. 128; Fleckner v. Bank of the United States, 8 Wheat. 351; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, where the court said there was no doubt the defendant company might have taken stock in an iron company in payment for its rolling-mill, if

statute cited above.⁹⁶ But a railway company "can no more make a permanent investment of funds in the stock of another road, than it can engage in general banking, manufacturing, or steam-boat business. It is neither incidental to the purpose of its incorporation nor necessary in the exercise of the powers conferred by its charter."⁹⁷ The purchase by a corporation of stock in another corporation will be enjoined at the instance of stockholders when it involves a misapplication of corporate funds, or is a mere speculation, or is induced by a vicious purpose.⁹⁸ But there is no rule to prevent a controlling stockholder in one corporation from purchasing a controlling interest in another.⁹⁹

§ 945. **Anti-trust statutes of States.**—Some of the States have enacted statutes or constitutional provisions, forbidding any contract to create a combination or monopoly for prevention of competition.¹ The State constitutional provision abolishing all monopoly features of any existing corporation in Louisiana, was held not to entirely annul the charter of a company incorporated with exclusive privilege of slaughtering cattle in the city of New Orleans.² The Illinois statute was held unconstitutional because it exempted combinations of farmers, and so denied the equal protection of the laws.³ In Tennessee, the statute was sustained,⁴ but the decision is inconsistent with that of the Illinois case, decided by the United States Supreme Court.⁵ Under constitutional and penal code prohibition of a combination, of a corporation by contract with another corporation or individual, "for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the

it had been taken with a view to selling again and not to hold it permanently.

⁹⁶ *Vide supra*, p. 841, n. 3.

⁹⁷ *Pearson v. Concord R. Co.* (1883), 62 N. H. 537, 13 Am. St. Rep. 590, 604. Neither can a railway company indirectly through its agents subscribe for the stock of another railway. *Pearson v. Concord R. Co.*, 62 N. H. 537, 13 Am. St. Rep. 590.

⁹⁸ *Pearson v. Concord R. Co.* (1883), 62 N. H. 547, 13 Am. St. Rep. 590, 605, citing *Pierce on Railroads*, 505.

⁹⁹ *Havemeyer v. Havemeyer*, 86 N. Y. 618, 45 N. Y. Super. Ct. Rep.

464, 43 N. Y. Super. Ct. Rep. 506; *O'Brien v. Breitenbach*, Hilt. 304.

¹ The New York Statute was construed in *Matter of Davies*, 168 N. Y. 89, and the Missouri statute in *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1; *State ex rel. Star Pub. Co. v. Ass'd Press*, 159 Mo. 410.

² *Putnam v. Ruch*, 54 Fed. 216, 56 Fed. 416.

³ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

⁴ *Astor v. Schlitz Brewing Co.*, 104 Tenn. 715.

⁵ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

people,"—a special intent or necessary tendency to accomplish the prohibited result of regulation of price or of production, must be shown; the nature of the combination being a question of fact to be determined by the court upon the evidence.⁶ The Wisconsin legislature in January, 1905, passed an act aimed at the railroads of the State, alleged to have been evading taxes. The act fixes six years, instead of two, as the limitation for recovery of penalties or forfeitures. And later, the same legislature passed a railroad rate bill providing for a commission of three members, to perform the duties theretofore performed by the traffic managers of railroads within the State; and to have power to change commodity rates, zone rates, group rates, or any other rate seeming to be unfair; with power also to fix switching charges, and compel delivery of cars upon spur tracks when the traffic demands such delivery.

§ 946. **Wrongful acts of shareholders; how far imputable to the corporation.**—It has been well argued that "trust" combinations are not, *per se*, corporate acts; that, neither in terms nor in form, are the deeds of trust executed by the companies as such, and that trusts, *qua* trusts, pure and simple, are *private affairs*, or agreements between the shareholders as individuals, for which the corporations are in nowise responsible.⁷ But, although it is well settled that the shareholders can bind the corporation only at a corporate meeting duly called and convened, and that all votes taken elsewhere and all separate consents whereby they assume to bind themselves in their corporate capacity or the company itself are invalid and void,⁸ a theory, somewhat novel in the law, has been advanced, that the acts in which the entire body of shareholders concur, are not distinguishable from corporate acts;⁹ and that the acts of all the shareholders are the acts of

⁶ McGinness v. Boston, etc. Co. (Mont. 1904), 75 Pac. 89.

⁷ See Brief of Messrs. Daly, Carter and Parsons for defendant in *People v. North River Sugar Refining Co.* (N. Y. Sup. Ct. 1889), 5 Ry. & Corp. L. J. 56, (1890), 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843.

⁸ *Commonwealth v. Cullen*, 13 Pa. St. 133; *Finley Shoe, etc. Co. v. Kurtz*, 34 Mich. 89; *Pierce v. New Orleans Building Co.*, 9 La. Ann. 397.

⁹ *People v. North River Refining Co.* (N. Y. Sup. Ct. 1889), 5 Ry. & Corp. L. J. 56, citing *People v. Kingston* 23, Wendell, 205, where Chief Justice Nelson, in a *quo warranto* proceeding, declared that "though the proceedings be against the corporate body, it is the acts or omissions of the individual corporators that is the subject of the judgment of the court." Mr. Morawetz says that "while a corporation may, from one point of view, be consid-

the corporation, and if unlawful, will work a forfeiture.¹⁰ When acting legitimately and within the corporate powers, a corporation and its stockholders are separate and distinct persons. In the making of contracts, taking, holding and conveying property, and in suing and being sued, the acts of the stockholders are not acts of the corporation. But otherwise, in attempt to form illegal or so-called "trust" combinations with other corporations. When such combination is made the ground for forfeiture of charter, such acts of the stockholders are held to be the acts of the corporation.¹¹ It is moreover urged that the trust deeds,

ered as an entity, without regard to the corporators who compose it, the fact remains self-evident that a corporation is not in reality a person or thing distinct from its constituent parts." *Morawetz on Corporations*, § 1; *People v. Assessors*, 1 Hill. 620.

¹⁰ *People v. North River Sugar Refining Co.* (N. Y. Sup. Ct. 1889), 5 Ry. & Corp. L. J. 56, where the court continued: "And this is entirely reasonable. For what is the corporation apart from the whole body of the members or stockholders, clothed with the statutory franchises? Merely a name. When the whole body of stockholders offend the law of the corporate being, the corporation offends. And who is punished by forfeiture or dissolution because of such offending? Not the mere corporate name, but the persons who have actually offended, and who have thereby forfeited the franchise which they possessed under the corporate name. The directors are but the agents of the corporation to manage its affairs and carry out the purpose and object of its formation. They are only authorized to do such things as are directly or impliedly directed or authorized by the charter." See also *Abbot v. American Hard Rubber Co.*, 37 Barb. 591, citing *Angell & Ames on Corporations*, § 280. But see *People v. North River Sugar Refining Co.* (1890), 121 N. Y. 582, 8 Ry. &

Corp. L. J. 22, where the theory enunciated in the court below was disavowed, *Finch, J.*, saying: "But that proof does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For if it has done nothing, if what has happened and all that has happened is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owner may; if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellants stand and which they submit to our examination."

¹¹ *People v. North River, etc. Co.*, 121 N. Y. 582; *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541; *People v. Chicago*

executed by the shareholders, generally provide for certain acts to be performed by the corporations, and that the companies, if they carry out these provisions, adopt and ratify the agreement of their shareholders, and thereby incur the same responsibility for the deed as if it had been originally a corporate act.¹²

Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319; Distillery, etc. Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200; State v. Nebraska Distilling Co., 29 Neb. 700.

¹² People v. North River Sugar Refining Co. (1890), 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, affirming (N. Y. Sup. Ct. 1889), 5 Ry. & Corp. L. J. 56, where the court said: "The defendant claims that unless authority to sign the trust deed, given by the directors of each corporation at a regular board meeting, is affirmatively proved, the acts complained of are not corporate acts. This contention ignores the fact proved in the case, that the corporate acts provided for by the deed have actually been performed by the corporations, and that the deed has in fact been put in execution. The proof shows that the deed was actually signed by the firms whose names appear to be appended thereto, and as to corporations by persons professing to represent them; that the firms were turned into corporations pursuant to the requirements of the deed; that the shares of capital stock of all the corporations (including the four that have since come in) were, with a single exception, transferred to the trust board; that the trust board has issued and distributed the trust certificates, and that a dividend of two and one-half per cent. has actually been declared and paid upon such certificates. Where did the trust board obtain the money with which to make that dividend? Necessarily from each corporation, under the provision that the profits arising from the business

of each corporation shall be paid over by it to the board hereby created. Such certainly is the fair implication from the fact of the receipt by the trust board of the necessary funds from the various corporations in connection with a deed purporting to be signed by their officers and containing this provision. Thus the corporations acted upon the deed and performed one of the most vital duties imposed upon them thereby. Further, it appears that all the capital stock of all the corporations was actually transferred to the trust board, not, as we have already seen, in severalty nor as tenants in common, but as joint tenants. That at once necessarily disqualified every director in every corporation, unless indeed a single share was reserved or transferred to each of such directors under the authority of the clause of the trust deed to which we have referred. If that was done, and as these directors have continued to perform their ordinary functions, we must assume that it was done, then the deed again became an executed contract, and the directors held their offices or continued to perform their duties by the force of its provisions. Still further, we find a strong implication that mortgages were placed upon the property of some of the corporations, by corporate act, pursuant to the provisions of the deed. . . . It really seems unnecessary to dwell further upon this subject. The accumulation of evidence points irresistibly to the complete practical identity of shareholders and corporations, and it is quite impossible to sever the

§ 947. **Examples of unlawful monopolies.**—"Where all, or a majority, of the stockholders comprising a corporation, do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them, over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* the corporation, against public policy, and if it was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and to prevent the abuse of corporate power, may be challenged as such by the State in a proceeding *quo warranto*."¹³ Whatever combination tends to create a monopoly or prevent competition between corporations and others, engaged in business of a public character,—is unlawful. It is against public policy, and unlawful to form a corporation for the purpose of controlling all the corporations engaged in the same kind of business; as held in the case of a corporation formed to purchase all the stock and control of the gas companies of Chicago;¹⁴ and in the case of the agreement of two Chicago gas companies to jointly control their respective gas mains, but not to sell gas within each other's districts.¹⁵ The monopoly sought, need not be confined to the necessities of life. The common law rule, against restraint of trade, extends to all articles of merchandise;¹⁶ and whether competition therein is destroyed or not;¹⁷ nor is it necessary that the monopoly shall be complete to make it unlawful; it is sufficient, if it really tends to that end, and to deprive the public of the advantages which flow from free competition; as, where a contract let by the Chicago Board of Education, with the condition that: "none but union labor shall be employed," on account of which the city was obliged to pay a higher price for the

acts of the persons solely interested in these corporations from that of the corporations themselves."

¹³ *State v. Standard Oil Co.* (1892), 49 Ohio St. 137, 34 Am. St. Rep. 541.

¹⁴ *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319. And see note to 8 L. R. A. 497.

¹⁵ *Chicago Gaslight Co. v. Peo-*

ple's Gas Light Co., 121 Ill. 530; *Portland Nat. Gas Co.*, 153 Ind. 483, 74 Am. St. Rep. 314.

¹⁶ *People v. Duke*, 44 N. Y. Supp. 336; *United States v. Addyston Pipe, etc. Co.*, 85 Fed. Rep. 286; *Roller Co. v. Cushman*, 143 Mass. 353; *Gloucester, etc. Co. v. Russia, etc. Co.*, 154 Mass. 92, 12 L. R. A. 563.

¹⁷ *United States v. Knight Co.*, 156 U. S. 1.

work,—the contract was held illegal.¹⁸ Where a corporation, in its by-laws, provided that its directors should fix price of milk to its stockholders, and they did so, and the price largely controlled the market price, the corporation was held to be a combination inimical to trade and commerce, and that the facts authorized judgment of forfeiture of the corporate charter.¹⁹ Under statutes forbidding monopolies, a corporation formed to control within a city, the prices of necessities of life or other commodities, as milk and coal, whether or not the prices were excessive, is for an illegal purpose, being contrary to public policy, which is to allow free competition.²⁰ And a manufacturing corporation formed to buy out all others, engaged in the same business, and by pooling them, prevent competition, and create a monopoly, in control of prices of a necessary article, is, because of its purposes, an illegal corporation. "Such a combination is illegal, and its purposes are violations of sound public policy. The common law forbids the organization of such combinations formed of numerous corporations and firms,—they are dangerous to the peace, and good order of society, and they arrogate to themselves the exercise of powers destructive of the rights of free competition in the markets of the country, and by their aggregate power and influence, imperil the free and pure administration of justice."²¹ And so it was held, and that the corporation had no rights recognizable in a court of equity, in the case of the "Biscuit Trust,"²² purposing

¹⁸ *Adams v. Brennan* (Ill.), 52 N. E. 614; *Holden v. Alton* (Ill.), 53 N. E. 556.

¹⁹ *People v. Milk Exchange* (1895), 145 N. Y. 267, 27 L. R. A. 437, 45 Am. St. Rep. 609.

²⁰ *People v. Milk Exchange* (1895), 145 N. Y. 267, 27 L. R. A. 437, 45 Am. St. Rep. 609; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221; *Judd v. Harrington* (1893), 139 N. Y. 105; *Harrow Co. v. Bement*, 31 N. Y. App. 290; *Ford v. Chicago Milk, etc. Assn.* (1895), 155 Ill. 166, 27 L. R. A. 298; *Distilling Co. v. People* (1895), 156 Ill. 448, 47 Am. St. Rep. 200; *Bishop v. American, etc. Co.* (1895), 157 Ill. 284, 48 Am. St. Rep. 318; *U. S. V. Co. v. Schlegel* (1894), 143 N. Y. 537; *U. S. V. Co. v. Foehrenbach* (1895), 148 N. Y. 58. The follow-

ing are decisions under the Texas anti-trust statute: *Brenham v. Water Co.*, 57 Tex. 542; *Edwards Co. v. Jennings*, 89 Tex. 618; *Tex. & Pac. Coal Co. v. Lawson*, 89 Tex. 394; *Insurance Co. v. State*, 86 Tex. 250; *Gates v. Hooper*, 90 Tex. 563; *Texas Brewery Co. v. Templeman*, 90 Tex. 277; *Fuqua v. Brewing Co.*, 90 Tex. 298; *Welch v. Phelps, etc. Co.*, 89 Tex. 653.

²¹ *Nat. etc. Co. v. Quick*, 67 Fed. 130; *Emery v. Candle Co.*, 47 Ohio St. 320; *Santa Clara Co. v. Hayes*, 76 Cal. 387, 9 Am. St. 211; *People v. Sheldon* (N. Y.), 34 N. E. 785. See *Review of Authorities in Atty.-General v. Central Ry. Co.*, 50 N. J. Eq. 52, 489, 24 Atl. 964, 25 Atl. 94.

²² *American, etc. Co. v. Klotz* (1891), 44 Fed. 721.

combination of all the leading bakeries, in a pool or trust. And so, held in the "Match Trust," where, to stop competition, large sums of money were expended in buying up the various plants, greatly in excess of their value,—these sums were called expenses, and were recouped by keeping up the prices of matches; and so held illegal, in case of a combination of all the harrow-teeth manufacturing factories.²³ It was held in the "Whiskey Trust" cases, that a corporation could not sell its entire property in furtherance of a monopoly. "The object of the 'trust' is clearly shown to have been illegal as destroying competition and creating a most offensive monopoly, not only limiting the product, but also, by dismantling as many distilleries as the 'trust' saw fit, absolutely preventing the manufacture, except in a few, controlled by the 'trust.'²⁴ In the 'Preserve Trust,' it was held that the corporation had no power to become a member of the trust, or to place its property in the hands of trustees with power to purchase and control other plants."²⁵ A beer "combine" to control and prevent competition in its sale, is not void at common law, although in restraint of trade,—beer not being a necessary of life, and its sale being closely restricted by public policy.²⁶ In consequence of the "Sugar Trust," "Standard Oil" and other like decisions, that trusts are illegal and can not effect corporate consolidation, resort was had to the scheme of the so-called "Securities Company" plan of a single corporation with enormous issues of stock and bonds, secured by the pledge of stocks of the operating corporations.²⁷ The charter of the Standard Oil Trust was forfeited in Ohio, and in like manner it organized anew in New Jersey.²⁸ A contract not to engage in manufacture of paper boxes in certain States for ten years is in restraint of trade, and illegal and void,²⁹ and so is a contract to purchase all the distilleries in the country.³⁰ An em-

²³ *Strait v. Nat. etc. Co.* (1891), 13 N. Y. Supp. 224, 21 N. Y. App. Div. 290 (1897).

²⁴ *American, etc. Co. v. Taylor, etc. Co.* (1891), 46 Fed. 152.

²⁵ *American, etc. Co. v. Taylor, etc. Co.* (1891), 46 Fed. 152.

²⁶ *Anheuser-Busch, etc. Co. v. Hacuk (Tex.)*, 27 S. W. 692. But see *Nester v. Brewing Co.* (Pa. Supp.), 29 Atl. 102.

²⁷ See *Yale Law Journal*, June, 1902, Paper by Edward B. Whitney, and *Taylor's Priv. Corp.*, § 309d.

²⁸ *State v. Standard Oil Co.* (1892), 49 Ohio St. 137.

²⁹ *Lanzit v. Sefton, etc. Co.* (1900), 184 Ill. 326, 75 Am. St. 171; *Western, etc. Assn. v. Starkey* (1890), 84 Mich. 76, 11 L. R. A. 503, 22 Am. St. Rep. 686; *Trenton v. Olyphant* (1898), 56 N. J. Eq. 680, 58 N. J. Eq. 507, 46 L. R. A. 255, 78 Am. St. Rep. 612; *National, etc. Co. v. Hobbs* (1895), 90 Hun, 288.

³⁰ *Distilling, etc. Co. v. People* (1895), 156 Ill. 448, 47 Am. St. Rep. 600.

ploye agreeing with an employer not to engage in similar business for a term cannot, as defense, set up that his employer is an illegal trust.³¹

An association of manufacturers of tiles, mantels and grates was formed between certain eastern manufacturers of tiles, etc., and certain dealers therein in San Francisco. The United States Supreme Court held that whereas the dealers agreed to purchase only of the manufacturers in the combine, and to sell unset tile to outsiders, only at a price fifty per cent. higher than they charged members, and that the manufacturers agreed to sell only to California dealers who were members of the combine—*held*, that this was a conspiracy in restraint of interstate commerce, contrary to the Sherman act of July, 1890.³²

§ 948. **The Standard Oil Trust.**—The first combination began in 1872 as a partnership, and then as a corporation organized under the laws of Ohio; its avowed purposes being the transportation and refining of coal oil. In January, 1882, it formed under the name of South Improvement Company, a giant combination of forty corporations to create a monopoly of the oil business, the Standard Oil Company having secured from the main trunk line railroads, leading into the oil district, contracts for transportation, which provided for a rebate on the oil it supplied, and a drawback of the same amount on all shipments of oil made by those outside of the combination. Proceedings begun in 1888, by the State, were followed in 1892 by decision of the supreme court declaring it to be an illegal corporation and forfeiting its charter.³³ Thereupon it became incorporated under the laws of New Jersey. The Northern Securities Company's case being decided by the United States Supreme Court, and having so many analogies to the Standard Company, suit was brought by George Rice, of Ohio, in the New Jersey chancery court, in July, 1904, for appointment of receiver for the company and for forfeiture of its charter; the bill charging that the Standard Oil Company of Ohio was declared illegal by the courts of that State, but that instead of dissolving as ordered, it has by subterfuge evaded

³¹ *Harrison v. Glucose, etc. Co.* (1902), 116 Fed. 304.

³² *Montague v. Lowry* (1904), 115 Fed. 27, 52 C. C. A. 621, affirming *Lowry v. Tile, etc. Assn.* (1902), 106 Fed. 27, which was an imposition of treble damages

under section 7 of the Anti-Trusts Act of 1890, rendering an illegal trust and its members liable in treble damages to a person injured thereby.

³³ *State v. Standard Oil Co.* (1902), 59 Ohio St. 137. *Supra*, § 934.

the Ohio decree and exists in New Jersey merely as a holding corporation for the original enterprise; that it exists in violation of the Anti-trust laws of the United States, and of the decisions of the courts of New Jersey; that the New Jersey Standard Oil Company was formed, and the capital stock of the Standard Oil Trust increased through a vote of its trustees from \$3,000,000 to \$10,000,000, and subsequently to \$110,000,000, themselves continuing in control, together with four additional trustees of their own selection; and that no other changes were made in turning the unlawful Standard Oil Trust into the Standard Oil Company of New Jersey, than the delivery of the assets by the trustees to a corporate entity, and a change of name in addition to a quartet of trustees. The suit is still pending.³⁴ The Standard Oil Company has ever been a mystery to the courts and its existence has never been successfully attacked. In a case in which a rival in the oil business having bought one of its trust certificates, as it seemed, with hostile intent, sought to compel a transfer thereof to him upon the books of the trustees, it was held that it was necessary for a purchaser of certificates of shares in the trust to show affirmatively that there had been a compliance on his part with the requirements of the association, and with the conditions recited in the certificates, before he could maintain an action against the trustees to compel a transfer upon their books of the shares held by him; and that equity will not compel a transfer to a rival in business, purchasing the certificates with hostile intent, but will leave the purchaser to his remedy at law.³⁵ On appeal, the court reversed the lower court, and compelled the trustees of the trust to transfer on their books the certificates; the court basing its decision on the similarity of trust certificates to stock certificates. The court also held that the fact that Rice had purchased the certificates for the very purpose of the suit, and was hostile to and a competitor of the trust, was immaterial.³⁶ At special term the supreme court held that the combination being illegal the courts will not aid any of the parties, and that so far as the law is concerned the trustees may appropriate the property to their own use and the holders of certificates will not be granted any relief.³⁷

³⁴ *Vide supra*, § 934, CRUSADES; PIPE LINES.

³⁵ *Rice v. Rockefeller* (1890), 56 Hun, 516, 9 N. Y. Supp. 866.

³⁶ *Rice v. Rockefeller* (1892), 134 N. Y. 174.

³⁷ *Rice v. Rockefeller* (1894), N. Y. Supr. Ct. Sp. T. N. Y. L. J., Apr. 26. See further as to the Standard Oil Trust, the following cited in "Bibliography of Commercial Trusts," by Wm. H. Win-

§ 949. **The Sugar Trust.**—The Sugar Trust is a combination of the sugar refineries of America, under the name of the Sugar Refineries Company. Those that were conducted by partnerships took corporate form for the purpose of entering into the combination. The shareholders surrendered their stock to trustees, and "trust certificates" were issued to the corporations in proportion to the value of their plants, which were redistributed among the former shareholders.³⁸ The trustees receive the pro-

ters, 7 Ry. & Corp. L. J. 236; Standard Oil Company—Camden (J. N.) 136 No. Amer. Rev. (1883), pp. 181-190; Dodd (S. C. T.), Pamphlet, New York, 1888 (46 pp.); Hudson (J. F.), Railways and the Republic (1886), pp. 67-106; Lloyd (H. D.), 47 Atlantic Mo. (1881), pp. 317-334; Welch (J. C.), 136 No. Amer. Rev. (1883), pp. 191-200; Trust Agreement, N Y. World, Feb. 28, 1888; N. Y. Senate Doc. No. 50 (1888), pp. 455-466; Brief History of — Its Methods and Influence, Pamphlet. New York, 1887 (23 pp.); Railway Discrimination in favor of, 1 Int. Commerce Com. Rep. (1888) 503, 1 Int. Com. Rep. (1888) 722; Report No. 3112, U. S. House of Representatives, 50th Congress, 1st Session, July 30, 1888, From the Committee on Manufactures in Relation to Trusts, Pamphlet, Washington, D. C., 1888, Part I, Sugar Trust (211 pp.), Part II, Standard Oil Trust (956 pp.).

³⁸ The literature of the Sugar Trust may be found in the following citations collected by Wm. H. Winters, in his "Bibliography of Commercial Trusts," 7 Ry. & Corp. L. J. 236: American Sugar Refining Co. Case, Cal.—7 Rail. & Corp. L. J. (1890) 83; Comm. 30 Cent. L. Jour. (1890), 114; Appointment of Receiver, Wallace, J., Decision, Feb. 17, 1890, Daily Alta Californian, Feb. 18, 1890; Case of the People v. North River Sugar Refining Co., Supreme Court, Circuit, Brief of Hon. Roger A. Pryor, Pamphlet, New York,

1888 (39 pp.); Reply of Hon. Roger A. Pryor, Pamphlet, New York, 1888, (9 pp.); Additional Brief for Plaintiff by the Attorney-General and Roger A. Pryor, Pamphlet, New York, 1889 (42 pp.); Brief for Appellant by John E. Parsons, Pamphlet, New York, 1889 (18 pp.); Brief for Defendant by Hon. Chas. P. Daly, Pamphlet, New York, 1889 (24 pp.); Argument for Defendants by James C. Carter, Pamphlet, New York, 1889 (62 pp.); Reprint of the same, Pamphlet (67 pp.); Opinion of Hon. Geo. C. Barrett, with briefs of Counsel, 22 Abb. N. C. (1889) 164; 19 N. Y. State Rep. 853; 16 N. Y. Civ. Proc. R. 1; 22 Amer. & Eng. Corp. Cas. 511; 5 Railw. & Corp. L. J. 56; 3 N. Y. Supp. 401; 2 Law, Rep. Ann. 33; Judge Barrett and the Newspapers, 5 Rail. & Corp. L. Jour. (1889) 53, 54; Supreme Court, General Term, Appellant's Brief, Pamphlet, 1889 (74 pp.); Respondents' Brief, Pamphlet, 1889 (74 pp.); Case on Appeal from Judgment, Pamphlet, 1889 (111 pp.); Opinion of Hon. Chas. Daniels, 7 N. Y. Supp. (1889), 406; 27 N. Y. State Rep. 282; 5 Law Rep. Ann. 386; 2 N. Y. Law Jour. 1505, 1508; 36 N. Y. Daily Reg. 726; Court of Appeals Decision, 1890; Sugar Trust Injunction, 23 Abb. N. C. (1889), 314; 2 N. Y. Law Jour. (1890), 2155; Commonwealth Refining Company Incorporation, Conn. Special Acts 1889, p. 1095; Effect of Judge O'Brien's Decision, N. Y. Herald, Feb. 16, 1890.

fits from every plant, and divide them, as dividends on the certificates, among the holders. Dividends have been declared and paid from profits paid in by the corporations. Though each corporation retained its directors, these have no power, and hold office at the pleasure of the trustees. For the benefit of the combination, and under authority of the deed, mortgages were placed on the property of some of the corporations. The purposes of the combination, as stated in the trust deed, are, *inter alia*, to furnish protection against unlawful combinations of labor; to protect against inducements to lower the standard of refined sugars; to promote the interests of the parties in all lawful and suitable ways. While the entire operations of all the corporations are practically controlled by the trustees, they themselves have no corporate existence; and the trust itself has never been attacked. Proceedings have been brought, however, against some of the companies entering into the combination, by the States of New York and California. The New York case was a suit by the People in the nature of *quo warranto*, seeking to forfeit the charter of the North River Sugar Refining Company, which under the direction of the trust board had closed its refinery and ceased operations. At special term of the Supreme Court, Judge Barrett delivered a learned opinion in which the authorities on the subject of monopoly were extensively reviewed, and decided that the defendant company in entering into the combination had exercised privileges not conferred upon it by law; and that the *ultra vires* act complained of, being injurious to the public, was, therefore, a proper ground of forfeiture.³⁹ The point was raised that the company itself, in its corporate capacity, had not entered into the combination, but only its shareholders in their individual capacity. The fact, however, that the trust deed provided for cer-

³⁹ *People v. North River Sugar Refining Co.* (N. Y. Sup. Ct. Special Term 1889), 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, 5 Ry. & Corp. L. J. 56. Quoting 2 Morawetz on Priv. Corporations, § 1024, the court said: "Mr. Morawetz states the rule with precision: 'A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter or by a general rule of law, and strictly every act

which the charter does not expressly or impliedly authorize, is unlawful; and if the doing of such act is an injury to the public, it may be sufficient ground of forfeiture.' The same rule is laid down in Kent, Taylor, Waterman, Kyd, Angell & Ames, and Green's Brice. 2 Kent. 312; Taylor, §§ 289, 457, 459; 2 Waterman, § 427; Kyd, §§ 479 *et seq.*; Angell & Ames, §§ 774, 775, 776; Green's Brice, 708, 709, 3 Ed. 787."

tain things to be done by the corporation and that these things had been done, constituted a ratification by the corporation of its shareholders' agreement and made the transaction properly a corporate act.⁴⁰ The case then went to the general term, where it was affirmed by the full court, Judge Daniel delivering an able opinion upon substantially the same lines as the decision at special term.⁴¹ But the New York Court of Appeals, while sustaining the judgment of forfeiture and affirming the lower court so far as to decide that it is unlawful for a corporation organized under the Manufacturing Act of 1848 to enter into a partnership agreement, amounting to a consolidation with other companies, otherwise than as provided by the statutes regulating consolidation,⁴² neither approved nor disapproved the *dicta* of the lower courts upon the collateral questions of monopoly, competition and restraint of trade.⁴³ For this court had formerly expressed a doubt as to whether competition is invariably a public benefaction and had said that it "may be carried on to such a degree as to become a general evil."⁴⁴ The California case, against the American Sugar Refining Company, a corporation of that State, which had entered into the same combination of refineries, was similar in many respects to the New York case. In this case also it was argued that the transaction could not be made the basis of an attack upon the corporate charter, because the stock transfer was not a corporate transaction, but was the independent act of the stockholders as individuals; that even if, as a result of the transfer, the "trust" did acquire the practical control of the corporate affairs, still that consequence was not one to be charged upon the corporation, which could act only through the agency provided by law—its constituted board of directors, duly assembled. But the court, while suggesting the identity of the shareholders and the corporation,⁴⁵ did not venture to base its judgment upon that ground, but

⁴⁰ *People v. North River Sugar Refining Co.* (N. Y. Sup. Ct. Special Term), 121 N. Y. 582; 5 Ry. & Corp. L. J. 56.

⁴¹ *People v. North River Sugar Refining Co.* (N. Y. Sup. Ct. Gen. Term 1889), 6 Ry. & Corp. L. J. 442, 7 N. Y. Supp. 406.

⁴² N. Y. Laws of 1867, ch. 960; N. Y. Laws of 1884, ch. 367.

⁴³ *People v. North River Sugar Refining Co.* (1890), 121 N. Y. 582, 8 Ry. & Corp. L. J. 22.

⁴⁴ *Leslie v. Lorillard*, 110 N. Y. 519.

⁴⁵ *People v. American Sugar Refining Co.* (Super. Ct. San Francisco, 1890), 7 Ry. & Corp. L. J. 83, where the court said: "In support of this position the case of *Gashwiler v. Willis*, 33 Cal. 12, is relied on. But, as I conceive, there is a very plain distinction between that case and the one in hand. The property with which the stockholders in that case at-

decided that the corporation in carrying out the agreement of its shareholders, did act in its corporate capacity and accordingly subjected itself to the penalty of forfeiture.⁴⁶

§ 950. **The Cotton-Seed Oil Trust.**—The Louisiana case against the American Cotton Oil Trust was brought in behalf of the State to enjoin it from conducting business in Louisiana, upon

tempted to deal was *not theirs*, but was that of *the corporation itself*, and the decision was put in the main, if not altogether, upon that fact—the learned judge who delivered the opinion observing as follows: 'The property in question (a quartz mine) was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not in their individual capacities owners of the property as tenants in common, joint tenants, co-partners or otherwise;' page 9. But the condition here is supposed to be precisely the reverse of that—the property with which the stockholders here undertook to deal was not the property of the corporation, but was their own. Of course the stock was the property of the stockholders who transferred it; but beyond that, the transfer of all the stock carried with it *the franchise*—which was theirs also—the individual collective right of the transferring stockholders to be 'a body politic and corporate,' Cal. Civ. Code, § 296—to have a corporate name—'American Sugar Refinery Company' (id.)—by that name to have power of succession, the capacity to sue in courts of justice and, in short, to have all the corporate powers and privileges accorded to stockholders by the law of corporate organization. Sec. 354. These together constitute the corporate franchise—granted by the state, not to the corporation (for it was not then *in esse*), but to 'the persons signing the articles and their associates and successors.' Sec. 296.

In other words, to the stockholders, then being or thereafter to be at any time during the existence of the corporation."

⁴⁶ *People v. American Sugar Refining Co.* (Super. Ct. San Francisco, 1890), 7 Ry. & Corp. L. J. 83, where the court said: "But whether, and under what circumstances, if under any, an act done by the body of the stockholders is a corporate act, becomes unimportant here because of another fact appearing in the record. I refer to the *scrip dividend* ordered by the board of directors of the defendant after the stock transfer to the Sugar Refineries Company had been made and by which certain undistributed profits—some \$250,000 in amount—were, notwithstanding the stock transfer, divided among the *ex-stockholders*. The transfer of the shares, unless modified by a collateral agreement, would, of course, operate as an assignment of these profits to the company. Such an agreement—one by which the transferring stockholders, notwithstanding they had parted with their stock, became the beneficial recipient of these profits—was made between them and the Sugar Refineries Company. This agreement between the stockholders and Mr. Searles concerning the disposition to be afterwards made of the undistributed profits was but executory in character; to carry it into execution required official corporate action—the favorable action of the board of directors duly assembled. And this was had."

the ground that it was an illegal association. This was the first attack aimed directly against any of the modern combinations known as trusts, and was decided under the Roman Civil Law rule against joint-stock associations which still prevails in Louisiana,⁴⁷ the court saying: "The facts charged against the oil trust are acts that can be done only by a corporation; they cannot legally be done by a partnership or by an unincorporated joint-stock company; they are not acts to be done by trustees. If an association of persons is acting as a corporation without being incorporated, they may be enjoined from so acting and from placing their stock on the market."⁴⁸ In 1884, a contract was entered into between

⁴⁷ *Vide supra*, § 939; *State v. Am. Cotton Oil Trust* (1888), 1 Ry. & C. L. J. 509, *aff'd*, 40 La. Ann. 8, 3 So. 409. The petition alleged "that the defendant association was formed about two years since in the city of New York, with a president, two vice-presidents, secretary and treasurer; that the agreement under which the said concern was organized, together with its by-laws, is kept a profound secret; that the trust is a gigantic monopoly formed for the purpose of acquiring and controlling the various cotton seed oil mills existing and operating in the different states of the south, for the purpose of depreciating the value and price of cotton seed and increasing the price of the products thereof formed by process of manufacture; that the trust has within the past year acquired a majority of the stock in the several corporations organized and operating in this state, under the laws thereof, for the purpose of purchasing cotton seed, and manufacturing therefrom cotton seed oil, soap, oil-cake, and other articles of commerce; that the trust acquired the majority of the stock in said corporations by exchanging certificates of stock in said corporations at a premium and advance thereon, and have elected directors and are controlling and operating said cot-

ton oil-mills, the property of said corporations, solely for the interest and benefit of said illegal association; that in making said exchanges the said trust illegally fabricated, manufactured and issued certificates purporting to represent shares in the equity of the property held by the trustees of the American Oil Trust; that the trust monopoly has succeeded in reducing cotton seed from fourteen dollars per ton to eight dollars per ton, and increasing seed products more than fifty per cent. in price; that the trust has closed two mills in this state; that the trust, although a foreign association, carries on business in this state without having any place of business therein, or any known agent upon whom process may be served; that the trust has obtained no license or permit, has paid no taxes either to the state or city government, and is without right to carry on business in this state; that Glenny & Violett are engaged in selling and dealing in so-called shares issued by the trust; that the said American Oil Trust has never been incorporated under the laws of this state, or any other state or country."

⁴⁸ *State v. American Cotton Oil Trust*, 1 Ry. & Corp. L. J. 509, *affirmed* 40 La. Ann. 8, 3 So. 409 (1888). *Cf.* "Unregistered Companies," 17 Irish L. T. 381; "As-

four corporations engaged in manufacturing cotton-seed oil at Memphis, for the formation of what is designated in the agreement as a "combination syndicate" and "partnership." The contracting mills agreed to select a committee, composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each mill, to be managed and operated by this committee, through officers, agents and employes selected by them, for the common benefit, the profits and losses of the corporations to be shared in proportions agreed upon. This arrangement was to last one year, but, with consent of all, might be renewed for two additional years, and, as appears, was at end of first year renewed for two other years. The possession of the several mills was turned over to this executive committee, and they were operated by these managers thenceforward under the name of the 'Independent Cotton Seed Association.' There was a provision in the contract by which other mills were to be admitted by consent, and a fifth corporation was in fact subsequently admitted. The Hanaur Oil Works was one of these contracting corporations, the contract being authorized by both shareholders and directors. In 1886, the business of the second year having been about concluded, the board of directors of the Hanaur Oil Works passed a resolution declaring this contract void, as being an agreement *ultra vires*, and their president was instructed to take possession of the mill. It was ultimately found necessary to bring suit for unlawful detainer in order to recover possession of the property; and the court held that the contract as to the remainder of the term was unexecuted and could be repudiated as *ultra vires*.⁴⁹ The decision was based solely upon the ground of *ultra vires*. "We have not deemed it necessary," said the court,

sociations, Legal & Illegal," 19 Irish L. T. 335.

⁴⁹ *Mallory v. Hanaur Oil Works* (1888), 86 Tenn. 598, 8 S. W. 396, 4 Ry. & Corp. L. J. 202, where the court said: "It is, however, argued by the learned counsel for appellants that if it be a partnership, that it does not, therefore, follow that it is *ultra vires*; that such a contract, not being prohibited by law, or the charter of the defendant in error, or against public policy, is not void, even if in excess of power expressly con-

ferred; that the business proposed by the contract, being within the purpose of the charter, is, therefore, within the implied powers of the corporation, and not *ultra vires*. In other words, 'that the question is not whether the corporation had, by virtue of the act of incorporation, authority to make the contract, but whether they are by those statutes forbidden to do it.' In this doctrine we do not concur. *There is, however, respectable authority for the position.*"

"to consider the question of the legality of such a combination of corporations as one tending to create a monopoly, for the ground upon which we place the case needs no additional prop. The question of the validity of such an arrangement is a very grave one, but need not now be considered."⁵⁰

§ 951. **The Diamond Match Trust.**—A corporation known as the "Diamond Match Company" was organized under articles of incorporation which stated that its business was to manufacture, buy, sell and deal in friction matches, and all articles entering into the composition and manufacture thereof, and also in machines and machinery, whether applicable to the manufacture of friction matches, or to other purposes, and to purchase, own, and sell exclusive rights under letters patent relating to the manufacture of friction matches, and to machines and machinery applicable thereto, or to other purposes, and to buy, sell, own and deal in any real or personal property necessary or convenient to the prosecution of said business. It appeared that the object of the corporation was to buy up the property of all individuals or corporations engaged in the manufacture of friction matches, exacting from the manufacturer, in every case of transfer, a bond, that he would not for a term of years engage in, or aid anyone else in, the manufacture of matches in any place where his action might conflict with the interests, or diminish the sales, or lessen the profits, of the Diamond Match Company. Suit was brought in Michigan to restrain the defendants from disposing of certain stock in the match company held by them as security for a loan to the complainant to enable him to purchase it; and the circuit court granted the injunction; but on appeal the purposes of the company were declared to be unlawful and any contract made to further them to be void as against public policy and such as the court would neither enforce while executory nor relieve against when executed,⁵¹ although it was shown that the enterprise had in fact re-

⁵⁰ *Mallory v. Hanaur Oil Works* (1888), 86 Tenn. 598, 8 S. W. 396, 4 Ry. & Corp. L. J. 202.

⁵¹ *Richardson v. Buhl* (1889), 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102, 7 Ry. & Corp. L. J. 89. *Sherwood, C. J.*, in a lengthy decision citing no authorities, concludes: "All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise or any of the nec-

essaries of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts. In my judgment not only is the enterprise in which the Diamond Match Company is engaged an unlawful one, but the contract in question in this case, being made to further its objects and purposes, is void upon the ground that it is against public policy. The decree at the circuit should

duced the price of matches, the court assuming that the price had been lowered for the purpose of crushing competition.⁵²

§ 952. **The Chicago Gas Trust.**—The Chicago Gas Trust Company was organized under the general incorporation law of Illinois. The statement filed by the original incorporators with the Secretary of State sets forth that the Trust Company was formed for two objects, or for one object of a two-fold character, in brief, the erection and operation of works in Chicago and other places in Illinois, for the manufacture, sale and distribution of gas and electricity; and "to purchase and hold or sell the capital stock" of any gas or electric company or companies in Chicago or elsewhere in Illinois. In the first proceeding against it, no attack was made upon the validity of the organization of the Gas Trust Company as a corporation. That it was formed in strict conformity with the requirements of the general incorporation law,

be reversed, and the complainant's bill dismissed with costs."

⁵² Campbell, J., said: "It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful, and against public policy. *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 186; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346; *Hoffman v. Brooks*, 11 Week. Cin. Law. Bul. 258; *Hannah v. Fife*, 27 Mich. 172; *Alger v. Thacher*, 19 Pick. 51. It is also well settled that if a contract be void as against public policy, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. *Foote v. Emerson*, 10 Vt. 344; and see *Hanson v. Power*, 8 Dana, 91; *Pratt v. Adams*, 7 Paige, 616; *Pratt v. Oliver*, 1 McLean, 300, 2 McLean, 277; *Stanton v. Allen*, 5 Denio, 434. It is

not necessary that the parties, or either of them, should rely upon the fact that the contract is one which it is against the policy of the law to enforce. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves. Campbell, J., concurring with Chaplin, J. Long, J.: "I concur in the result reached by Mr. Justice Sherwood in this case. I am not, however, entirely satisfied with many of the reasons he gives for his conclusions. Whether the organization of the Diamond Match Company is one against public policy I do not propose to discuss. Defendants are not members of the company, nor have they ever been. They claim the right to sell and dispose of this stock so held by them as security, and to realize therefrom the amount then due under the contract. By the terms of the contract they have the right to pursue this course. By the decree of the court below they were restrained from making this sale, I agree with Mr. Justice Sherwood that the decree of the court below be dismissed, with costs." Morse, J., did not sit.

was not denied by the State. Nor did the State question the right to acquire and operate works for the manufacture and sale of gas and electricity in pursuance of the object designated in the first clause above mentioned. The controversy presented by the record related solely to its authority to purchase and hold the capital stock of other gas companies. The information charged that by so purchasing and holding a majority of the shares of the capital stock of other companies, the appellee usurped and exercised "powers, liberties, privileges and franchises not conferred by law." The appellee pleaded in justification, that the power so to purchase and hold the stock is granted by the terms of its charter, and the decision was based upon the technical rule of *ultra vires*; and whatever else may be said as *dicta*, the case is authority simply for the proposition that a corporation created under the general act of Illinois has no power to purchase the stock of other corporations created under the same law for the purpose of carrying on the same business. A corporation formed for the purpose of selling and manufacturing gas has no power to buy shares of stock in other gas companies, and although the enabling statutes authorize incorporation for "any lawful purpose,"—where the "purpose of incorporation is to buy out the stock of four competing gas corporations in a city, with purpose to create a monopoly, this is not a lawful purpose and will be ground for forfeiture of the charter. The word 'unlawful' as applied to corporations is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which are *ultra vires*."⁵³ An agreement of two gas companies not to do business, each in the other's territory, is in restraint of trade, and is an unlawful agreement, a gas company being a public service corporation.^{53a}

§ 953. **The Cattle Trust.**—In a case which involved the validity of the trust certificates of the American Cattle Trust, the court declined to pass upon the question whether or not the object of the association was to form such a combination against the freedom of trade and competition as is contrary to public policy.⁵⁴ And in declining to grant the injunction prayed for, the court

⁵³ *People v. Chicago G. T. Co.* (1889), 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, affirmed by the U. S. Supreme Court Feb., 1905.

^{53a} *Chicago G. L. Co. v. People's G. L. Co.*, 121 Ill. 530.

⁵⁴ *Gould v. Head* (1890), 38 Fed.

Rep. 886, 7 Ry. & Corp. L. J. 402, where Phillips, J., in the outset says: "I do not feel called upon, in the determination of the questions raised by the exceptions, to pass upon the question whether or not the real object and inspiration of the American Cattle Trust

quoting from the Louisiana Cotton Oil Case said: "If, as alleged, these certificates have been taken as a price in exchange for ten million dollars of property transferred to the trust, then, whatever be their validity and effect as shares of stock, whether or not they confer on the holders the privileges of corporate stockholders, or whether or not they confer the right to participate in the carrying on of any illegal business, yet they undoubtedly do represent an interest in the property referred to, and as such have a legal and real value; and we can not understand how such property rights can be placed *hors de commerce* by an injunction."⁵⁵ On a previous hearing, however, the court had decided that a mercantile corporation can not, by an arrangement with other corporations, place its stock in the hands of trustees with power to manage the affairs of all the companies as one, for the purpose of increasing its profits, thus substituting the trustees as the governing body of the corporation instead of its officers, as such an act is inconsistent with the purposes of its creation.⁵⁶ It was afterwards held, in this case that equity will not compel a corporation to register a transfer of stock where the purpose is to get control of the corporation to wreck it.⁵⁷

§ 954. **The Alcohol Trust.**—The Alcohol Trust was a combination of distillers for the purpose of preventing danger of ruinous competition and overproduction, not only by limiting the production of the distilleries in operation but also by closing up those that could not be profitably conducted. The Nebraska Distilling Company had conveyed its property to the trustees; but the Supreme Court of Nebraska held that the purpose being contrary to public policy, the conveyance was *ultra vires* and passed no title to the property.⁵⁸ The caution with which the courts in these cases,

was to form such a combination against the freedom of trade and competition as to subject it to the disability of being contrary to public policy. The trust company, as such, is not before the court; and counsel for defendant declines to urge such objection against the character of the trust."

⁵⁵ Gould v. Head (1890), 38 Fed. Rep. 886, citing State v. American Cotton Oil Trust, 40 La. Ann. 8, 3 South. 409.

⁵⁶ Gould v. Head (1889), 38 Fed. Rep. 886.

⁵⁷ Gould v. Head (1890), 41 Fed. 240.

⁵⁸ Any contract entered into with such an object in view is, under the laws of the state, null and void; and the conveyance from the distilling company to the trust was in contravention of the authority conferred by statute on that company, in excess of the powers granted by its charter, and against public policy, and no title passed by such conveyance. State v. Nebraska Distilling Co. (1890), 29 Neb. 700, 46 N. W. 155, 8 Ry. & Corp. L. J. 323.

(although inveighing against the evils of monopoly), fall back upon the technical of *ultra vires*,—is significant.⁵⁹

§ 955. Power of Congress over trusts. Anti-trust Act of July 2, 1890. Interstate commerce law. Combinations which are not in violation of the statute.—The constitutional power of Congress to restrain illegal trade conspiracies and mono-

⁵⁹ Thus, in *State v. Nebraska Distilling Co.* (1890), 29 Neb. 700, 46 N. W. 755, 8 Ry. & Corp. L. J. 323, it is said the acts of a corporation to be unlawful need not necessarily be *mala prohibita* or *mala in se*, although such acts are illegal in all cases; but any act of a corporation which, by the terms of its charter, it is not authorized to do, is in excess of its powers, and therefore unlawful. In this case, quoting the Supreme Court of the United States, the court said, in speaking of the proper construction of articles of association of corporations organized under general laws: "We have to consider, when such articles become the subject of construction, that they are, in a sense, *ex parte*. Their formation and execution—what shall be put into them as well as what shall be left out—do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become corporators, and stimulated by their zeal for the personal advantage of the parties concerned, rather than the general good. . . . These articles, which necessarily assume by the sole action of the corporators enormous powers, many of which have been heretofore considered of a public character, sometimes affecting the interests of the public very largely and very seriously, do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction. Where the question is whether they con-

form to the authority given by statute in regard to corporate organizations, it is always to be determined upon just construction of the powers granted therein, with a due regard for all the other laws of the state upon that subject. . . . The manner in which these powers shall be exercised and their subjection to the restraint of the general laws of the state and its general principles of public policy, are not in any sense enlarged by inserting in the articles of association the authority to depart therefrom.' This, we think, is a correct construction of the law relating to such articles, and we adopt the same." *State v. Nebraska Distilling Co.* (Neb. 1890), 8 Ry. & Corp. L. J. 323, where the court also said: "Alcohol is an article of commerce. It is applied to a thousand uses in arts and manufactures. The amount which is rectified and used as intoxicating drinks forms but a very small part of the quantity actually distilled. And being an article of commerce, any contract creating a monopoly therein is against public policy, and void." Then recurring to the technical rule, the court continued: "A corporation can exercise no powers except such as are granted to it by the charter under which it exists. (*Thomas v. The Railroad*, 101 U. S. 71; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.) It is no part of the powers of the distilling company to sell all its property, real and personal, together with the franchises and powers necessary to properly carry on the business. (*Oregon*

polies, is extended only to the regulation and protection of trade and commerce between the States, or with foreign nations; and is held to apply to all such compacts or combinations, reasonable or unreasonable, which tend to injuriously affect interstate commerce. In the exercise of this power, Congress passed the act of July 2, 1890, known as the "Anti-Trust Law," "Sherman Law," or "Interstate Commerce Act." "To protect trade and commerce against unlawful restraints and monopolies," . . . "every contract, or combination, in the form of trust, or otherwise, or any conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal." It is further declared in the act that "every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." This was the first attempt by Congress to regulate interstate commerce, and protect it against combinations of corporations of the different States, or of other persons. For a while the law was practically nullified by decisions of federal courts, and it proved ineffective of its purpose, until, under late decisions of the United States Supreme Court, the Act has become, against illegal trusts and monopolies, the most powerful remedy. Every contract, combination or conspiracy, whose necessary effect is to restrict competition in commerce among the States is violative of that act. But such attempts to monopolize a part of commerce between the States which only incidentally or indirectly restrict such competition are not in violation of the statute. Where a manufacturing corporation, and its employes restricted the sales of its products to those who refrained from dealing in the commodities of its competitors, such restriction of its own trade, and refusal to sell to others, was held not to be in violation of that Act. The owner of goods may dictate the prices at which he will sell them,

Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1.) The fact that the corporation has authority to put and end to its existence by a vote of a majority of its stockholders, in which event it may proceed to settle up its affairs, dispose of its property and divide its capital

stock, and surrender its charter to the state, does not authorize it to terminate its existence by a sale and disposal of all its property and rights. Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1."

without liability to damage, suffered by his refusal to sell them to an applicant, at prices which would enable him to sell them at a profit.⁶⁰

§ 956. **Interstate commerce.**—Under the constitutional provision giving Congress power to "regulate commerce among the several states," etc., the word "commerce" embraces transportation of persons and tangible things, and the instruments of commerce, the railroad, telegraph and telephone.⁶¹ Commerce includes navigation; the leading case as to the power of Congress to regulate commerce is *Gibbons v. Ogden*,⁶² wherein it was held that the power as such was not possessed by the State in any degree. From that decision there has been no dissent. Commerce is king. The general welfare of the people is subordinate to the necessities and interests of traffic. Private contracts are subordinate to the commerce power. It extends to the restraint and regulation of private contracts in restraint of trade, and of unjust discrimination against persons or places, where the subject matter of the contract is interstate or foreign commerce, or commerce with the Indian tribes. As to pools and combinations for maintaining rates and prices, the question was settled by the two decisions in the Joint Traffic Cases.⁶³

Insurance.—The business of fire insurance was held not to fall within the intent of the "commerce" clause.⁶⁴

§ 957. **Legislation in aid of enforcement of the anti-trust, or interstate commerce law of July 2, 1890.**—The fifty-seventh Congress, in February 1903, passed four bills aimed directly at the trusts. These were the first anti-trust legislation of Congress, in nearly ten years.

The first of these provided for an appropriation of \$500,000, to defray expenses in prosecuting illegal combinations.

The second, was the act of February 14th, 1903. It was in the interest of "publicity." It created the Bureau of Corporations (in the Department of Commerce and Labor), with authority to secure systematic information regarding the organization and

⁶⁰ *Whitwell v. Continental Tobacco Co.* (1903), 125 Fed. 454, 64 L. R. A. 689.

⁶¹ *Leloup v. Mobile*, 127 U. S. 640.

⁶² *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

⁶³ *United States v. Joint Traffic*

Assn. (Oct. 24, 1898), 171 U. S. 505; *United States v. Trans-Missouri, etc. Assn.*, 166 U. S. 290; *Andrews' American Law*, p. 344; *et seq.*

⁶⁴ *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Hooper v. California*, 155 U. S. 648.

operation of corporations engaged in interstate commerce. The real beginning of the bureau's anti-trust work was, when Congress in 1904 ordered the bureau to start an investigation of the Beef and Cattle Trust, which was afterward enjoined, preliminary to prosecution. The full report of the commissioners was made to Congress in December, 1904.

The third, was the act of February 19, 1903, to enlarge the power of the interstate commerce commission in dealing with railroads and other common carriers that gave secret rebates on freight rates, which enabled powerful trusts to suppress and destroy competition. This was called the Elkins Act. It emasculated the Sherman Act by striking out its provision for punishment of violations, by imprisonment, leaving the penalty to be a maximum fine of \$20,000 upon the corporation for any such violation.

The fourth, was the act of February, 11, 1903, called the "Short-Cut." It provided for the removal of causes pending in the Circuit Courts, to a hearing before a bench of three judges and for carrying appeals from the Circuit Court directly to the Supreme Court. Neither the fifty-eighth nor the fifty-ninth Congress passed any anti-trust act; though the House, February, 9, 1905, by overwhelming vote, passed the Esch-Townsend rate-bill, to give the interstate commerce commission power to regulate the rates of common carriers of interstate commerce. The extra session of this Congress, it is not doubted, will pass the bill.

Application of these laws.—Among other applications, these acts are held to apply to railroads as common carriers, and to prohibit contracts between them, which are in restraint of interstate trade; whether or not the contracts are between competing lines, and are for purposes only of affecting rates and charges for transportation; and whether or not those rates are reasonable, if restraint of trade is the necessary effect of the purpose of such contract. "The language of the act of 1890," said the court in the Trans-Missouri Freight Association Case, "includes every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract, therefore, that is in restraint of trade or commerce, is, by the strict language of the act, prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purpose of thereby affecting traffic rates

for the transportation of persons and property."⁶⁵ But this act does not prohibit a monopoly in the manufacture of a commodity.⁶⁶ Nor does it apply to a combination among commission merchants dealing in live stock, the combination having only indirect influence on interstate commerce.⁶⁷

§ 957a. Federal incorporation or license, of interstate commerce corporations, proposed.—In December, 1904, in the president's message to Congress, and the report of the commissioner of the bureau of corporations, both recommend that all corporations doing an interstate business, shall require federal license. In short, that the right of corporations to engage in interstate commerce shall require federal license and be placed under federal control, and beyond the power of the State to tax. Under such regulation of interstate commerce by corporations, they would receive immediate and constant federal protection, and be supervised by federal laws, almost exclusively, as is now done in the case of national banks.

§ 957b. "Holding" corporations, organized to deal in the stock of other corporations.—The anti-trust act of Congress of 1890, as decided by the Supreme Court of the United States, does not apply to combinations formed to control the means of production, because production is not commerce, but the court decided that it prohibits combinations between independent railroad companies to maintain rates. And later the court held a combination to be within the prohibition of that act, if the combination had the power to regulate rates in interstate commerce; and that, whether or not it exercised the power, the combination is prohibited. The formation of the United States Steel corporation, involving over a billion of dollars, made it clear, in the light of these decisions, that, for the unity of control of great corporations, some new plan must be devised to supersede the old one of consolidation. The "trust," as originally formed, had been declared illegal, and partnership of corporations held contrary to the spirit and policy of the law, and consolidation of two or more corporations had proved inefficient for independent control

⁶⁵ *United States v. Trans-Missouri, etc. Assn.*, 166 U. S. 290 (four judges dissenting); *United States v. Joint Traffic Assn.* (1898), 171 U. S. 505; *Addyston, etc. Co. v. United States*, 175 U. S. 211. *Per contra*, see 19 U. S. App.

36, 53 Fed. 440; *United States v. Addyston, etc. Co.*, 85 Fed. 271.

⁶⁶ *United States v. Knight Co.*, 156 U. S. 1.

⁶⁷ *Hopkins v. United States* (1898), 171 U. S. 578.

of associated corporations. Accordingly, to circumvent the anti-trust act, as so interpreted by the Supreme Court, there was devised in 1901, the "holding" company, designed, not for any authorized business of its own, but to acquire and hold the stock of other corporations by mediation of a trustee, to accomplish by indirection purposes declared by the court to be unlawful, and contrary to public policy. The "holding" corporation, so devised, was for the control, by a few persons, of all foreign and domestic commerce. The first exhibition of this new plan was in the formation of the Northern Securities Company, and its acquirement of the larger part of the capital stock of the Northern Pacific Railroad Company, and of the Great Northern Railroad Company.⁶⁸

A stockholding corporation is legal, where it does not violate a statutory, or the common law prohibition against the suppression of competition, by restraint of trade or otherwise.⁶⁹ Where the statutes authorize incorporation for any legal purpose, a company may be incorporated for dealing in the stock of corporations generally.⁷⁰ But where the purpose or effect of any such holding of the stock of other corporations is to prevent competition, the law will not allow one corporation to purchase the stock of another, as where two competing railroads consolidate,⁷¹ nor allow one such corporation to guaranty the bonds of another as consideration for the holding of the stock of the one corporation for the benefit of the shareholders of the other.⁷²

Dealing by way of mortgage.—In the form of deeds of trust, mortgages are often given by a "holding" corporation, and the certificates of stock deposited with the trustee, in order that the stock itself may be covered by the mortgage.⁷³ In such case the mortgagor is not prevented from mortgaging its property.⁷⁴

Competing manufacturing corporations.—It is illegal for trustees to hold a majority of the stock of a competing manufacturing corporation, with the purpose and effect of preventing competition.⁷⁵

⁶⁸ *Vide*, HOLDING CORPORATIONS, §§ 938-942, 1053.

⁶⁹ *Ellerman v. Chicago, etc. Co.* (1891), 49 N. J. Eq. 217.

⁷⁰ *Willoughby v. Chicago, etc. Co.* (1892), 50 N. J. Eq. 656.

⁷¹ *Penn. R. R. v. Commonwealth* (Pa. 1886), 7 Atl. 368.

⁷² *Pearsall v. Great Northern R. R.* (1896), 161 U. S. 671.

⁷³ *Toler v. East Tennessee, etc. R. R.* (1894), 67 Fed. 168.

⁷⁴ *Gasquet v. Fidelity, etc. Co.* (1896), 75 Fed. 343.

⁷⁵ *People v. North River, etc. Co.* (1890), 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843.

§ 957c. **The Northern Securities Company.**—The most important decision so far reached by the United States Supreme Court, under the anti-trust act of Congress of July 2, 1890, is that recently made in the *Northern Securities Company v. United States*.⁷⁶ The stockholders of the Great Northern Railway Company and the Northern Pacific Railway Company, the one incorporated in the State of Wisconsin, and the other in the State of Minnesota, having competing and parallel lines extending from Lake Superior to the Pacific Coast, and aggregating 10,000 miles in length,—formed a combination and devised the scheme of organizing a third company, a "holding" corporation, under the liberal laws of the State of New Jersey, for the purpose of holding the shares of stock of both the other companies, their stockholders to exchange their shares for others, to be issued by the holding corporation. For the execution of the scheme, the holding corporation was organized as the Northern Securities Company, with capital stock of \$400,000,000. It became the custodian of over nine-tenths of the stock of the Northern Pacific Railway Company, and more than three-fourths of the stock of the Great Northern Railway Company, their shareholders receiving in exchange shares of \$400,000,000 of stock in the holding corporation. This practically placed the control of both roads in the hands of a single company, and substituted one set of stockholders with common interest, for two sets of stockholders with rival interests. The State of Minnesota instituted suit against the company, on the ground that the purpose of its organization was contrary to the statutes of Minnesota, prohibiting the consolidation of parallel and competing lines of railroad. On appeal to the United States Supreme Court, it refused to assume jurisdiction, because all the necessary parties were not before the court.⁷⁷ Afterward action was brought by the United States in the United States Circuit Court at St. Paul, Minnesota, to enjoin the holding corporation from exercising any control over the other two companies, and to restrain them from submitting to such control. From the decree of the Circuit Court,⁷⁸ granting such injunction, appeal being taken to the United States Supreme Court, it:

Held, that necessarily the constituent companies, under the arrangement, ceased to be in active competition for trade and com-

⁷⁶ *Northern Securities Co. v. United States* (1904), 193 U. S. 197, affirming 120 Fed. 721 (1903).

⁷⁷ *Minnesota v. Northern Securities Co.* (1902), 184 U. S. 189.

⁷⁸ *United States v. Northern Securities Co.* (1903), 120 Fed. 720.

merce along their respective lines, and became, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination, under which competition between the constituent companies would cease.

Held, that the arrangement was an illegal combination, in restraint of interstate commerce, in violation of the Anti-trust act of July 2, 1890, and that it was within the power of the Circuit Court, after the completion of the transfer of such stock to the holding company, to enjoin it from voting the stock, and from exercising any control whatever over the acts and doings of the railroad companies, and also to enjoin them from paying any dividends to the holding corporation, on any of their stock held by it.

Held, that enforcement of the provisions of that act by a federal court, does not amount to an invasion, by the federal government, of the reserved rights of the States creating the several corporations. That the constitutional guaranty of liberty of contract is not infringed by the enforcement of the provisions of that act, and that Congress did not exceed its powers under the commerce clause of the Federal Courts in enacting that act.⁷⁹

The contention of the defendants was that there had been no intention on their part to interfere with trade between the States, but their purpose had been to establish a better trade between the east and the far west, and between this country and the orient. They showed that the merger had been followed by an increased trade with the orient and that reduced transportation rates had resulted, as proof of which it was asserted that flour was carried from the Mississippi valley to China, a distance of 8,000 miles, for 80 cents a barrel. It further was contended that the Securities Company was an investment company, not a transportation company, and therefore did not have power to suppress competition, even had it so desired. The court held that the contentions were irrelevant or untenable. Its decree, however, did not dissolve the Northern Securities Company, but enjoined it from voting the stock of the two roads or exercising any control over them. Immediately after the rendition of the decision, the directors announced their purpose of dissolving the company and to distribute among the stockholders on a *pro rata* basis the 1,181,242 shares

⁷⁹ Northern Securities Co. v. United States (1904), 193 U. S. 197, affirming 120 Fed. 721 (1903).

of Northern Pacific stock. Harriman and his associates applied to the United States Circuit Court for the northern district of New Jersey, for an injunction to prevent the carrying out of that plan so far as concerned the 712,320 shares of Northern Pacific stock, formerly held by them. They asked that the original shares be returned instead of their *pro rata* share in both companies. The court granted a preliminary injunction to preserve the then existing *status* of affairs pending the adjudication of the legal questions involved. From this injunction of the Circuit Court the Securities company took an appeal to the United States Court of Appeals for the third circuit, which reversed the judgment of the Circuit Court and dissolved the injunction. Harriman thereupon applied to the Supreme Court for a writ of *certiorari*. The Supreme Court issued the writ, and heard arguments in the case.

Final decree of the Supreme Court.—April 3, 1905, the United States Supreme Court announced its final^{*} decision: That the transfer of stock to the Northern Securities Company by Harriman and associates was not a deposit, but was an absolute and unconditional sale and purchase. They cannot reclaim the specific shares, but must be content with their ratable proportion of the corporate assets. The Northern Pacific System, in connection with the Burlington, is competitive with the Union Pacific System; and the decree, sought by the complainants, would not only be in itself inequitable, but would tend to smother that competition, and directly contravene the object of the Sherman law, and the purposes of the government suit in this case. The complainants seek the return of the property delivered to the Securities Company, on the ground of illegality of the contract, but no considerations of equity justice, or public policy, would justify this court in relaxing the rigor of the rule which bars a recovery.

§ 957d. "Community of interest." "Gentlemen's agreement."—After consideration of the decision in the Northern Securities Case, that scheme of a "holding" corporation was abandoned and the original "community of interest," or, "gentlemen's agreement" plan has been readopted by the syndicates,—to bring about the same results, if Congress will legalize railroad pools. The so-called "gentlemen's agreement" was originally adopted in 1888, when railroad competition was so strong that it was impossible to maintain paying rates, and rate wars were frequent. By this agreement capitalists pledged themselves to fur-

⁸⁰ Chesapeake, etc. Co. v. United States, 115 Fed. 610, affirming 105 Fed. 93.

nish no more capital to independent parties for the construction of new roads; and the railroad presidents agreed to discharge any official who should cut a rate. Then construction of new lines ceased. The readoption of the community of interest plan, has brought a notable and regrettable change in the method of government of the great corporations. Originally the boards of directors actually directed. Now they delegate their powers to small committees, and they turn over all control to one man, the chairman. The directors abdicate their functions and the one man power is supreme. It remains to be seen whether a remedy will be in requirement by Congress of federal license in the case of corporations engaged in interstate commerce, as is proposed,—a system of management that is similar to the management of national banks. Of unlawful combinations under "gentlemen's agreements," it has been well said that, "mutuality in the understanding may be secured without any express agreement and without a spoken or written word between the conspirators, or a meeting of the members of the combine, or their even knowing each other, or the precise thing to be accomplished, or the plans for its accomplishment, either in a general way or in detail, being distinctly stated by any member of the combine to any other member. If there is a meeting of minds, brought about in any way to accomplish a common purpose, the essentials of guilty combination are all satisfied." The "trusts" mainstays are the "gentlemen's agreement," and the holding corporation. The transferer of stock of competing railroad companies to a holding corporation, where such holding is held illegal can not, nor can his assignee, recover the stock in the railroad companies, on the ground of illegality in the transfer,⁸¹ he having been a conspirator in the transfer.

Injunction.—A "holding" corporation will be restrained from abusing its ownership of the majority of the stock of another corporation, by mismanagement of its affairs, to the end of paralyzing its powers in order to depreciate the value of the minority shares and buy up the remainder at an inadequate price.⁸² Such wrecking or freezing-out processes are among the fraudulent methods of the holding corporation to accomplish its purpose. A corporation to save itself loss, may acquire the stock of another corporation, as in the collection of a debt, or otherwise with intent to dispose of the stock within reasonable time; but it has no

⁸¹ Continental Securities, etc. Co. v. Northern Securities, etc. Co. (N. J. Eq. 1904), 57 Atl. 876. York, etc., 150 N. Y. 410, 34 L. R. A. 76, 55 Am. St. Rep. 689; George v. Central, etc. Co., 101 Ala. 607,

⁸² Farmers' L. & T. Co. v. New 14 South. 752.

authority to expend a part of its assets in the purchase in open market of the stock of another corporation, without express power conferred to do so. It can not acquire the stock of any other corporation for the purpose of controlling it.⁸³ But, where authority is expressly given in its charter, to purchase and hold stock of other corporations, such "holding" corporation enjoys the same privileges, and is subject to the same liabilities as a natural person holding stock. It may vote such stock at all meetings of stockholders.⁸⁴

§ 957e. Liability for damage resulting from unlawful combination. Any person who is a member of an unlawful combination or conspiracy in restraint of interstate trade or commerce, in violation of the Anti-trust act of Congress of 1902, is liable, under the 6th Section, as defendant for any resulting damage to the business or property of the plaintiff, regardless of any direct contract relations between plaintiff and defendant.⁸⁵ "Any person who shall be injured in his business or property by any other person by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court in the United States district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold damages by him sustained and the costs of the suit." Where a by-law of an association of granite manufacturers provided that a member dealing with any manufacturer not a member of the association should for each transaction contribute to the association from \$1 to \$500, and the business of a member was ruined by such fines of ten dollars to one hundred dollars imposed, the defendants were held liable, such means of coercion by fines being illegal, though the purpose of the association was competition, and not illegal.⁸⁶

§ 957f. The Chicago Beef and Cattle Trust.—The first trust prosecution by the federal government was in the spring of 1902, when in an action brought under the Sherman act of 1890, a temporary injunction was issued by Judge Grossup of the United States Circuit Court at Chicago against defendants, seven

⁸³ *De La Virgne Co. v. German, etc. Inst.*, 175 U. S. 40; *Rogers v. Nashville, etc. Ry. Co.*, 91 Fed. 299.

⁸⁴ *National Bank v. Cave*, 99 U. S. 628; *Davis v. United States, etc. Co.*, 77 Md. 35; *Rogers v. Nash-*

ville, etc., 91 Fed. 299; *Market, etc. Ry. Co. v. Hellman*, 109 Cal. 571.

⁸⁵ *People v. Chicago G. T. Co.*, 130 Ill. 268, 8 L. R. A. 497.

⁸⁶ *Oregon, etc. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.

named beef-packing companies. Defendant's demurrer was overruled by the court, and the injunction made permanent in February, 1903, restraining defendants from continuing their alleged conspiracy in restraint of trade,⁸⁷ and defendants appealed to the United States Supreme Court. The attorney-general of the United States, in his bill of complaint, among other things charged defendants with "having their purchasing agents refrain from bidding against each other, with bidding prices up temporarily to induce large shipments, and then ceasing to bid in order to obtain stock at low prices; with agreeing on prices at which the dressed meats shall be sold to the consumer; with conspiring with railroads for rebates, and other discriminations." It was alleged that the traffic in live stock transported from State to State constituted interstate commerce and that the packing combine was therefore in restraint of commerce between the States. "Persons owning live stock and living in other States and territories than those where the stockyards are situated were accustomed to send such stock to the various stockyards named for the purpose of sale there. The defendants, who were severally engaged in the business of buying such live stock, for the purpose of slaughtering and converting it into fresh meat, entered into an agreement with each other to refrain from bidding against each other, except colorably, in the purchase of such live stock, with the purpose and result of suppressing all competition in such purchases."

How packers control prices.—"Controlling 60 per cent of the fresh meat industry of the whole country, they sit down at their slaughtering and packing establishments and, with the aid of the telegraph, through the instrumentality of countless agents and attorneys spread throughout the country, clothing their transactions and sheltering their misconduct by ciphers and secret codes, lower or raise, and when thus lowered or raised fix and maintain absolutely, as among themselves, the price of every pound of one of the great necessities of life as it enters and follows the channels of interstate commerce. That the defendants are all engaged in the common effort to obtain unlawful rates, which they subsequently share or pool among themselves, and that their scheme contemplates not only the pooling of these unlawful rates, but the exclusion of all outside competitors from obtaining them."

Packers fix prices.—"That the defendants have combined and conspired arbitrarily to raise, lower, and fix prices of fresh meat

⁸⁷ United States v. Swift et al. (1903), U. S. Circuit Court.

and to keep them uniform as among themselves. That this conspiracy is rendered effective by periodical secret meetings throughout the country by the agents and attorneys of the defendants; that at such meetings uniform prices are agreed upon, and due notice is given of the prices so agreed upon, and that the defendants adhere to the prices thus fixed."

Trap for stock shippers.—That "in pursuance of conspiracy among themselves their agents bid up the price of live stock at certain selected times to an abnormal point, naturally inducing the shipment from other States of live stock to the points where the price is bid up in quantities much larger than under conditions. That then, taking advantage of this congestion of the markets, they refrain from bidding against each other in the purchase of live stock, with the result that the producers and owners of the stock are forced to sell at ruinous prices. Thus, the unlawful conspiracy to refrain from bidding against each other, being made doubly profitable, and the great profits which come from the transaction, in turn increasing the power of the combination, tends to fasten upon the people a monopoly. The conspiracy in this case is ancillary to the conspiracy to refrain from bidding and to the creation of the monopoly which this whole case discloses."

Curtail meat shipments.—That "for the purpose of aiding in the raising, lowering, fixing, and maintaining of uniform prices for fresh meat, the defendants collusively restrict and curtail shipments of meats to the various markets throughout the country. The word 'collusively,' fairly interpreted, means that they curtailed shipments by agreements with each other; that penalties are imposed against each other by defendants for all deviations from the prices fixed."

Rule for giving credits.—That "they will not allow themselves even to compete for the term of credit which may be given to their respective customers. That no purchaser may go from one to another of these defendants and obtain the advantage of a single day's delay in the shipment of his bill. That the same purpose is behind the agreement to make and impose uniform charges for cartage. The price of the meat being uniform, and the terms to credit uniform, even the rates of cartage are uniform."

Three points in argument.—United States Attorney General Moody, before the Supreme Courts, presented as his three points of argument, that the packers received unlawful rebates from the

railroads which enabled the former to build up a great monopoly; that they absolutely throttled competition in the matter of the purchase of beef on the hoof; that "they not only controlled the market for dressed beef and other products, but they declined to compete against each other in the markets of the country." As to the illegal acts charged to the packers, he cited that "they make and impose uniform prices for cartage, that the price of the meat is uniform, that the terms of credit are uniform, that to make railroad rates uniform they pool their rebates, and that they impose uniform penalties upon themselves for violating any of the terms of their agreements."

Anti-Competitive pact.—"An agreement having been thus clearly alleged, he said the question arose as to whether the agreement relates to interstate commerce and proceeded to argue that proposition, saying that the same sort of bargain is made for cattle produced and owned within the State of sale as for cattle produced and owned in another State and sent to the "locus" of the transaction for the purpose of sale there. The interstate character of the transaction, he said, where an owner of a commodity living in one State ships it to another, continues from the beginning of the shipment to and including the sale of the commodity, if it has not lost its identity by the breaking of the original package in which it had been imported." Quoting from opinion of the court, he said it was clearly established by the case in point that the "sale by the owner, or his agent, of commodities imported or to be imported from another State to the place of sale in the original package," is an act of interstate commerce and the owner, or his agent, taking part as vendor, is engaged in transacting interstate commerce."

Original package contention.—"It is contended that the unloading of the cattle from the cars in which they are transported and their disposition in the various pens in the stock yards constitute a breaking of the original package and a commingling of the property with the domestic property of the State, to such an extent that the purchase and sale of them are domestic commerce. It is difficult to treat this contention seriously. If the original package conception has any relevancy to this discussion, surely it must be that the packages which nature itself has made are the original packages. The two parties to the transaction, the buyer and the seller, when they agree upon the contract of sale, are effecting an interstate transaction. When all, or substantially all,

of the buyers in this interstate market enter into an agreement with respect to their conduct in making purchases, the agreement thus entered into relates to interstate commerce."

Interstate commerce.—"These defendants are engaged in interstate commerce. The petition shows a typical case of interstate commerce. If the business which they do, exclusive of manufacture, is not interstate commerce, there can be no such thing outside of transportation. They buy their raw material, which is gathered together from all the cattle raising States and territories of the union, and sent to the great live stock markets of the country. After they have transformed that material into the finished product, they sell it throughout the United States."

Combination aims at competition.—"The combination, which they have entered into, is designed to restrain all their business transactions, exclusive of manufacture, by the suppression of all competition therein, both in their purchases and their sales, by the fixing and maintaining of uniform prices for their product, and, so far as possible, uniform prices for their raw material; and by obtaining such unlawful advantages as tend to create a monopoly in a necessity of life. They can not be permitted ingeniously to separate the various steps of their undertaking and so deal with them that they can be regarded as intrastate transactions. It is not the less interstate commerce because the manufacturer in one State, instead of taking his product into another State for purposes of sale and there selling it, sees fit to transport it to a resident agent for the same purpose and with the same result." On January 30, 1905, the Supreme Court gave its unanimous decision. It sustained the injunction against the packers, granted by the lower court.⁸⁸ It held that traffic in live stock transported from State to State is interstate commerce, and persons engaged in buying and selling such live stock are engaged in interstate commerce. The combination between dealers to suppress all competition in the purchase of live stock is an unlawful restraint of trade. The combination between dealers to fix and maintain a uniform price in the sale of meat throughout the country is an unlawful restraint of trade. The combination of dealers to obtain preferential railroad rates is an unlawful restraint of trade. All combinations suppressing competition between independent dealers fall under the prohibition of the Sherman Anti-trust act. The court holds that while the various individual acts which the

⁸⁸ United States v. Swift et al., U. S. Sup. Ct., Jan., 1905.

packers performed in pursuance of their combination may not have been unlawful, these acts "were bound together as parts of a single plan" of which the purpose was unlawful. In the purchase, shipment and sale of cattle they were engaged in a transaction covering several States—"a current of commerce among the States," to quote the court. An agreement among them to restrain or control this current for the purpose of monopolizing commerce is thus necessarily an attempt to restrain interstate commerce. The combination may directly restrain commerce in a single State, "but its effect upon commerce among the States is not accident, secondary, remote or merely probable."

Prosecution. Indictments by the federal grand jury.—In March following this decision, and under orders from the President, the United States District Attorney of the Federal Circuit Court at Chicago, called the grand jury into session. It began investigation, continuing three months until July 1, 1905, resulting in return of indictments of five beef packing corporations, and twenty of their principal officials, charging unlawful conspiracy to increase the cost of meat to the consumer,—in violation of the anti-trust laws of Congress; also indictments of four representatives of another packing corporation for violation of the Federal laws prohibiting the acceptance of secret rebates from rates to the public.

These indictments charge conspiracy to restrain trade in cattle and beef and the by-products, and to monopolize illegally their purchase and sale. The different counts charge prevention of competition in the purchase of cattle, by requiring of the purchasing agents of the several companies, that they refrain from bidding against one another; and further charge prevention of competition in the sale of beef and its by-products, by agreements among defendant companies and officers, to fix prices, greatly in excess of those which would have prevailed in the market, but for the alleged conspiracy; and further charge agreements to restrict the quantities of beef, on sale,—whenever such restriction is necessary to maintain excessive prices; and further charge conspiracy of defendant corporations, and other packing companies, by transfer of their capital stock and property to the National Packing Company, by themselves incorporated, and by them as stockholders and officers controlled in a way to destroy the competition pre-existent among defendant corporations, and by these devices to monopolize trade in cattle and beef and by-products, with the result of restraining the free growth of commerce among the states and with foreign nations.

The indictments further charge incorporation by defendants of many subsidiary companies, to act illegally as agents of the said National Packing Company, in fixing excessive prices, and in destroying competition in the sale of lard, sausage and numerous other by-products of cattle and beef; and charge that by these many devices defendants unlawfully control and dictate the prices of the largest part of the meat supplied to the world.

§ 957g. **The Tobacco Trust.**—Representative Kehoe, of Kentucky, in introducing a resolution in the House of Representatives in January, 1905, requesting that the secretary of commerce and labor investigate the causes of the low price of leaf tobacco in the United States, said: "The conditions are identical with those in the oil country in Kansas and the far west. The trust absolutely controls the market for tobacco in the United States and Europe, and the sufferers are the original producers, even more than the consumers. The trust has driven men from business and ruined them financially, until now the farmers are receiving only one-half or one-third as much for their tobacco as they did before the trust was organized. Only a few years ago there were at least 100 tobacco warehouses in Louisville and Cincinnati which handled the crop from Ohio, Kentucky, and Tennessee. Since the trust came into existence and extended its operations, these warehouses have been shut up and their owners have been driven out of business. When the tobacco was sold by ordinary commission merchants the planters received from 15 to 20 cents a pound for it. Since the trust drove the commission men out of business, the farmers get only 5 or 6 cents a pound, although the cost of production is as great and the cost of the finished product made by the trust has been increased. This low rate for leaf tobacco scarcely pays for the cost of production and leaves nothing at all in the way of profits for the farmer. They can not earn interest on the value of their plantations and their livelihood is gone from them so far as tobacco is concerned. In order to protect themselves against the operations of the trust the farmers organized what they called the Burley Tobacco association. After the farmers organized, the officers of their association went to New York to get money. They received assurances that \$10,000,000 would be loaned on condition that the growers should raise \$500,000 themselves and secure control of at least 75 per cent of the Burley tobacco product. Representatives of the farmers came back to the plug tobacco section, raised \$500,000 and secured control of 80 per cent of the entire crop,

which in its unmanufactured state was worth about \$20,000,000. Meanwhile the trust had been exerting in New York its great financial influence in conducting its operations, exactly as the Standard Oil Company does. When representatives of the farmers went back to New York they could not get a cent, although their crop as it stood was worth twice the \$10,000,000 which had been promised them."

Growers at mercy of trust.—"As a result the tobacco growers, in spite of their association, were unable to manufacture their product, and they are today at the mercy of the trust. They will be forced to sell their tobacco to the great corporation at 5 or 6 cents a pound. There are no other buyers, no commission men, no warehouses except those controlled by the trust, and the farmers are compelled to sell their product to the trust or let it perish. The tobacco trust, like the oil trust and the beef trust, has depressed the price of raw material, increased the market rates for finished product, and is crushing both consumer and producer, because it controls every avenue of manufacturing and of distribution, preventing competition by use of its vast financial resources, and forcing the farmer and retailer alike to deal with the trust or go out of business."

§ 957h. *The Paper Trust.*—Proceedings begun are pending against the General Paper Company and twenty-five other paper manufacturers, made defendants in a petition filed December, 1, 1904, by Attorney General Moody in the United States District Court for injunction to restrain defendants from doing business in violation of the Anti-trust law of Congress, charging that defendants have entered into a conspiracy to control the output, distribution and price of print paper by using the General Paper Company as their sales agent; that competition has practically ceased because of this combine, and that the price, particularly of print paper, has thereby been advanced ten to fifteen per cent, the trust owning or controlling a large part of the timber in this country available for paper manufacture, and the present duty on wood pulp making it impossible for independent manufacturers to buy abroad.

§ 957j. *Traffic contracts between connecting railroads, are not contrary to the anti-trust laws.*—It is everywhere in the United States accepted that traffic agreements may be made between railroad corporations and connecting railroads and steamboat lines, for carriage beyond their lines, and for division of

fares and freight charges,⁸⁹ but such contracts must not give the other company control, or extensive powers over its road to the extent of a transfer of its property and franchise to another corporation, or to prevent that service to the public under its own corporate management which was contemplated in the contractor's charter.⁹⁰

§ 957k. "Pools," combinations between competing parallel railroads Interstate commerce law.—Any unauthorized contract between parallel and competing railway corporations to prevent competition, is contrary to public policy and void.⁹¹ As, for one railroad company to purchase the stock of another, for control over it, in order to prevent competition with it.⁹² And a contract of a railway company to give an express company exclusive privileges over its line; and a contract is void, wherein a railroad company agrees to locate a station at a certain point on its line, and not to establish any other station in the same vicinity.⁹³ It is said that an arrangement by which two competing systems of railroads agree to divide their earnings for traffic between given points, for which they were previously competitors, is against public interest, contrary to public policy, and can not be judicially enforced. But in disposing of these cases, courts will not decree the nullity of the contract sought to be enforced. They simply abstain from dealing with it, or adjudicating any rights arising thereunder, or giving their aid for the division

⁸⁹ St. Louis Ry. Co. v. Larned, 103 Ill. 293; Railway Co. v. Pratt, 22 Wall. (89 U. S.) 123; Wheeler v. San Francisco, etc. Co., 31 Cal. 46, 89 Am. Dec. 147; Kyle v. Laurens Ry. Co., 10 Rich. L. (S. C.) 382, 70 Am. Dec. 231; Stewart v. Erie Trans. Co., 17 Minn. 372; Wiggins Ferry Co. v. Chicago, etc. Ry. Co., 73 Mo. 389; Olcott v. Tioga Ry. Co., 27 N. Y. 546, 75 Am. Dec. 373; Munhall v. Pennsylvania Ry. Co., 92 Pa. St. 150; Shawmut Bank v. Plattsburg, etc. Co., 31 Vt. 491; Green Bay, etc. R. Co. v. Union Steamboat Co., 107 U. S. 98; Rutland, etc. Co. v. Proctor, 29 Vt. 93; Railway Companies v. Keokuk Bridge Co., 131 U. S. 371; Buffit v. Troy, etc. Co., 40 N. Y. 168; Parish v. Wheeler, 22 N. Y. 494.

⁹⁰ State v. Hartford, etc. Co., 29 Conn. 538.

⁹¹ Gulf, etc. R. Co. v. State, 72 Tex. 404, 1 L. R. A. 849, 13 Am. St. Rep. 815; Stewart v. Erie Trans. Co., 17 Minn. 372; Hartford, etc. Co. v. N. Y., etc. Co., 3 Rob. (N. Y.) 411; United States v. Freight Assn., 166 U. S. 290.

⁹² Ohio, etc. Ry. Co. v. Indianapolis, etc. Co., 5 Am. Law Reg. (N. S.) 733.

⁹³ Mobile, etc. Co. v. People, 132 Ill. 559; Fuller v. Dame, 18 Pick. (Mass.) 472; Texas, etc. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268; St. Joe, etc. Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357; Cleveland, etc. Co. v. Coburn, 91 Ind. 557; Workman v. Campbell, 46 Mo. 305; First Nat. Bank v. Hendrie, 49 Iowa, 402, 31 Am. Rep. 153.

of profits, although ascertained between the parties thereto.⁹⁴ So also, where the proprietors of several lines of canal boats agreed to establish fixed rates of freight and passage for a certain season, and to divide the net earnings among themselves according to fixed rules, the attempt of one of the contracting parties to enforce the agreement against a recalcitrant member of the combination was discountenanced.⁹⁵ But pooling agreements between railways have been sustained as not being partnerships;⁹⁶ and that a contract between rival and competing railway companies, made for the purpose of preventing competition, but not for the purpose of raising the prices of transportation above a reasonable standard, is not void as against public policy.⁹⁷ So also, it is held that an

⁹⁴ *Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co.* (La. 1889), 7 Ry. & Corp. L. J. 184, where the court said "We have been at great pains, and have devoted long and tedious labor, to examine all the authorities, consisting mainly of decisions rendered on the point by courts of last resort in this country, which were submitted to us by counsel in the case, and we reach the conclusion that American jurisprudence has firmly settled the doctrine that all contracts which have a palpable tendency to stifle competition, either in the market value of commodities or in the carriage or transportation of such commodities, are contrary to public policy, and are therefore incapable of conferring upon the parties thereto any rights which a court of justice can recognize or enforce." The doctrine finds additional support and sanction from the following authorities: *Gibbs v. Gas Co.*, 130 U. S. 408, in which the court said: "Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with freedom of contract, . . . yet, in the instance of business of such character that it presumably can not be restrained to any extent whatever without prejudice

to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy." See, also, *Iron Co. v. Extension Co.*, 129 U. S. 644; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Arnot v. Pittston & E. Coal Co.*, 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Morrill v. Railroad Co.*, 55 N. H. 537; *Jackson v. McLean*, 36 Fed. Rep. 213; *Lumber Co. v. Hayes*, 18 Pac. Rep. 392; *Hamilton's Note to Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* (1883), 15 Fed. Rep. 667. In *Cleveland, etc. Ry. Co. v. Closer* (Ind. 1890), 43 Alb. L. J. 209, the court said: "We are not required to decide, nor do we decide, that combinations fair to the public, untainted by any sinister design, and formed solely to prevent the destruction of business by unregulated competition, may not be valid."

⁹⁵ *Hooker v. Vanderwater*, 4 Denio, 349.

⁹⁶ *Briggs v. Vanderbilt*, 19 Barb. 222; *Pratt v. Ogdensburg & L. C. R. Co.*, 102 Mass. 557; *Hot Springs R. Co. v. Trippe*, 42 Ark. 465, 48 Am. Rep. 65; *Converse v. Norwich & N. Y. Trans. Co.*, 33 Conn. 166.

⁹⁷ *Manchester & L. R. Co. v. Concord R. Co.* (1890), 66 N. H. 100, 20 Atl. Rep. 383. *Cf. Wood's Ry.*

agreement entered into by a telegraph company to divide earnings and expenses with another company, is neither *ultra vires* nor against public policy, especially where approved by a majority of directors and stockholders.⁹⁸ In England, if the public interests are not prejudiced thereby, companies having the same termini may, for the purpose of avoiding competition, validly form a pool and distribute traffic and earnings among themselves proportionally.⁹⁹ Railroad pooling contracts are declared to be contrary to the Anti-trust act of Congress of 1890.¹ The act applies only so far as interstate and international trade is affected.² For example, it authorizes a bill to enjoin arbitrary regulation of retail prices by combination of dealers importing coal into a city from another State.³ Injunction is authorized only on the part of the government.⁴ A combination of shingle manufacturers to close the mills of some of its members, to increase prices, and reduce production of shingles, where shipped from one State into another

Law, 590-600; *Morrill v. Boston, etc. R. Co.*, 55 N. H. 531, apparently *contra*, was decided under a statute prohibiting pools. In a "Letter in Favor of the Legalization of Pools," addressed to Hon. S. M. Cullom, Chairman of the Federal Senate Committee on Interstate Commerce, by George B. Blanchard, Chairman of the Central Traffic Association (1890), 8 Ry. & Corp. L. J. 1, the writer says: "The unintelligent conception of pools was that they partook of the nature of combinations of chance or pools in stocks. There was also a mistaken public idea that pools sought to maintain burdensome rates in order to pay excessive dividends upon watered stock, increased issues of bonds, etc. Rates are beyond such influences. It is more or less true of all sections of the country that there is little, if any, relation between a railway's stocks and bonds and its charges for transportation. The prohibition of pooling was therefore the mandate of public misconception and three years' operation of the law has largely dispelled it."

⁹⁸ *Benedict v. Western Union Telegraph Co.*, 9 Abb. N. Cas. 14.

⁹⁹ *Beach on Railways*, § 528, citing *Hare v. London, etc. Ry. Co.*, 2 Johns. & H. 80. See the judgment in that case, where *Shrewsbury, etc. Ry. Co. v. London, etc. Ry. Co.*, 17 Q. B. 652; 2 Macn. & G. 324, 6 H. L. 113, is discussed. See also *Lancaster, etc. Ry. Co. v. North Western Ry. Co.*, 2 Kay & J. 293; *Browne & Theobald's Ry. Law*, 288. But the agreement by which the pool is formed has been said to be illegal, if it extend to future traffic upon a line of railway which a company may hereafter be empowered to construct. *Browne & Theobald's Ry. Law*, 288, citing *Midland Ry. Co. v. London, etc. Ry. Co.*, 2 Eq. 524.

¹ *United States v. Trans-Missouri, etc. Assn.* (1897), 166 U. S. 290.

² *United States v. Knight Co.* (1895), 156 U. S. 1.

³ *United States v. Coal, etc. Assn.* (1898), 85 Fed. 252; *United States v. Jelico, etc. Co.* (1891), 46 Fed. 432.

⁴ *Blindell v. Hagan* (1893), 54 Fed. 40.

violates the act.⁵ Under the act, Congress has power to regulate the purchase, sale and trade in commodities between the States, and to enjoin combinations in restraint of such trade, by means of agreements to suppress competition and increase prices.⁶ Where several railroad companies agreed to operate their connecting roads as if by one corporation which owned all of them, and to divide the gross earnings, the purpose obviously being to suppress competition and establish rates, however unreasonable, such pooling arrangement was held contrary to public policy and void.⁷ Interstate commerce is not involved where the purpose of the combination is to regulate trade, but not to restrict it.⁸ A State may prohibit from doing business in the State, a foreign corporation, because associated with a trust.⁹

§ 957L. Rebates. Discrimination in rates.—The foremost example of monopoly, is in discriminating freight rates of great railroad systems. It is now the most powerful means used in crushing business competition, affecting not alone individuals, but communities, cities and States, withering their enterprise, and heightening the prices of the necessities of life to the toiling millions. Secret rebates in freight rates to favored shippers, is a monstrous tyranny over the fortunes of all other shippers and industries. It is a most dangerous power over all wealth sources. It is the power of several railroad managers to give to one business or community prosperity over others, and to compel them to close their doors and abandon industries involving their entire fortunes. This giant power to oppress is effectively governable only by Congress, under its power to regulate interstate commerce. The tyranny of secret rebates has been somewhat checked by recent decisions of the Federal Courts, but such rebates within a State remain to be broken up as a most serious legislative duty. No competition can long endure against those who are secretly and in defiance of the law enjoying rates for the transportation of their property, which constitute a preference over all others in the same business. No more fruitful source of monopoly can be found than the enjoyment of preferential rates. A contract to

⁵ *Gibbs v. McNeely* (1902), 118 Fed. 120.

⁶ *Addyston, etc. Co. v. United States* (1899), 175 U. S. 211; *Chicago, etc. Ry. v. Wabash, etc. Ry.* (1894), 61 Fed. 993.

⁷ *Bald Eagle, etc. v. Nittany,*

etc. R. R. (1895), 171 Pa. St. 284; *Cleveland, etc. Ry. v. Closser* (1890), 126 Ind. 348.

⁸ *Anderson v. United States* (1898), 171 U. S. 604.

⁹ *Waters-Pierce, etc. Co. v. Texas* (1900), 177 U. S. 28.

make secret rebate, from the public tariff rates, to a shipper because of large freightage, if others are not to have the same rebate, or upon any other ground, is unlawful and void.¹⁰ A contract giving shippers exclusive advantage in rates, over all other shippers;¹¹ or, to allow exclusively to any one or more persons, drawbacks on freight not allowed to others is void.¹² If the rates charged are in all cases reasonable, a common carrier may charge less to one person than to another,¹³ unless such difference in charges will create monopoly, or destroy the business of the less favored.¹⁴ A railroad is bound to furnish transportation for persons and freight at a reasonable charge, and in the order in which the goods are delivered.¹⁵ Discriminations in rates based simply on amount of freight shipped, are held to be in favor of capital, contrary to public policy, and a wrong to the disfavored party, for which the courts may give redress.¹⁶ A belt-line railroad is subject to the interstate commerce act of Congress.¹⁷ A contract to make a rebate by reason of larger freightage, is void, if others are not to have the same rebate.¹⁸ A railroad may charge more for the transportation of coal to local dealers than to manufacturers. This is not "undue or unreasonable discrimination," provided against in the Pennsylvania statute.¹⁹ In the absence of statute, variations in rates are not necessarily unjust discriminations.²⁰

§ 957m. **Methods of evasion of the law against rebates, drawbacks, and special rates.**—There are several developed methods used by the railroads to evade the interstate commerce law against rebates, and give undue preference exclusively to

¹⁰ *Scofield v. Lake Shore, etc. R. R. Co.* (1885), 43 Ohio St. 571, 54 Am. Rep. 846; *Kansas Pacific Ry. v. Bayles* (1894), 19 Colo. 348, 35 Pac. 744; *Brundred v. Rice* (1892), 49 Ohio St. 640, 34 Am. St. Rep. 589; *Interstate Commerce Com. v. Baltimore, etc. Co.* 145 U. S. 275; *Fitzgerald v. Grand Trunk R. R.* (1891), 63 Vt. 169, 13 L. R. A. 170; *Hawley v. Kansas, etc. Co.* (1892), 48 Kan. 593; *State v. Cincinnati, etc. R. R.* (1890), 47 Ohio St. 130.

¹¹ *Chicago, etc. Ry. Co. v. Suf-fern*, 129 Ill. 274; *Atchison, etc. Ry. Co. v. Denver, etc. Ry. Co.*, 110 U. S. 667; *State v. Cin. etc. R. R. Co.*, 47 Ohio St. 130.

¹² *Indian River S. Co. v. East, etc. Co.*, 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258.

¹³ *Idem.*

¹⁴ *Idem.*

¹⁵ *Interstate Com. Comm'rs v. B. & O. R. R.*, 145 U. S. 263.

¹⁶ *Hays v. Pennsylvania Co.*, 12 Fed. 309 (1882).

¹⁷ *Interstate, etc. Co. v. Indianapolis, etc. Ry.* (1900), 99 Fed. 472.

¹⁸ *Scofield v. Lake Shore, etc. Ry.* (1885), 43 Ohio, 571.

¹⁹ *Hoover v. Pennsylvania R. R.* (1893), 156 Pa. St. 220.

²⁰ *Johnson v. Pensacola, etc. R. R. Co.* (1878, 16 Fla. 623.

large producers and shippers among the trusts, and close up competitive industries. These devices take on various forms of commissions, arbitrages, billing under weight, blind billing, dockage, lighterage, terminal charges, special style of tank cars, overlading, billing to intermediate points at low terminal rate, stopping cars in transit, delivering small lots at carload rates and "ghost trains", on which no freight is paid. Among other methods to evade the law of Congress against rebates in interstate transportation, are secret rebates by means of private car-lines, switch track charges, the payment of fictitious damage claims, "industrial railways," and the "midnight schedule." Under the Anti-trust law of Congress, it is the special duty of the interstate commerce commission to make inquiries into those methods. All other corporate affairs pertain to the bureau of corporations of the department of commerce and labor. The bureau is forbidden to investigate common carriers.

§ 957n. **The industrial railroad, etc.**—The industrial railroad is, in effect, only a switch-track, owned by the favorite shipper, who uses his own engines to haul his freight a mile or so to the connecting railroad, and gets a division of the rate charged for hauling the freight to its destination, however far distant.

Private car-lines. Refrigerator cars.—By the private car-line the shipper forwards his freight in his own cars, and the railroads make him allowance for using his own cars instead of theirs. The testimony taken by the interstate commerce commission, regarding private car-lines, develops that beef-packing companies, owning their own refrigerator cars, make exclusive contracts with railroads, and thereby crush out small shippers and commission merchants, by transporting fruit and vegetables on their own account. The only remedy is claimed to be, as a pending bill before Congress provides, making private car-lines common carriers, when engaged in interstate commerce, so as to place them under control of Congress, and to make them subject to all general laws governing the service of ordinary railroad companies;—requiring that every private car line file with the interstate commerce commission its tariff schedule of mileage or per diem rates, and prohibiting the exaction of any rate differing therefrom, for any service not provided for in its published schedule; requirement of full reports to the interstate commerce commission giving mileage of every car, and the rate paid to each railroad, and prohibition against giving or accepting rebates or discriminations.

§ 957p. **Payment of fictitious damage claims.**—Payment of fictitious damage claims, is another device by which the favored shipper of live-stock, presents a bill for damage to his stock, which bill is not contested, but paid without protest. Of the two federal agencies to inquire into these methods, one is the Bureau of Corporations of the Department of Commerce, and the other is the Interstate Commerce Commission. The unlawful relations of corporations and common carriers engaged in interstate commerce, in whatever form of rebates, or private-car charges, fall within the province of the interstate commission, the bureau of corporations having no authority to investigate common carriers. But that commission, under the present law, is practically powerless to remedy the wrongs in the case of rebates from the regular rates.

The pending proposition is requirement by Congress of a federal license, as a preliminary to interstate commerce by corporations, subject to revocation upon violation of interstate commerce laws. Only the nation can cope with a billion-dollar "trust" which obliterates State boundaries in its resistless operation. The several States are powerless to enforce their statutes against discrimination in rates, by rebates to reach the commerce of the nation, which must move on, regardless of States or State lines.

§ 957r. **"The midnight schedule."**—There is little doubt that the practice of granting rebates to favored shippers by railroads is less prevalent now than formerly. One reason of this is that the Elkins law, passed in 1903, was mainly designed to prevent such infractions of the interstate commerce law as rebates and discriminations, which are classed as misdemeanors. It made it easier to reach and punish these offenses, even if it did abolish the penalty of imprisonment and make the imposition of fines the only punishment. The letter of the law is obeyed more today, but there are numerous ways of evading the spirit. The private car lines, the private switch track, and other artful methods of granting rebates, without violating the Anti-rebate law, have been developed. Among these is a method known as the "midnight schedule." The interstate commerce act allows a reduction in freight rates to go into effect after a three days' public notice. To advance a rate it is necessary to give ten days' notice. A freight charge may be greatly reduced and then restored to the old rate within a short space of time. President A. B. Stickney of the Chicago Great Western railroad has shown how large shippers take advantage of this provision of the law to secure rates

which amount practically to rebates. "The large dealer in grain agrees with the traffic manager of a railroad that upon a certain day a notice shall be issued that the rate on a particular kind of grain is to be reduced, say one cent per bushel, between certain points. Armed with this secret knowledge the grain dealer is able to outbid other dealers by offering a fraction of a cent more than the market price of the grain. He accumulates immense quantities of the commodity, practically obtains the visible supply in a certain locality, and when the new rate is put into effect, he is able to ship his grain to market at less cost than has been customary. After his grain is shipped the old rate is restored by giving the required notice to the interstate commerce commission. The law has been strictly observed, but the favored dealer has had an advantage which operates the same as a straight rebate. He has been able to crush out all competitors because of his secret understanding with the railroad concerning 'the midnight schedule.'"

§ 957s. **Bibliography of trusts.**—An extensive literature on the subject of trust combinations has sprung up of late years, not only in the regular legal publications, but also in newspapers, general magazines, pamphlets, reports and addresses. Much that is valuable in this ephemeral literature would be lost to the profession and to the student of political economy but for the diligent researches of Mr. William H. Winters, the librarian of the New York Law Institute, who in his "Bibliography of Commercial Trusts," has collated all the authorities of value upon the general subject of trade combinations, syndicates and pools, together with citations to reviews, monographs and annotated cases, bearing more particularly upon the subjects of competition, combination and criminal conspiracy, with references to recent legislation and proposed legislation on the subject. In this exhaustive compilation, guidance is afforded at every step in the study of the law and history of the ancient monopolies and the "trusts" of modern times.²¹

²¹ *Vide supra*, § 936, note 18; § 948, note 37; § 949, note 38.

CHAPTER XXXVIII.

TORTS.

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| <p>§ 958. Rule of corporate liability for torts.</p> <p>959. Scope of corporate agent's authority.</p> <p>960. Acts of servants and employees.</p> <p>961. Liability for torts of agents and servants.</p> <p>962. Negligence. Liability of common carriers. Contracts limiting liability.</p> <p>963. Nuisance. Nonfeasance.</p> <p>964. Distinction between misfeasance and nonfeasance.</p> <p>965. Trespass <i>quaere clausum fregit</i>.</p> <p>966. Torts involving malice.</p> <p>967. Whether a corporation may act maliciously.</p> <p>968. Malicious prosecution.</p> <p>969. False imprisonment.</p> <p>970. Libel. Civil liability. Libel by mercantile reporting agency. Libel in admiralty.</p> <p>971. Personal injuries by vio-</p> | <p>lence, liability in damages.</p> <p>§ 972. Offense committed under legislative authority.</p> <p>973. Fraud of its officers and agents is fraud of the corporation.</p> <p>974. Torts in <i>ultra vires</i> business.</p> <p>975. Effect of consolidation upon torts. Liability of new corporation.</p> <p>976. Torts of predecessor corporation.</p> <p>977. Torts by or against <i>de facto</i> corporation.</p> <p>978. Foreign corporation may maintain action for tort.</p> <p>979. Capacity of corporation to sue in case of tort.</p> <p>980. Liability of stockholders for torts by the corporation.</p> <p>981. Exemplary damages where the corporation participates in tort of its agent.</p> |
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References:

- Criminal torts and frauds. Sections 1015-1031.
- Liability of the corporation for acts of its officers and agents. Sections 768-791.
- Liability of directors, officers and agents. Sections 746-757.
- Civil actions and defenses by and against the corporation. Sections 982-1014.
- Receivers. Sections 1218-1245.

§ 958. Rule of corporate liability for Torts.—Corporations are "persons," within the meaning of the Fourteenth Amendment of the Federal Constitution, and, as such, can invoke its protection.¹ They are civilly liable, the same as are natural persons,

¹ Minneapolis, etc. v. Beckwith, 129 U. S. 26.

for torts committed by themselves, their servants, and agents; and, from the earliest times, they have been so held liable.² The doctrine of *ultra vires* has no application, as a defense to corporate torts.³ An action may be maintained against a corporation, for its malicious or negligent torts, however foreign they may be to the objects of its creation, or beyond its granted powers.⁴ In the language of the eminent Judge Cooley: "The rule is now well settled, that, while keeping within the apparent scope of corporate powers, corporations have a general capacity to render themselves liable for torts, except for those, where the tort consists in the breach of some duty, which, from its nature, could not be imposed upon, or discharged by a corporation. The rule of liability embraces not only the negligence and omission of its officers and agents, who are put in charge of, or employed in, the corporate business, but also all tortious acts which have been authorized by the corporation, or which are done in pursuance of any general or special authority, to act in its behalf, on the subject to which they relate, or which the corporation has subsequently ratified."⁵ A receiver may sue the directors for fraud, *ultra vires* acts, or negligence.⁶ A private business corporation, which continues its corporate business in its corporate name, after the time fixed by its charter for its duration, has expired, can be sued and made liable as a corporation *de facto* for a tort, committed by it after its charter has expired.⁷ Notwithstanding the doubts and technical refinements formerly entertained, in considering the liability of corporations, and the necessity of that liability resting upon some act or instrument, sanctioned or attested by the corporate seal, it is now universally conceded, that cor-

² *Denver, etc. Co. v. Harris*, 122 U. S. 597; *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568, 4 L. R. A. 280.

³ *Chestnut Hill, etc. Co. v. Rutter* (Pa. 1818), 4 Seargt. & R. 6, 8 Am. Dec. 675; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. (U. S.) 604.

⁴ *First Nat. Bank v. Graham*, 100 U. S. 699; *Philadelphia, etc. R. Co. v. Quigley*, 21 How. 209; *Alexander v. Relfe*, 74 Mo. 495; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322.

⁵ Cooley on Torts, 120.

⁶ *Campbell v. Watson* (1901), 62 N. J. Eq. 396; *Coddington v. Canaday* (1901), 157 Ind. 243, 61 N. E. 567; *Hood v. McNaughton* (1892), 54 N. J. L. 425; *Farwell v. Great Western* (1896), 161 Ill. 522; *Higgins v. Tefft* (1896), 4 N. Y. App. Div. 62; *Hayden v. Thompson* (1895), 71 Fed. 60.

⁷ *Miller v. Newburg Orrel Coal Co.* (1888), 31 W. Va. 836, 13 Am. St. Rep. 903, a case of death from a coal mine explosion.

porations are liable for their torts, and that this liability may be enforced in the same manner, as if the wrong complained of, had been committed by a natural person.⁸ One court has said that it is not true that a corporation has no mind. Its mind is the joint product of the mind of its officers and directory in a united organization; and in point of fact, corporations bring into their service, the highest order of ability, and the best executive talent in the country.⁹ The doctrine that a corporation, having no soul, can not be actuated by a malicious intention, is more quaint than substantial.¹⁰ The objection, that indictment requires appearance at the bar, and that a corporation, being an incorporeal entity, can not comply with this rule, is also futile, since its appearance may be entered by attorney.¹¹ In an old case, where the master and wardens of a company, were cited into the spiritual court by their proper names, with the addition of their offices in the company, and the objection was raised that they were cited by their proper names, but in their political capacity, the court very quaintly observed, that, "if they stood out, they might be laid, by the heels, in their natural capacity."¹²

§ 959. **Scope of corporate agent's authority.**—If the tortious act of the agent was done within the general scope of the business of the corporation, it will be responsible, whether the act was done negligently, wantonly, or even wilfully. "For the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business, and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even wilfully. . . . But if a servant goes outside of his employment, and without regard to his service, acting maliciously, or, in order to effect some purpose of his own, wantonly commits a trespass, or causes damages to another, the master is not re-

⁸ Cooley on Torts, 120; Peebles v. Patapsco Guano Co. (1877), 77 N. C. 233; Venas v. Merchants' Ins. Co., 27 La. Ann. 367; Hays v. Houston R. Co., 46 Tex. 272; Lee v. Village of Sandy Hill (1869), 40 N. Y. 442; Smith v. Birmingham Gas Co., 1 A. & E. 526; Mound v. Monmouthshire Canal Co., 2 Dowl. N. S. 113; Riddle v. Proprietors (1810), 7 Mass. 169, 5 Am. Dec. 35; Lyman v.

White River Bridge Co., 2 Aik. 255.

⁹ Copley v. Grover, etc. Co., 2 Woods, 494, following Philadelphia, etc. R. Co. v. Quigley (1858), 21 How. 202.

¹⁰ Green v. London, etc. Co., 7 C. B. N. S. 290.

¹¹ Queen v. Birmingham, etc. Ry. Co., 2 Gale & D. 243.

¹² Rex v. Thursfield, Skin. 27.

sponsible; so that the inquiry is, whether the wrongful act is in the course of the employment, or outside of it, and to accomplish a purpose, foreign to it. In the latter case, the relation of master and servant does not exist so as to hold the master for the act."¹³ A corporation is responsible for the tortious acts of its agent, done in the line of his employment, and in the execution of the authority conferred, although it did not directly authorize the wrong action, or subsequently ratify it.¹⁴ The true test of the liability of the principal in such cases, is to ascertain whether, in committing the act, for example, fraud, the agent was acting in the business of his principal. If he was engaged in the course of his employment, then parties, injured by his misconduct or fraud, can resort for redress, to the persons who clothed him with the power to act in their behalf, and who have received the benefits resulting from his agency.¹⁵ Thus, in an action for damages for malicious prosecution, wherein a corporation and its general manager were joined as parties defendant, the corporation demurred, on the ground that it appeared that the acts complained of, were those of the general manager, and not done within the scope of his authority or duty, nor in the service of the company. But it was held that, although the acts complained of, were *ultra vires*, and could not be within the scope of the power of the company or its agents, the company was none the less liable therefor.¹⁶ It has, on the other hand, been held that the agent must be shown to have express authority for his act, or that it must have been ratified.¹⁷

§ 960. Acts of servants and employes.—The corporation and its servant are liable for a wilful tort of the servant, whether or not the master has ratified the tort.¹⁸ The liability of a corporation is the same as that of individuals for a similar wrong. The same rule applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants. This is said to be so well settled as not to require the citation of authorities.¹⁹ Where the local agent of a telegraph company, who was also agent of an express

¹³ Mott v. Consumers' Ice Co., 73 N. Y. 543; Taylor, Pr. Corp. 341.

¹⁴ Wheeler, etc. Manuf. Co. v. Boyce (1887), 36 Kan. 350.

¹⁵ Fogg v. Griffen, 2 Allen, 1.

¹⁶ Hussey v. King (1887), 98 N. C. 34, 2 Am. St. Rep. 312.

¹⁷ Carter v. Howe Machine Co. (1878), 51 Md. 290.

¹⁸ Riser v. Southern Ry. Co. (S. C. 1903), 46 S. E. 47.

¹⁹ Baltimore, etc. R. Co. v. Fifth Baptist Ch. (1883), 108 U. S. 317.

company in the same place, sent a forged dispatch to a merchant in a neighboring city, requesting him to forward money to his correspondent at the former place, to use in buying grain, and the dispatch was sent, and the money forwarded, by express, in response to the telegram, but was intercepted, and converted to his own use by the agent, the telegraph company was liable, though an action might also have been maintained against the express company.²⁰ For, as was said by the court, the defendant selected its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons, receiving dispatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company, have faithfully and honestly discharged the duty, owed by it to its patrons, and that they would not, knowingly, send a false or forged message, and it would ordinarily be an unreasonable and impracticable rule, to require the receiver of a dispatch, to investigate the question of the integrity and fidelity of the defendants' agents, in the performance of their duties before acting. Whether the agent is unfaithful to his trust, or violates the duty to, or disobeys the instructions of, the company, its patrons may have no means of knowing. If the corporation fails in the performance of its duty, through the neglect or fraud of the agent, whom it has appointed to perform it, the master is responsible. It was the business of the agent to send dispatches of a similar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation.²¹ The Pullman Palace Car Company is liable, for injuries sustained by occupants of its sleeping-cars, through the negligence, or wilful misconduct of an employe whom it places in charge of a car. So, where the porter, placed in charge of such a car, by the company, makes a criminal assault on a female occupant thereof, she is entitled to recover from the company, a fair pecuniary compensation for all injuries, temporary or permanent, directly caused to her, in her

²⁰ McCord v. Western, etc. Co. (1888), 39 Minn. 181, 4 Ry. & Corp. L. J. 452; Telegraph Co. v. Dryburg, 35 Pa. St. 298.

²¹ McCord v. Western, etc. Co.

(1888), 39 Minn. 181, 4 Ry. & Corp. L. J. 453; Bank v. Telegraph Co., 52 Cal. 280; Booth v. Bank, 50 N. Y. 400.

person, health and strength, including compensation for the mental and physical anguish which has been, or may thereafter, be caused.²² But the liability of a sleeping-car company for injury to an ordinary passenger on the train,—who entered the car for the purpose of asking the privilege of washing his hands, and is there, wantonly, and without provocation, assaulted and beaten by the porter of the car,—is governed by the principles of the law of master and servant, and the company is not liable for such unauthorized wilful wrong.²³ But at the suit of the same plaintiff, against the railway company, to whose train the sleeping-car was attached, the company was held liable, as the passenger was not a trespasser on the sleeping-car.²⁴ In another case where a corporation has been held liable, under this rule of *respondeat superior*, it appeared that a railroad company was in peaceable possession of a piece of road, and while so in possession, another company, by an armed force of several hundred men, acting as its agents and employes, under its vice-president and assistant general manager, attacked, with deadly weapons, the agents and employes of the company having charge of the road, forcibly taking possession thereof. There was a demonstration of armed men all along the line of the railroad seized, and, while this was being done, and the seizure was being made, the plaintiff, an employe of the company in possession, being on the track of the road, defending it with arms, was fired upon, by the men of the attacking company, and seriously injured. Immediately upon the seizure of the railroad, the employer of the seizing forces, accepted it, and entered into possession, and for a time used, and operated it as its own. The plaintiff brought suit to recover damages for his injuries, and it was held, that the seizing company was liable in tort for the acts of its agents, that the plaintiff could recover, not only damages for the injuries actually received, but punitive damages also.²⁵

§ 961. **Liability for torts of agents and servants.**—A corporation is liable, for the acts of its agents and servants while engaged in the business of their principal, in the same manner, and to the same extent, that an individual is liable, under like cir-

²² *Campbell v. Pullman Palace Car Co.* (1880), 42 Fed. Rep. 484, 8 Ry. & Corp. L. J. 195.

²³ *Williams v. Pullman, etc. Co.* (1888), 40 La. Ann. 87.

²⁴ *Williams v. Pullman Palace Car Co.* (1888), 40 La. Ann. 417.

²⁵ *Denver, etc. Ry. Co. v. Harris* (1886), 122 U. S. 597.

cumstances.²⁶ It would be an abandonment of the well-established principle of *respondeat superior* to hold, that the agents' of a corporation, in the discharge of their official duties, might be guilty of malicious torts, and yet permit the corporation to shield itself from responsibility by relying on its soulless character.²⁷ Accordingly, as above stated, a corporation is civilly liable for torts committed by its servants, or precisely as a natural person; and that it is liable, as a natural person, for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency, or authorizing the act.²⁸ Conversely, a corporation is not to be held liable, for the malicious acts of its agents, under circumstances which would not render a natural person liable. Accordingly, the unauthorized malicious acts of its agents will not render a corporation liable for exemplary damages, unless the acts be ratified by it with full knowledge of the facts,²⁹ or, unless the agents acted in a spirit of mischief, or of criminal indifference to civil obligations.³⁰ Illustrations: A corporation can not defeat liability for an injury caused by negligence of an officer, employed by it in running a steamboat, by plea that the business was *ultra vires*, the company's charter powers being limited to banking, and conducting a railroad.³¹ And, whether or

²⁶ *Vide supra*, § 768; First Nat. Bank v. Graham, 100 U. S. 699; Merchants' Bank v. State Bank, 10 Wall. 645. Why, it may be well asked, should not the rule be the same substantially in reference to corporations and their agents as between individuals and their servants? The vast multiplication of corporations, and the variety of interests affected thereby, have demanded and suggested a course of proceeding adapted to the ends of justice, and in the first application of wholesome rules appropriate remedies have been gradually unfolded, as well in enforcing the rights of corporations in "suing" as in holding them amenable to "being sued." Main v. North Eastern Ry. Co., 12 Rich. 82.

²⁷ *Wheless v. Second Nat. Bank*, 1 Baxt. 469.

²⁸ *Denver, etc. Ry. v. Harris* (1886), 122 U. S. 597, approving *State v. Morris, etc. R. Co.*, 23 N. J. 369, and citing *Salt Lake City v. Hollister*, 118 U. S. 256; *New Jersey, etc. Co. v. Brockett*, 121 U. S. 637; *National Bank v. Graham*, 100 U. S. 699.

²⁹ *Gulf, etc. R. Co. v. Moore* (1887), 69 Tex. 157; *Hays v. Houston, etc. R. Co.* (1876), 46 Tex. 272; *Galveston, etc. R. Co. v. Donahoe* (1882), 56 Tex. 163.

³⁰ *Denver, etc. Ry. v. Harris* (1886), 122 U. S. 609; *Philadelphia, etc. R. Co. v. Quigley*, 21 How. 202; *Milwaukee, etc. Ry. Co. v. Arms*, 91 U. S. 492; *Missouri, etc. Ry. Co. v. Humes*, 115 U. S. 521; *Barry v. Edwards*, 116 U. S. 562.

³¹ *Central, etc. Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353.

not the injury resulted from the unauthorized act of the agent, in the conduct of such *ultra vires* business, the corporation will be liable, if it acquiesces in, and ratifies the act.³² The corporation is liable for any tortious act of its agent or servant, which it expressly authorizes, or which is fairly within the general scope of the authority of the agent, who commits the tortious act. First, it is liable, if the corporate management, acting within the scope of its powers, either authorizes, acquiesces in, or ratifies the tort, or, if it was within the scope of the agent's authority. Under this rule, a corporation will be liable in damages for the publication of a libel by its agents,³³ or for false imprisonment,³⁴ or for malicious prosecution,³⁵ when authorized or ratified by the corporation. This rule applies more particularly to torts of officers and agents, rather than to those of servants and employes. The corporation is liable for the deceit or fraudulent act of its agent, in a transaction wherein he has corporate authority to act, or, when the act is inferable from the scope of his employment;³⁶ Second, the corporation is liable for any tortious act, committed in the course of the agent's employment, as, in the case of employes and servants, though they have no authority to represent or contract for the corporation. It is liable for assault and battery,³⁷ and trespasses,³⁸ or public nuisance,³⁹ committed by an employe or a servant acting within the scope of his employment,⁴⁰ and, when the act is connected with his employment, and, although the act is wilful and malicious.⁴¹ Third, it is liable, if the wrongful or negligent act or omission occasioned a violation of a duty of the corporation, which it owed specially to the person injured, or owed it to him as a mere member of the community.

§ 962. Negligence. Liability of common carriers. Contracts limiting liability.—A bank may be held liable for loss of a special deposit for safe keeping, when the loss results from neg-

³² *Alexander v. Relfe*, 74 Mo. 495.

³³ *Philadelphia, etc. v. Quigley*, 21 How. 202; *Washington, etc. Co. v. Lansden*, 172 U. S. 534; *Southern Express Co. v. Fitzner*, 59 Miss. 581.

³⁴ *Lynch v. Metropolitan, etc. Co.*, 90 N. Y. 77.

³⁵ *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 Am. Rep. 468.

³⁶ *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9.

³⁷ *Hewett v. Swift*, 3 Allen (85 Mass.) 420; *Holmes v. Wakefield*, 12 Allen, 580.

³⁸ *Palmer v. Maine Central*, 92 Me. 399.

³⁹ *Ford v. Santa Cruz R. Co.*, 59 Cal. 290.

⁴⁰ *Porter v. C. R. I. etc. Co.*, 41 Iowa, 358.

⁴¹ *Mott v. Consumers' Ice Co.*, 73 N. Y. 543.

ligence of its officers or employes,⁴² or for neglect to present at maturity, or to protest, a note it holds for collection,⁴³ or for loss occasioned by crediting a deposit to the wrong person.⁴⁴ The liability of the common carrier, for the wrongful acts of its servants and employes, is not limited to the rule, limiting responsibility of the master to acts of his servants.⁴⁵ For reasons of public policy, and on account of the nature of its employment, special covenants or obligations are implied by a common carrier, not only,—in carrying the passenger, to use every reasonable precaution for his safety,⁴⁶—but also to protect him, from any wrongful act by the carrier's servants engaged in his transportation. And, for any such act, the carrier is liable, however wilful or malicious it may be, and however unnecessary to the conduct of the carrier's business. Further, the common carrier's implied obligation is, that its servants shall make every effort to protect its passengers, while under its charge, from assaults by other persons.⁴⁷ The common carrier is held to like obligations, in the carriage of goods and merchandise. It is its duty to carry freight, as well as passengers, upon demand, and to the extent of its capacity,⁴⁸ if the freight offered, is lawful and harmless,⁴⁹ and to transport it safely against loss or damage, except it arise from the act of God, or the public enemy,⁵⁰ or from the perishable nature of the goods.⁵¹ Any such authority implies the exercise of due care, to prevent injury, and for any injury, resulting from its negligence, the authority conferred will not exempt the corporation from liability.⁵² Where a coal company allowed its refuse to wash into a creek running through the land of another, and causing the creek to overflow, and cover the land with such refuse, to its damage, the court said: "That the coal company is a corporation, can make no difference. Its rights are just, as great, and no greater, than

⁴² *National Bank v. Graham*, 100 U. S. 699.

⁴³ *Chapman v. McCraig*, 63 Ind. 360.

⁴⁴ *Jackson Ins. Co. v. Cross*, 9 Heisk. (Tenn.) 283.

⁴⁵ *Stewart v. Brooklyn, etc. Co.*, 99 N. Y. 588; *Palmer v. Manhattan Ry. Co.*, 133 N. Y. 261.

⁴⁶ *Philadelphia, etc. Co. v. Derby*, 14 How. 468; *Warner v. Baltimore, etc. Co.*, 168 U. S. 339.

⁴⁷ *Pittsburg, etc. v. Hinds*, 53 Pa. St. 512.

⁴⁸ *Winona, etc. Co. v. Blake*, 94 U. S. 180.

⁴⁹ *Pittsburg, etc. R. Co. v. Morton*, 61 Ind. 539.

⁵⁰ *Propeller Niagara v. Cordes*, 21 How. 7.

⁵¹ *Illinois Central Co. v. McCellan*, 54 Ill. 58.

⁵² *Fero v. Buffalo, etc. Co.*, 22 N. Y. 209, 78 Am. Dec. 178; *Frankford, etc. Co. v. Philadelphia, etc. Co.*, 54 Pa. St. 345, 93 Am. Dec. 708.

those of a private person in the same business. That it is authorized by its charter to mine coal generally in the State, can not enlarge its rights in any particular locality. Even had its charter empowered it to establish a business, and carry it on in a particular place, it can not be presumed that the State intended to authorize it to carry on the business in a manner, destructive of the property rights of others, without compensation. While the thing to be done, may be lawful in a general way, there are, and must be, limitations upon the means by which it is to be done."⁵³

Contracts limiting the corporation's liability for negligence.—The weight of authority holds, that a common carrier can not shield itself from liability for its own negligence, by contract with the shipper or passenger to that effect. In the federal courts, such a contract is void. Such limitation in Texas is forbidden by statute,⁵⁴ and similarly in Alabama,⁵⁵ and in Indiana.⁵⁶ In Pennsylvania, it is held that a common carrier may contract against losses, due to negligence.⁵⁷

Charitable corporations.—A charitable corporation is an exception to the rule that corporations are liable for the negligence and wrongful acts of their agents or servants; though, it is liable, in case of negligence in employing or retaining such employees.⁵⁸

§ 963. **Nuisance; nonfeasance.**—The mere fact of incorporation, gives the company no more authority to maintain a nuisance, than an individual would have, in a like situation.⁵⁹ On an indictment for a nuisance, it was said that, if a corporation commits a trespass on private property, or obstructs a way to the special injury and damage of an individual, no one could doubt its liability therefor.⁶⁰ In like manner, and for the same reason, if they do similar acts, to the inconvenience and annoyance of the public, they are responsible, in the form and mode appropriate to the prosecution and punishment of such offenses.⁶¹ Legislative

⁵³ Columbus, etc. Iron Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528.

⁵⁴ Liverpool, etc. Co. v. Phoenix Ins. Co., 129 U. S. 397; Gulf, etc. Ry. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494.

⁵⁵ Ala. etc. Ry. v. Thomas, 83 Ala. 343, 3 South. 802.

⁵⁶ Rosenfeld v. Peoria, etc. Ry., 103 Ind. 131, 53 Am. Rep. 500.

⁵⁷ Forepaugh v. Delaware, etc.,

128 Pa. St. 217, 5 L. R. A. 508, 15 Am. St. Rep. 672.

⁵⁸ Glavin v. R. I. Hospital, 12 R. I. 411, 34 Am. Rep. 675.

⁵⁹ *Vide infra*, § 1010; Powell v. Brookfield, etc. Co. (Mo. App. 1904), 78 S. W. 646.

⁶⁰ Commonwealth v. Proprietors (1854), 2 Gray, 346.

⁶¹ Commonwealth v. Proprietors (1854), 2 Gray, 346; State v. Morris, etc. R. Co., 23 N. J. 360;

authority to a railroad company, to bring its tracks within municipal limits, and to construct shops and engine houses there, does not confer authority to maintain a nuisance, by the noises and smoke in, and from, its engines and workshops.⁶² But the erection of telegraph poles in city streets, can not be complained of by one not suffering special damage, when the erection is authorized by statute and ordinance.⁶³ Neither are telegraph poles and wires in a public street, necessarily a nuisance, which will be prohibited at the suit of one in front of whose lot they are erected.⁶⁴ A corporation may be indicted for nonfeasance, for failure to perform a duty it owes to the public, the non-performance of which constitutes a public nuisance, as, in failure to repair a public bridge,⁶⁵ or public canal,⁶⁶ or failure of a railroad to repair a highway, crossed by its line.⁶⁷ For malfeasance or misfeasance, a corporation is indictable, as, for creating a dam across navigable river,⁶⁸ or for excavating a public highway, or placing obstructions therein.⁶⁹ But a railroad in the hands of a receiver, and under his management, is not indictable, for a nuisance caused by stoppage of its trains in a public highway, thereby obstructing it.⁷⁰

§ 964. Distinction between misfeasance and nonfeasance.

A distinction is drawn between the liability of a corporation for

Maund v. Monmouthshire Canal Co., 4 Man. & G. 452; *Queen v. Birmingham, etc. Ry. Co.*, 3 Ad. & El. N. S. 223; *Queen v. Great North, etc. Ry. Co.*, 9 Ad. & El. N. S. 315; *Eastern Counties Ry. v. Broom*, 6 Exch. 314.

⁶² *Baltimore, etc. R. Co. v. Fifth Baptist Ch.* (1882), 108 U. S. 317, holding that an action lies by the church in its corporate capacity against the railroad company for such a nuisance in running their cars and engines, ringing bells, blowing off steam, and making other noises in the vicinity of a church, or meeting house, on the Sabbath, and during public worship, as to annoy and molest the congregation worshipping there and greatly to depreciate the value of the house and render the same unfit for a place of religious worship. *Acc.* *First Bap-*

tist Ch. v. Schenectady, etc. R. Co. (1848), 5 Barb. 79.

⁶³ *Gray v. Mutual Union Telegraph Co.*, 12 Mo. App. 485.

⁶⁴ *Hewett v. Western Union Telegraph Co.*, 4 Mackey (D. C.), 424, 54 Am. Rep. 284.

⁶⁵ *Commonwealth v. Central Bridge Corp.*, 12 Cush. (66 Mass.) 242.

⁶⁶ *Delaware, etc. Co. v. Commonwealth*, 60 Pa. St. 367, 100 Am. Dec. 570.

⁶⁷ *New York, etc. Co. v. State*, 50 N. J. Law, 303, 53 N. J. Law, 244; *Louisville, etc. Co. v. State*, 3 Head (Tenn.), 523, 75 Am. Dec. 778.

⁶⁸ *State v. Great Works, etc. Co.*, 20 Me. 41, 37 Am. Dec. 38.

⁶⁹ *State v. Ohio, etc. Co.*, 23 Ind. 362.

⁷⁰ *State v. Vermont, etc. Co.*, 30 Vt. 108.

misfeasance and nonfeasance, but the difficulty in distinguishing the character of these offenses, strongly illustrates the absurdity of the doctrine, that a corporation is indictable for a nonfeasance, but not for a misfeasance.⁷¹ The distinction between a wrongful act and a wrongful omission, misfeasance and nonfeasance, has been explicitly denied. No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame to some individual, or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards, or to an act, improper by nothing but the want of safeguards. If a company be authorized to make a bridge with parapets, but makes it without them, does the offense consist in the construction of the unsecured bridge, or in the neglect to secure it? If the distinction were always easily discoverable, why should a corporation be liable for one species of offense and not for the other? The incongruity of allowing the exemption, is one strong argument against it.⁷²

§ 965. *Trespass quare clausum fregit*.—A corporation is liable for a trespass by its agent, whether upon land, or upon other property, when committed in the course of his employment by the corporation.⁷³ *Trespass quare clausum* lies against a corporation entering upon land, under color of the power of eminent domain, for the purpose of constructing its works, without having complied with all the statutory provisions respecting condemnation, or without having paid or deposited, or given security for, the amount awarded, or, as in case of a railroad company, when it wastes lands lying beyond the limits of its right-of-way,⁷⁴ or

⁷¹ *Vide infra*, § 1020; *Commonwealth v. Proprietors* (1854), 7 Gray, 346; *Queen v. Great North, etc. Ry.*, 9 Ad. & El. N. R. 325.

⁷² *Regina v. Great Northern, etc. R. Co.*, 9 Q. B. 324, where Lord Denman continued: "The law is often entangled in technical embarrassments, but there is none here. It is as easy to charge one person or a body corporate with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a price for an act as for the omission."

⁷³ *Foot v. City of Cincinnati*, 9 Ohio, 31, 34 Am. Dec. 420.

⁷⁴ *Blodgett v. Utica, etc. R. Co.*, 64 Barb. 480; *Cohen v. St. Louis, etc. R. Co.*, 34 Kan. 158, 55 Am. Rep. 242; *Eaton v. Boston, etc. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Lee v. Pembroke Iron Co.*, 57 Me. 481, 2 Am. Rep. 59; *Beach on Railways*, §§ 830, 851, where this subject is fully treated. See also *Imboden v. Etowah, etc. Mining Co.*, 70 Ga. 86; *Hobbs v. Amandor, etc. Canal Co.*, 66 Cal. 161. But where the evidence in a case failed to show that defendant, a

under color of a statute which does not confer the authority,⁷⁵ or under a statute which makes no provision for compensation.⁷⁶ A malicious and oppressive trespass by a railway's agents, upon the rights of a telegraph company, in pulling up its poles, upon the alleged ground that they were upon the railroad's right-of-way, may entitle it to exemplary or punitive damages, when the result of the trespass is to impair its credit, and subject it to the expense of litigation. The sense of wrong and insult, consequent on the trespass, which, as between natural persons, entitles one to redress by way of exemplary damages, has, however, no application in a suit by a corporation.⁷⁷ But it has been held, that in an award of two hundred dollars, as actual, and ten thousand dollars, as exemplary, damages, the disproportion was so great as to manifest that spirit of prejudice or partiality in a jury, which required a reversal of the judgment.⁷⁸ In an action against a corporation for malicious trespass, declarations of a servant indicating his own indifference to the consequences of the trespass, are inadmissible; but declarations, made by him, prior to the completion of the trespass, as to matters within the scope of his employment, are admissible, to show the *animus* of defendant.⁷⁹

§ 966. **Torts involving malice.**—Although it has been said that, owing to its nature, a corporation can not commit a tort involving malice, since "it must be shown that the defendant was actuated by motive in his mind, and a corporation has no mind,"⁸⁰ nevertheless, the malice of its agents may be imputed to the corporation, and it may be held liable for their malicious wrongs,

water company, had not used proper care in repairing its dam, the breaking of which injured plaintiff's mining claim, and washed away his tools, the judgment in plaintiff's favor for damages was reversed, and a new trial ordered. *Weidekind v. Tuolumne County Water Co.* (1887), 74 Cal. 386.

⁷⁵ *Beach on Railways*, § 851, and cases there cited; *Whitehead v. Arkansas Central R. Co.*, 28 Ark. 460; *Secomb v. Milwaukee, etc. R. Co.*, 49 How. Pr. 75; *Pennsylvania R. Co. v. Eby*, 107 Pa. St. 166.

⁷⁶ *Seneca R. Co. v. Auburn, etc.*

R. Co., 5 Hill, 170; *Trenton Water Power Co. v. Raff*, 56 N. J. 335; *Williamson v. Canal Co.*, 78 N. C. 156; *Cogswell v. Essex Mill Co.*, 6 Pick. 94; *Beach on Railways*, § 851.

⁷⁷ *International, etc. R. Co. v. Telephone, etc. Co.* (1887), 69 Tex. 277, 5 Am. St. Rep. 45.

⁷⁸ *International, etc. R. Co. v. Telephone, etc. Co.* (1887), 69 Tex. 277, 5 Am. St. Rep. 45.

⁷⁹ *International, etc. R. Co. v. Telephone, etc. Co.* (1887), 69 Tex. 277, 5 Am. St. Rep. 45.

⁸⁰ *Vide, infra*, § 1017; *McClellan v. Cumberland*, 24 Me. 566.

when committed in a transaction within the scope of their authority;⁸¹ and so, a corporation, to the same extent as an individual, may be held liable in an action for libel,⁸² or for conspiracy,⁸³ or for malicious false arrest, or imprisonment.⁸⁴

§ 967. **Whether a corporation may act maliciously.**—It has been argued, that, inasmuch as a malicious motive, and a criminal intent, can not be attributed to a corporation in its corporate capacity, it is not indictable for those crimes, of which malice or some specific criminal intent, is an essential ingredient.⁸⁵ A distinction is drawn between acts, injurious in their effects, and for which the actor is liable without regard to the motive which prompted them, and conduct, the character of which depends upon the motive, and which, apart from such a motive, can not be made the ground of legal responsibility. If this distinction were well taken, it would follow that, since a corporation, as such, is incapable of malice, it is not liable for a malicious prosecution. The leading American cases, holding that malicious prosecution does not lie against a corporation, because it can not be guilty of a malicious intent, have been overruled.⁸⁶

§ 968. **Malicious prosecution.**—It is not only in cases where a prosecution has been instituted, by the command of the corporation acting through its directors, that it may be sued for malicious prosecution.⁸⁷ In order to maintain an action for malicious prosecution against a corporation, it is not necessary to show an express authority from the corporation to carry it on, but it is sufficient to show that the prosecution was commenced, and carried on, by agents of the corporation, in its interest, and for its benefit, and that they acted within the scope of the authority conferred upon them by the corporation.⁸⁸ Thus, a corporation

⁸¹ Philadelphia, etc. Co. v. Quigley, 21 How. (U. S.) 202.

⁸² Philadelphia, etc. Co. v. Quigley, 21 How. (U. S.) 202.

⁸³ Zinc, etc. Co. v. First Nat. Bank, etc., 103 Wis. 125, 74 Am. St. Rep. 845.

⁸⁴ Lake Shore, etc. Co. v. Prentice, 147 U. S. 101; Goodspeed v. Bank, 22 Conn. 530, 58 Am. Dec. 439.

⁸⁵ Owsley v. Montgomery, etc. R. Co., 37 Ala. 560.

⁸⁶ Childs v. Bank of Missouri, 17 Mo. 213, followed only with

qualification as to torts within the scope of an agent's authority by Gillet v. Missouri, etc. Ry. Co., 55 Mo. 315; and Owsley v. Montgomery, etc. R. Co., 37 Ala. 560, in effect overruled by South, etc. R. Co. v. Chappell, 61 Ala. 529, and by Boogher v. Life Assn. (1882), 75 Mo. 319; and Jordan v. Alabama, etc. R. Co., 74 Ala. 85, respectively.

⁸⁷ Vide *infra*, § 1023; Boogher v. Life Assn. (1882), 75 Mo. 319, 42 Am. Rep. 413.

⁸⁸ Boogher v. Life Assn (1882),

may be held liable, for malicious prosecution instituted by a general agent,⁸⁹ or even by his subordinate agent.⁹⁰ In such cases, the corporation and servant can be made joint defendants.⁹¹ A department-store corporation may be held liable, for exemplary damages for illegal arrest of an employe, by one of its chief officers.⁹² A bank may be held liable, in damages for malicious intent, in arrest of an alderman, for introducing a privileged resolution claimed to be libelous.⁹³ A corporation may be held liable, for a malicious prosecution,⁹⁴ but not when brought upon advice of counsel in criminal proceedings.⁹⁵ The corporation is not bound, in case of suit brought by it against defendant in criminal prosecution, at the instance of an attorney, who was not expressly authorized to bring the suit.⁹⁶

§ 969. **False imprisonment.**—Even cases that deny the liability of a corporation for malicious prosecution, admit their liability for false imprisonment.⁹⁷ A railway company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by the authority of the company; and it is not necessary that that authority be under seal.⁹⁸ The malicious and oppressive conduct of an agent of a corporation, and his wanton and reckless disregard of a person's right in procuring his false imprisonment, may subject the company to damages.⁹⁹ And, in an aggravated case, it will be liable in punitive damages.¹

75 Mo. 325, 42 Am. Rep. 413; approving *Fenton v. Machine Co.*, 9 Phila. 189.

⁸⁹ *Turner v. Phoenix Ins. Co.* (1884), 55 Mich. 236; *Hussey v. King* (1887), 98 N. C. 34, 2 Am. St. Rep. 312.

⁹⁰ *Moore v. Metropolitan Ry.* (1872), L. R. 8 Q. B. 36. *Of Wheeler, etc. Manuf. Co. v. Boyce* (1887), 36 Kan. 350.

⁹¹ *Hussey v. Norfolk Southern R. Co. & King* (1887), 98 N. C. 34, 2 Am. St. Rep. 312.

⁹² *Bingham v. Lipman, etc. Co.* (Oreg. 1901), 67 Pac. 98; *Schwartzung v. Van Wie, etc. Co.* (1902), 69 N. Y. App. Div. 282.

⁹³ *Wachsmuth v. Merchants' National Bank* (1893), 96 Mich. 426, 21 L. R. A. 278.

⁹⁴ *Feighner v. Delaney* (1898),

21 Ind. App. 36; *Reed v. Loosemore* (1900), 197 Pa. St. 261.

⁹⁵ *Atchison, etc. R. Co. v. Brown* (1897), 57 Kan. 785, 48 Pac. 31.

⁹⁶ *Beiswanger v. Am. etc. Co.* (Md. 1904), 57 Atl. 202.

⁹⁷ *Vide infra*, § 1025; *Owsley v. Montgomery, etc. R. Co.* (1861), 37 Ala. 560. The court said that the same reasoning that sustained cases in trespass against corporations applied to trespass for false imprisonment.

⁹⁸ *Goff v. Great Northern Ry.*, 3 El. & El. 672; *Eastern Counties Ry. Co. v. Broom*, 6 Ex. 314.

⁹⁹ *Wheeler, etc. Manuf. Co. v. Boyce* (1887), 38 Kan. 356.

¹ *Wheeler, etc. Manuf. Co. v. Boyce* (1887), 36 Kan. 350. In this case the plaintiff below was thrust into a jail at the instance

§ 970. **Libel. Civil liability.** Libel by mercantile reporting-agency. Libel in admiralty.—A corporation may be held civilly responsible for libel.² Thus, an action for libel is maintainable against a joint-stock company, or corporation which publishes a newspaper in which the libel is maintained.³ A railroad corporation is liable in tort for the publication of a libel, where a libelous extract from a newspaper, indicating that a neighboring ticket broker was not a reliable person from whom to buy tickets, was kept posted forty days in a conspicuous place in an office of the road arranged especially for the sale and advertising of railroad tickets, under the immediate charge of an employe, and the general passenger agent, although notified, had refused to interfere with the posting.⁴ So, where a railroad corporation, by its superintendent prepared a "discharge list," wherein a criminal act was assigned as the reason for the discharge of an employe, and sent the list to all of its agents who had power to employ men for the company, this was considered to be a sufficient pub-

of the agent of the defendant below, without warning or trial, when there was no civil or criminal suit pending against him, and kept there for ten days with seventeen or eighteen prisoners who were either charged with or convicted with crime. The sewing machine sought to be recovered from his wife had been paid for, and belonged absolutely to her; and defendants with knowledge of this fact undertook to compel the payment of money not due, or the recovery of the property which they did not own, by the arrest and incarceration of the plaintiff without cause and in a manner that was clearly illegal. Apart from the loss of time, and interruption to his business, as well as the humiliation and indignity suffered by him by being thrust into jail upon a false charge, it appears that the confinement resulted in his sickness; "and when we consider the malicious and oppressive conduct of the defendant, and that the case is one which calls for the inflict-

tion of exemplary or punitive damages, we can only conclude that the verdict of one thousand dollars in favor of the plaintiff was fully justified, if not too small. We say without hesitation, that an award of a larger amount would not have been disturbed on the ground that it was excessive."

² *Missouri Pac. Ry. Co. v. Richmond* (1881), 73 Tex. 568; *Bacon v. Michigan, etc. R. Co.* (1884), 55 Mich. 224; *Philadelphia, etc. R. Co. v. Quigley*, 21 How. 202; *State v. Atchison*, 3 Lea, 729, 31 Am. Rep. 663; *Fogg v. Boston, etc. R. Co.* (1889), 148 Mass. 513, 12 Am. St. Rep. 583; *Samuels v. Evening Mail Assn.*, 75 N. Y. 604, reversing 9 Hun, 288; *Whitfield v. South Eastern Ry. Co.*, El. B. & E. 115.

³ *Van Aernam v. Bleistein*, 102 N. Y. 355; *Evening Journal Assn. v. McDermott*, 44 N. J. L. 430, 43 Am. Rep. 392.

⁴ *Fogg v. Boston, etc. R. Co.* (1889), 148 Mass. 513, 12 Am. St. Rep. 583.

lication to support an action for libel.⁵ A necessary correlative to the principle of the exercise of corporate powers and faculties, by legal representatives, is the recognition of corporate responsibility for the acts of those representatives.⁶ To establish liability, however, the publication must be shown to have been made by the company's authority, or to have been ratified by it, or to have been made by one of its servants or agents in the course of the business in which he was employed,⁷ and, if made in the course of his business, the company is liable, even though it was in excess of his authority and wrongful.⁸ The law can not be invoked, however, to redress every breach of good morals or manners in newspaper publications.⁹ An alleged libel is not

⁵ Bacon v. Michigan, etc. R. Co. (1884), 55 Mich. 224.

⁶ Philadelphia, etc. R. Co. v. Quigley, 21 How. 202. The contention of the railway company in this case was that being a corporation with defined and limited faculties and who were concerned in the publication of the libel. But the court said: "To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and therefore that no crime or offense can be imputed to it. That, although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by their dominant body, that such acts, not being contemplated by their charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents, and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the states of the Union relative to these artificial

persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy and capital of society for the development of enterprises of public utility. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it."

⁷ Fogg v. Boston, etc. R. Co. (1889), 148 Mass. 513, 12 Am. St. Rep. 583.

⁸ Fogg v. Boston, etc. R. Co. (1889), 148 Mass. 513, 12 Am. St. Rep. 583; Home v. Newmarch, 12 Allen, 49; Hawes v. Knowles, 114 Mass. 518, 19 Am. Rep. 383; Levi v. Brooks, 121 Mass. 501; Goddard v. Grand Trunk Ry., 57 Me. 202, 2 Am. Rep. 39; Philadelphia, etc. R. Co. v. Doby, 14 How. 468.

⁹ Stewart v. Minnesota Tribune Co. (1889), 40 Minn. 101, 12 Am. St. Rep. 696, where it was held that a statement that a professional man had moved his office to his house to save expenses was not libelous.

proved, by the fact that the manager of the corporation dictated the matter, complained of as libelous, to a stenographer, who wrote it out, and mailed it.¹⁰ A newspaper corporation may be liable, for exemplary damages for libel, for a publication by its agents, acting within scope of their authority.¹¹ A corporation, acting as a commercial agency, is liable, for false and defamatory publications, when natural persons would be held liable. Their reports are privileged communications, only when made to a subscriber interested in the pecuniary standing of the merchant reported.¹² But the publication by a mercantile agency, organized for the purpose of ascertaining and reporting the financial standing and ability of merchants, traders, and other business men, in reports issued and sent to the agency's subscribers, that a judgment had been recovered against plaintiff, is not libelous *per se*; and in an action therefor, when the complaint contains no allegation of special damage, there is no question for the jury.¹³ The circumstances under which a publication is made concerning a party, and other matter published with it, may tend to characterize the words used, so as to give to them an import, productive of an imputation which otherwise they could not have.¹⁴ In cases of that character, there may be a question for the jury to determine, in view of the situation and relation so represented, and upon their finding may be dependent the question, whether the words used are libelous. In these mercantile reports, there is nothing except the import of the words themselves, to characterize their purpose or effect, other than the fact that the business of the company is to furnish information of the pecuniary condition of persons, whose vocations are such, as to be likely to render business credit desirable. It is not seen that the character of the enterprise in which these companies are engaged, gives to the mere statement of what purports to be a fact, anything more than is expressed or fairly implied. The meaning of words, in an action of slander or libel, can not be extended by innuendo beyond their import, aided, as they may be, by extrinsic facts with which they are connected. The use of extrinsic evidence, is to

¹⁰ Owen v. Ogilvie, etc. Co. (1898), 32 N. Y. App. Div. 465.

¹¹ Times, etc. Co. v. Carlisle (1899), 94 Fed. 762; Bello v. Fuller (1892), 84 Tex. 450.

¹² Bradstreet Co. v. Gill (1888), 72 Tex. 115, 13 Am. St. Rep. 768.

¹³ Woodruff v. Bradstreet Co. (N. Y.), 6 Ry. & Corp. L. J. 475.

¹⁴ This was illustrated in the cases of Zier v. Hoffin, 33 Minn. 66; Sheppard v. Whitaker, L. R. 10 C. P. 502; Erber v. Dun, 12 Fed. Rep. 526.

explain the application of words in connection with such facts as are alleged. Unless facts be alleged, which will justify the inference that a publication of this character carries with it any meaning, essentially different from that it would have, if taken from any other source, the same rule will be applied. The fact that its apparent authenticity may have been greater, is not important.¹⁵ Where an alleged libel consists in the publication by a mercantile reporting agency, for the information of its subscribers, of a sheet containing, among other business men's names, that of plaintiff, followed by asterisks,—with no proof of any meaning attached thereto, except the testimony of defendant's superintendent,

¹⁵ Woodruff v. Bradstreet Co. (N. Y. 1889), 6 Ry. & Corp. L. J. 475, where the court *per* Bradley, J., continued: "The cases cited by the plaintiff's counsel have been examined, and none of them seem to support his contention. In Williams v. Smith, L. R. 22 Q. B. Div. 134, the publication in the *Hatters' Gazette*, London, for December, 1887, was to the effect that a judgment recovered against the plaintiff, who was a hatter, on the 13th day of October previous, remained unpaid. This appeared under headings, and in a column known as a "black list." The judgment was recovered as stated, and had been paid. It was held that the place where the words were located in the *Gazette*, and the inference which was permitted by their use—that the judgment remained unpaid—thus indicating the plaintiff's default, justified the interpretation given by the jury, which rendered the publication libelous. That case is distinguishable from the present one by reasons which may support that recovery without aiding the plaintiff in this action. In King v. Patterson, 49 N. J. 417, the alleged libel was the publication of a statement to the effect, as construed, that the plaintiff, who was engaged in the clothing business, had put a chattel mortgage on her stock of goods. The case as reported indicates that

special damages were alleged and proved, and so far as it there appears, the main ground of defense, upon the law, was that publication was privileged. That was the only question considered on review. By a divided court it was held not privileged. Upon that proposition the views of the court in *Sunderlin v. Bradstreet*, 46 N. Y. 188, were adopted. The distinction in principle between the King Case and the present one, as well in the character of the report as in that of the damages alleged, is obvious. There the purport of the publication was that the plaintiff had mortgaged her stock of goods to secure an existing debt, and thus placed herself in a situation liable to result in embarrassment by means of the opportunity furnished by giving the mortgage to interrupt and break up her business. In such case an inference might be permitted that she would not place herself in that situation without an existing necessity for the protection of her business arising out of inability to pay. In that respect that case is distinguishable from *Newbold v. Bradstreet*, 57 Md. 38. The additional cases cited do not seem to require any special attention or comment here. These views lead to the conclusion that the judgment should be affirmed." All concurred, except Follett, C. J., and Vann, J., not sitting.

who testifies that they referred only to a marginal note directing persons, desirous of further information concerning the person, in connection with whose name they occurred, to call at defendant's office,—a verdict for the defendant should be directed, as the characters are not libelous *per se*, and are not shown to have any libelous significance as used.¹⁶ A libel in admiralty will lie against a corporation, as against a natural person, under like circumstances, to enforce a maritime contract, or to recover damages in case of tort.¹⁷

§ 971. Personal injuries by violence; liability in damages.—

No case appears, of indictment of a corporation, for an act of personal violence, but it has been held civilly liable in exemplary damages for assaults and batteries by its employes while engaged in its service, as in railroad cases.¹⁸ When such act is done intentionally, grossly, and wilfully, exemplary damages against a corporation are allowed by statute in most of the States.¹⁹ A private corporation may be made a defendant in an action to recover damages for personal injuries,²⁰ whether to its own employes and servants,²¹ or to strangers,²² or to persons, to whom it owes peculiar obligations growing out of the relation between passenger and carrier.²³ But the distinction between the liabilities of private and public corporations, is of importance in this connection.²⁴ For example, it has been held, that a "House of Refuge," founded for the care, custody, and reformation of convict, vagrant, or incorrigible youths, being a charitable organization, is not liable, for damages for an assault by one of its officers on an inmate.²⁵ This distinction was involved in a recent case in Massachusetts, in which an organization for dis-

¹⁶ *Kingsbury v. Bradstreet Co.* (N. Y. 1889), 6 Ry. & Corp. L. J. 474.

¹⁷ *The Comanche*, 8 Wall. (U. S.) 448.

¹⁸ *Hewitt v. Swift*, 3 Allen, 420; *Holmes v. Wakefield*, 12 Allen, 580.

¹⁹ *Singer Manuf. Co. v. Holdfodt*, 86 Ill. 455.

²⁰ *Moore v. Fitchburg R. Co.*, 4 Gray, 465; *Hanson v. European, etc. Ry. Co.*, 62 Me. 84, 16 Am. Rep. 404; *McKinley v. Chicago, etc. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Passenger R. Co. v.*

Young, 21 Ohio St. 518, 8 Am. Rep. 78; *Eastern Counties Ry. Co. v. Broom*, 6 Ex. 314. See also § 1030*a*, *infra*.

²¹ *Beach on Railways*, § 971; *Beach on Contributory Negligence*, §§ 371-373.

²² *Beach on Railways*, § 970.

²³ *Beach on Railways*, §§ 972 *et seq.*

²⁴ *Insurance Patrol v. Boyd*, 120 Pa. St. 624; *Newcomb v. Boston Protective Department* (Mass. 1890), 8 Ry. & Corp. L. J. 65.

²⁵ *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495.

covering and preventing fires, and saving life and property, was held to be a private, and not a charitable corporation, and accordingly, liable for any injuries caused by the negligence of its servants.²⁶ A corporation and its agents may be joined, as defendants in an action to recover damages, resulting from an assault and battery, committed by the latter, under the previous authority or subsequent ratification of the former;²⁷ although there is a case, holding that an action for assault and battery, will not lie against a corporation joined as defendant in such an action. If so joined, the writ is abatable as to all.²⁸ A civil suit, to recover damages for injuries, resulting in death, could not be maintained at common law.²⁹ This defect has been remedied in England by Lord Campbell's Act, which provides a method,

²⁶ *Newcomb v. Boston Protective Department* (Mass. 1890), 8 Ry. & Corp. L. J. 65. In this case the defendant was incorporated by Stat. Mass. 1874, ch. 61, which limits its membership to officers and agents of fire insurance companies in the city of Boston. The act gives the corporation power to maintain a corps of men and suitable apparatus for discovering and preventing fires and saving life and property, and its employees are given the right to enter buildings and assist at fires, and have certain rights in the streets, subordinate to those of the fire department. The expenses of the corporation are paid by assessments on all fire insurance agencies or organizations doing business in Boston, which are required to make a report of the aggregate amount of premiums received by each, and a penalty is provided for a failure to make report. The corporation has no capital stock, and has no income except from the assessments; and in levying assessments, no distinction is made between companies that are members of the corporation and those which are not. The evidence was that no distinction was made at fires in protecting insured property and that which was

not insured, and that it would be impracticable to make a distinction. And, as stated in the text, it was held that the defendant was a private and not a charitable corporation, and liable for the negligence of its servants. "The defendant," said the court, "places great reliance upon *Insurance Patrol v. Boyd*, 120 Pa. St. 624, which somewhat resembles the case at bar. But in that case membership in the corporation was open to everybody, and the expenses were wholly paid by voluntary contributions."

²⁷ *Moore v. Fitchburg R. Co.*, 4 Gray, 465; *Hewett v. Swift*, 3 Allen, 420; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365; *Eastern Counties Ry. Co. v. Broom*, 6 W. H. & G. 314.

²⁸ *Orr v. Bank of the United States* (1821), 1 Ohio, 36, 13 Am. Dec. 588. This case gives a fair statement of certain obsolete legal principles regarding the law of corporations and the reasons upon which they were supposed to be founded. The case was followed in *Foote v. City of Cincinnati*, 9 Ohio, 31, but is inconsistent with *Atlantic, etc. R. Co. v. Dunn*, 19 Ohio St. 162, and *Passenger R. Co. v. Young*, 21 Ohio St. 518.

²⁹ *Beach on Railways*, § 1010.

whereby the family of the deceased may recover compensation;³⁰ and similar acts have been passed by the legislatures of the American States.³¹ In Maine, New Hampshire and Massachusetts, indictment and fine is used, as a method of recovering damages for causing death, the fine being for the benefit of the deceased's relatives.³²

§ 972. Offense committed under legislative authority.—A corporation is not indictable for an offense, when acting strictly within its express powers, constitutionally conferred to do the offensive act, though such offensive act would constitute a nuisance, or trespass, if the corporation were without such powers, as, in the obstruction of the streets, by a street railway company.³³ "If the thing done is within the statute, it is clear that no compensation can be afforded, for any damages sustained thereby, except so far as the statute itself has provided it, and this is clear, on the legal presumption that the act creating the damage, being within the statute, must be a lawful act."³⁴ When the corporation claims charter, or other statutory authority to do an act, causing injury to others, and which would constitute a trespass or nuisance, in the absence of such authority,—it is to be strictly construed against the corporation, and in favor of the public.³⁵

§ 973. Fraud of its officers and agents, is fraud of the corporation.—A corporation may be guilty of fraud, the fraud of its officers and agents in the course of corporate dealings, being in law the fraud of the corporation.³⁶ Thus, it is liable, in an action

³⁰ Beach on Railways, § 1010, citing *Blake v. Midland Ry. Co.*, 18 Q. B. 93; *Duckworth v. Johnson*, 4 Hurl. & N. 653; *Boulter v. Webster*, 11 L. T. (N. S.) 598; *Pym v. Great Northern Ry. Co.*, 4 Best & Sm. 396.

³¹ *Brown v. Buffalo, etc. R. Co.*, 22 N. Y. 191; *Cooley on Torts*, *271; 2 *Thompson on Negligence*, § 90; *Beach on Railways*, § 1010.

³² *State v. Maine Central R. Co.*, 60 Me. 490; *State v. Grand Trunk Ry. Co.*, 61 Me. 114; *Boston, etc. R. Co. v. State* (1855), 32 N. H. 215; *Commonwealth v. Boston, etc. R. Co.* (1882), 8 Am. & Eng. R. Cas. 297; *Commonwealth v. Boston, etc. R. Co.*, 129 Mass. 500; *Commonwealth v. Boston, etc. R. Co.*, 11 Cush. 512; *Commonwealth*

v. Metropolitan R. Co., 107 Mass. 236; *Commonwealth v. Fitchburg R. Co.*, 11 Allen, 189; *Commonwealth v. Vermont, etc. R. Co.*, 108 Mass. 7; *Commonwealth v. Fitchburg R. Co.*, 120 Mass. 372; *Commonwealth v. Boston, etc. R. Co.*, 126 Mass. 61; *Commonwealth v. East Boston, etc. Co.*, 13 Allen, 589.

³³ *State v. Louisville, etc. Co.*, 86 Ind. 114.

³⁴ *Duncan v. Findlater*, 6 Clark & F. 894.

³⁵ *Coolidge v. Williams*, 4 Mass. 140; *Snell v. Buresh*, 123 Ill. 151; *McAndrews v. Collard*, 42 N. J. Law, 189, 36 Am. Rep. 508.

³⁶ *Craigis v. Hadley* (1885), 99 N. Y. 131, where receiving a deposit just before a bank was go-

of deceit, for a fraudulent misrepresentation or concealment by its servants or agents,³⁷ while acting within the scope of their employment. And, in this connection the words "scope of authority or employment" are used in a broad and comprehensive sense.³⁸ Thus, an action of deceit will lie against an incorporated bank, for the fraudulent misrepresentation of its cashier, made while acting within the scope of his authority, and for the interest of his employers.³⁹ So, such an action of deceit lies against a joint-stock banking company, for the fraudulent misrepresentation of its manager.⁴⁰ Where a person has been drawn into a contract to purchase shares, belonging to a company, by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived, institutes a suit against the company to rescind it on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser can not be held to his contract, because a company can not retain any benefit which it has obtained through the fraud of its agents.⁴¹ There is an English decision that if the person who has been induced to purchase shares by fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, it can not be maintained against the company, but only against the directors personally.⁴² This, however, has been practically overruled, in a case where the rule was stated to be that the remedy against a company, in respect of the fraud of its agents, is not to be confined to cases where the fraud is part of a contract which can be rescinded so as to place the parties in *statu quo*. The action of deceit was held to be maintainable, the fraud of the agent being treated as the fraud of the principal; the

ing to close its doors, when its officers must all have known of its hopeless insolvency and after its paper had gone to protest, was held to be the fraud of the bank.

³⁷ *National Bank v. Graham*, 101 U. S. 699; *Butler v. Watkins*, 13 Wall. 456; *New York, etc. R. Co. v. Schuyler*, 34 N. Y. 30; *Works v. Barber*, 106 Pa. St. 125; *Western, etc. R. Co. v. Franklin Bank*, 60 Md. 36; *Lamm v. Port Deposit, etc. Assn.*, 49 Md. 233; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233.

³⁸ *Mackey v. Commercial Bank*,

L. R. 5 P. C. 394, distinguishing *dicta* in *Western Bank v. Addie*, L. R. 1 Sc. App. 145.

³⁹ *Mackey v. Commercial Bank*, L. R. 5 P. C. 394.

⁴⁰ *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259.

⁴¹ *Western Bank v. Addie*, L. R. 1 Sc. App. 145. *Vide infra*, §§ 255, 257, 263, 266.

⁴² *Western Bank v. Addie*, L. R. 1 Sc. App. 145. *Cf. New Brunswick, etc. Ry. Co. v. Conybeare*, 9 H. L. Cas. 725.

court saying that they saw no valid reason for exempting incorporated, more than unincorporated, principals from this form of action;⁴³ that while, strictly speaking, a corporation can not of itself be guilty of fraud, yet, since its objects can only be accomplished through the agency of individuals, there can be no doubt that conduct on the part of an agent, which would subject a natural person to liability, will render a corporate principal equally liable.⁴⁴

§ 974. **Torts in ultra vires business.**—*Ultra vires* is no longer a defense of a corporation, against liability for injuries suffered by acts or negligence of its agents, acting under its authority. All wrongs done by corporation, are, in a sense, *ultra vires*, and the question is not whether the transaction was done in business within the power and capacity of the corporation to do, or was beyond them, but is whether it had the right to do, or to neglect to do, the act complained of. The want of a franchise to do a tortious act, is not defense to the act.⁴⁵ When a corporation engages in unauthorized business, it is liable, for torts committed in the course of that business. Although it has no right to do wrong, it has the capacity, and may do wrong, and if its agents, acting under its authority, do wrong, it is liable in damages for any resulting injury. But otherwise,—if the wrong is done by its subordinate agents, or servants, without any authority from the managing officers,—the corporation is not liable.⁴⁶

§ 975. **Effect of consolidation upon torts. Liability of the new corporation.**—Statutes authorizing consolidation, frequently provide for the continuance of the separate existence of the old companies, so far as outstanding obligations to third persons are concerned, and include obligations arising out of torts.⁴⁷ Under the rule that a corporation, which succeeds to all the rights and franchises of a corporation, must take the obligations with the benefits, to the extent of the value of the property so conveyed,

⁴³ Mackey v. Commercial Bank (1874), L. R. 5 P. C. 414.

⁴⁴ Mackey v. Commercial Bank (1874), L. R. 5 P. C. 414; Ranger v. Great Western Ry. Co., 5 H. L. C. 86.

⁴⁵ Bissell v. Michigan, 22 N. Y. 258; New York, etc. Co. v. Haring, 47 N. J. Law, 137; Nims v. Mt. Herman School, 160 Mass. 177, 39 Am. St. Rep. 467.

⁴⁶ Central, etc. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Salt Lake City v. Hollister, 118 U. S. 256; Zinc, etc. Co. v. First Nat. Bank, etc. Co., 103 Wis. 125, 74 Am. St. Rep. 845.

⁴⁷ Warren v. Mobile, etc. R. Co., 49 Ala. 582; Selma, etc. R. Co. v. Harbin, 45 Ga. 706.

the new corporation, upon consolidation, impliedly assumes, and becomes liable, for the torts, as well as debts, and other obligations of the old companies, in the absence of any statutory exemption therefrom.⁴⁸ Where, by an act of the legislature, one railroad company is authorized to purchase, and another company to sell, its rights, franchises and property, and thereupon the former corporation is to be subject to all the duties, liabilities, obligations, and restrictions, to which the latter corporation was subject,—upon the completion of the transaction, the purchasing corporation becomes liable, in an action for damage occasioned by the prior neglect of the purchased corporation.⁴⁹ Where the language of the enabling statute is broad enough to place the defendant, in all respects, in the position of the other corporation, upon the conveyance and assignment provided for,—it is equivalent to an amalgamation of the two; all the franchises, privileges and powers, are transferred, without reservation; not merely the franchise to own and manage a railroad, but the franchise of being a body politic, with rights of succession, of acquiring, holding and conveying property, and of suing and being sued by its corporate name. It puts out of the reach of creditors, all property liable to attachment to satisfy claims, either in contract or tort. It practically terminates the corporate existence of the selling corporation, except perhaps so far as such existence may be necessary in order to hold and distribute the consideration received for the sale, or to meet the requirements of statutes which prolong the life of all corporations after dissolution, for the purpose of enabling them to close their concerns. It operates as a dissolution of the corporation by force of the statute, and of the assent manifested by the sale. It would be a very narrow construction to hold that when a statute subjects the purchasing corporation to all the duties, liabilities, obligations and restrictions of the other, it only intended to impose those obligations which the corporation owed the public under its

⁴⁸ *Louisville, etc. Co. v. Boney*, 117 Ind. 501, 3 L. R. A. 435; *Berry v. Kansas City, etc. Co.*, 52 Kan. 759, 39 Am. St. Rep. 371; *Philadelphia v. Ridge, etc. Co.*, 143 Pa. St. 444.

⁴⁹ *New Bedford R. Co. v. Old Colony R. Co.* (1876), 120 Mass. 397; *Coggin v. Central R. Co.*, 62 Ga. 685, 35 Am. Rep. 132; *Texas, etc. R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272; *St. Louis,*

etc. R. Co. v. Marker, 41 Ark. 542; *Warren v. Mobile, etc. R. Co.*, 49 Ala. 582; *Stephenson v. Texas, etc. R. Co.*, 42 Tex. 162; *Railroad Co. v. Hutchins*, 37 Ohio St. 282; *Chicago, etc. R. Co. v. Moffitt*, 75 Ill. 524. See *Columbus, etc. R. Co. v. Skidmore*, 69 Ill. 566; *Indianola R. Co. v. Fryer*, 56 Tex. 609. *Cf. Houston, etc. R. Co. v. Shirley*, 54 Tex. 125.

charter and the laws of the commonwealth, and that the property transferred was only that by which it served the public in the exercise of its franchise. In the absence of express provision, it is not to be inferred that it is the intention of the enabling act to impair claims of third parties for existing liabilities, or to shorten the time within which the remedy must be pursued. The question is not whether the statute compels the creditor to accept the defendant corporation as a new debtor against his will, or an injured person to resort to a stranger for satisfaction, but whether it empowers the creditor or the person injured to resort, if he chooses, in the first instance, to the corporation which, by the terms of the statute, is made liable to him. It is held that it does, and that the privity necessary to support an action, is created by the statute and the purchase and conveyance under it.⁵⁰ And, where two railroad companies have been consolidated, an action for damages also lies against one of the old companies for personal injuries causing death, and which resulted from its own wrongful act.⁵¹ But, of course, no liability is imposed upon the companies entering into a consolidation, for the torts of the new organization. For all purposes, except the settlement of their affairs, they are considered as dissolved.⁵² The consolidated company can not plead in an action against it, in tort, that the consolidation was not authorized by law.⁵³

§ 976. **Torts of predecessor corporation.**—It is the rule that a corporation is not liable for tort of another corporation, to whose property and franchises it has succeeded by purchase and transfer.⁵⁴

§ 977. **Torts by or against de facto corporation.**—A *de facto* corporation is liable for wrongs committed by it, in any case that

⁵⁰ New Bedford R. Co. v. Old Colony R. Co. (1876), 120 Mass. 397.

⁵¹ Warren v. Mobile, etc. R. Co., 49 Ala. 582; Miller v. Steamship Co., 67 Barb. 285.

⁵² Beach on Railways, § 559. And a judgment against one of the original companies for a tort committed by the consolidated company being void, no execution can issue thereon even against the consolidated company. Gray v. National Steamship Co., 115 U. S. 116, 121.

⁵³ Racine, etc. R. Co. v. Farmers' Loan & T. Co., 49 Ill. 331, 347, 95 Am. Dec. 595; Bissell v. Michigan Southern, etc. R. Co., 22 N. Y. 258, 263; Reynolds v. Myers, 51 Vt. 444, 455; Callender v. Painesville, etc. R. Co., 11 Ohio St. 516. Cf. Carey v. Cincinnati & Chicago R. (1857), 5 Iowa, 357.

⁵⁴ Gray v. National, etc. Co., 115 U. S. 116 (1885); Pittsburg, etc. Co. v. Fierst, 96 Pa. St. 144; Chesapeake, etc. R. v. Griest (1887), 85 Ky. 619, 4 S. W. 323.

a *de jure* corporation would be liable,⁵⁵ and may maintain an action for a tort to its property, to the same extent that a *de jure* corporation could. *Ultra vires* is no defense to its suit.⁵⁶

§ 978. **Foreign corporation.**—A foreign corporation may maintain an action for tort.⁵⁷

§ 979. **Capacity of corporation to sue in case of tort.**—A corporation, to the same extent as a natural person, has incidental power to sue, to recover damage for torts, committed against it.⁵⁸

§ 980. **Liability of stockholders for torts by the corporation.** The stockholders are not personally liable for torts of the corporation, where they have not participated therein, and there is no express statutory provision making them liable.⁵⁹

§ 981. **Exemplary damages, where the corporation participates in tort of its agent.**—Exemplary damages may be recovered against corporations, for the wrongful acts of their servants and agents, done in the course of their employment, in all cases, and to the same extent that natural persons, committing like wrongs, would be held liable.⁶⁰ There is nothing in the nature of a corporation to prevent awarding exemplary damages against it.⁶¹ The question is only as to circumstances under which to impose such damages, the purpose being both punishment and compensation. The prime purpose of awarding such damages, is punishment of the offender, as a warning to others, rather than as compensation to the person injured. Unless the corporation, in some way, participates in the malicious offense, it is not liable, although liable to make compensation to the party injured by his agent. The corporation can not be held liable for punitive damages, by reason alone of the malicious intent of the agent.⁶² Malice is imputable to the corporation, either where its managing

⁵⁵ Pinkerton v. Pennsylvania, etc. Co., 193 Pa. St. 229.

⁵⁶ Alderman v. School Directors, 91 Ill. 179; Baltimore, etc. Co. v. Fifth Baptist Church, 137 U. S. 568.

⁵⁷ People v. Central R., etc., 48 Barb. (N. Y.) 478; Turner v. Phoenix Ins. Co., 55 Mich. 236.

⁵⁸ Mather v. Ministers, etc., 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663; Town of Strafford v. Sanford, 9 Conn. 275.

⁵⁹ Imperial, etc. Co. v. Jewett (1901), 169 N. Y. 143; Cable v.

McCune, 26 Mo. 371, 72 Am. Dec. 214; Below v. Fuller, 84 Tex. 450, 31 Am. St. Rep. 75. *Vide supra*, § 585.

⁶⁰ Wheeler, etc. Manuf. Co. v. Boyce (1887), 36 Kan. 350; Lake Erie, etc. R. Co. v. Acres (1886), 108 Ind. 548.

⁶¹ Lake Shore, etc. Co. v. Prentice, 147 U. S. 101; Hoboken, etc. Co. v. Kahn, 59 N. J. Law, 218, 59 Am. St. Rep. 585.

⁶² Lake Shore, etc. Co. v. Prentice, 147 U. S. 101.

officer or officers, within scope of their authority, themselves commit a tort, or ratify it, or when the tort is committed by a subordinate agent, or servant, and, whether wilfully committed by him, or by reason of his incompetence.⁶³ But malice is not imputable to the corporation, in such case of incompetence of the agent, unless it knows, or has reason to know, of such incompetence and unfitness, and notwithstanding such knowledge, retains the agent in place.⁶⁴ In an action of tort, the jury may award punitive damages, in addition to compensation for the plaintiff's injury, where the defendant corporation's agent has acted wantonly or oppressively; but such act must be with malicious intent on the part of the agent, or where there is that entire want of care by the governing officers, that presumes conscious indifference to consequences, or where the governing officer participated in, and directed the act complained of, or expressly or impliedly, by his conduct, authorized it, or approved it, either before or after it was committed.⁶⁵

⁶³ *Milwaukee, etc. v. Arms*, 91 U. S. 489.

⁶⁵ *Lake Shore, etc. R. Co. v. Prentice* (1893), 147 U. S. 101.

⁶⁴ *Wardrobe, etc. v. Cal. Stage Co.*, 7 Cal. 118, 68 Am. Dec. 231.

